



आयुक्तअपील्स., पुणेअपील- II सीएक्स (गोवामे)
सीमाशुल्क, केन्द्रीय उत्पादशुल्क एवं सेवाकर आयुक्तलय
OFFICE OF THE COMMISSIONER (APPEALS), PUNE APPEAL - II CX.
(AT GOA)
CENTRAL EXCISE & CUSTOMS ICE HOUSE, E.D.C. COMPLEX,
PATTO PLAZA, GOA-403 001.

Ph: 0832 - 2438997 / Fax: 0832 - 2437785

A.	FILE NO.	:	F.No. A-81/CEX/GOA/2015-16 F.No. A-88/CEX/GOA/2015-16 F.No. A-89/CEX/GOA/2015-16 F.No. A-90/CEX/GOA/2015-16 F.No. A-91/CEX/GOA/2015-16 F.No. A-93/CEX/GOA/2015-16 F.No. A-94/CEX/GOA/2015-16 F.No. A-95/CEX/GOA/2015-16 F.No. A-96/CEX/GOA/2015-16 F.No. A-99/CEX/GOA/2015-16 F.No. A-113/CEX/GOA/2015-16												
B.	ORDER-IN-APPEAL NO. (UNDER SECTION 35(A) OF CENTRAL EXCISE ACT, 1944)	:	GOA-EXCUS-000-APP-275-to-285-2015-16 DATED 25.02.2016												
C.	PASSED BY	:	Shri PAWAN KUMAR SINHA Commissioner (Appeals), Pune Appeal - II Cx. (At Goa).												
	DATE	:	25.02.2016												
D.	ARISING OUT OF ORDER- IN-ORIGINAL NO. & DATE	:	<table border="1" style="width: 100%;"> <thead> <tr> <th style="text-align: center;">Order-in-Original No. & Date</th> </tr> </thead> <tbody> <tr><td>1. 05/ADC/GOA/CEX/2015-16 dt.11-08-2015</td></tr> <tr><td>2. 06/ADC/GOA/CEX/2015-16 dt.09-09-2015</td></tr> <tr><td>3. 08/ADC/GOA/CEX/2015-16 dt.18-09-2015</td></tr> <tr><td>4. 11/ADC/GOA/CEX/2015-16 dt.09-10-2015</td></tr> <tr><td>5. 09/ADC/GOA/CEX/2015-16 dt.18-09-2015</td></tr> <tr><td>6. 13/ADC/GOA/CEX/2015-16 dt.20-10-2015</td></tr> <tr><td>7. 12/ADC/GOA/CEX/2015-16 dt.21-10-2015</td></tr> <tr><td>8. 15/ADC/GOA/CEX/2015-16 dt.20-11-2015</td></tr> <tr><td>9. ACCEX/DIV-IV/11-21/2015-16 Dt.02-11-15</td></tr> <tr><td>10. ACCEX/DIV/IV/33-37/2015-16 dt.05-11-15</td></tr> <tr><td>11. ACCEX/DIV/IV/22-32/2015-16 dt.02-11-15</td></tr> </tbody> </table> <p>PASSED BY:</p> <p>1. Addl. Commissioner of C.Ex., ICE House, EDC Complex, Patto Plaza, Panaji, Goa- 403 001</p> <p>2. Asstt. Commissioner, Div-IV, Pioneer Blessings Commercial Complex, Margaon, Goa- 403 601.</p>	Order-in-Original No. & Date	1. 05/ADC/GOA/CEX/2015-16 dt.11-08-2015	2. 06/ADC/GOA/CEX/2015-16 dt.09-09-2015	3. 08/ADC/GOA/CEX/2015-16 dt.18-09-2015	4. 11/ADC/GOA/CEX/2015-16 dt.09-10-2015	5. 09/ADC/GOA/CEX/2015-16 dt.18-09-2015	6. 13/ADC/GOA/CEX/2015-16 dt.20-10-2015	7. 12/ADC/GOA/CEX/2015-16 dt.21-10-2015	8. 15/ADC/GOA/CEX/2015-16 dt.20-11-2015	9. ACCEX/DIV-IV/11-21/2015-16 Dt.02-11-15	10. ACCEX/DIV/IV/33-37/2015-16 dt.05-11-15	11. ACCEX/DIV/IV/22-32/2015-16 dt.02-11-15
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E.	ORDER-IN-APPEAL ISSUED ON	:	11.03.2016												

F.	NAME AND ADDRESS OF APPELLANTS	:
		1. M/s.Laxmi Industries, Plot No.M-44, Phase IIIB, Verna Indl. Estate, Goa-403722. 2. M/s.Prakash Corrugated Products, L-116-B, Phase-III, Verna Indl. Estate 3. M/s.Mohit Steel Industries Pvt. Ltd., Kundaim Indl. Estate, Goa-403115. 4. Online Packaging Pvt. Ltd., S-71 to 73&50, II-B, Verna Indl. Estate, Goa- 403722. 5. M/s.West Coast Ingots Pvt. Ltd., Plot No.1, Kundaim Indl. Estate, Goa- 403115. 6. M/s.Vel-Vin Packaging Pvt. Ltd., D2/14-15, Corlim Indl. Estate, Goa- 403110. 7. M/s.Amigo Extrusions Tech., B-3 to 5, Corlim Indl. Estate, Goa- 403110. 8. M/s. Anupam Insulating Industries., Plot No.46&47, Phase 3A, Sancoale Indl. Estate, Zuari Nagar, Goa. 9. M/s. Paramount Conductors Pvt. Ltd., D 2-3, Sancoale Indl. Estate, Zuari Nagar, Goa. 10. M/s. Bharat Conductors Pvt. Ltd, Plot No.41, Phase 3A, Sancoale Indl. Estate, Zuari Nagar, Goa. 11. M/s. Mandovi Castings Pvt. Ltd., Plot No.341, Kundaim Indl. Estate, Kundaim, Goa.

यदि कोई व्यक्ति इस आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal, may file an appeal or revision application, as the case may be, against such order, to the appropriate authority in the following manner:

(I) भारत सरकार को पुनरीक्षण आवेदन

Revision application to Government of India:

- (1) केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35 इड के तहत, नीचे बताए गए मामलों के बारे में धारा 35बी की उप-धारा (1) के प्रथम परंतुक के अंतर्गत, पुनरीक्षण आवेदन, संयुक्त सचिव, भारत सरकार, वित्त मंत्रालय, पुनरीक्षण आवेदन इकाई राजस्व विभाग को किया जाना चाहिए, जो 6ठी मंजिल, हुडको विशाला बिल्डिंग, बी - विंग, भीकाजी कामा प्लेस, आर.के. पुरम, नई दिल्ली - 110066 पर स्थित है :-
- (1) A revision application lies to the Joint Secretary, to the Govt. of India, Revision Application Unit, Ministry of Finance, Department of Revenue situated at 6th Floor, HUDCO Vishala Building, B-Wing, Bhikaji Cama Place, R.K. Puram, New Delhi - 110 066, under Section 35EE of the Central Excise Act, 1944 in respect of the following cases, governed by first proviso to sub-Section (1) of Section-35-B:
- (क) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भाण्डागार या अन्य कारखाने में या किसी भाण्डागार से दूसरे भाण्डागार में माल ले जाते हुए मार्ग में, या किसी भाण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भाण्डागार में हो, माल की प्रक्रिया के दौरान हुई हो
- (a) In case of loss of goods where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse.
- (ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पाद शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।
- (b) In case of rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India.
- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (c) In case of goods exported outside India (except to Nepal or Bhutan) without payment of duty.
- (घ) अंतिम उत्पादों पर उत्पाद शुल्क के भुगतान के लिए जो इयूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित हैं, वो समय-समय पर या बाद में वित्त अधिनियम (सं.2), 1998 की धारा 109 द्वारा नियुक्त किए गए हों।
- (d) Credit of any duty allowed to be utilized towards payment of excise duty of final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

- (2) केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश, प्रेषित दिनांक से तीन मास के भीतर मूल आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित शुल्क के भुगतान के सबूत के साथ टीआर-6/जी.ए आर-7 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No.EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001, **within 3 months** from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies of each of the Order-in-Original (O-I-O) and Order-in-Appeal (O-I-A). It should also be accompanied by a copy of TR-6/G.A.R.-7 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (3) An appeal against this order shall lie before the Tribunal on payment of the 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty is in dispute.

- (4) पुनरीक्षण आवेदन के साथ जहाँ आवेष्टित रकम एक लाख रुपए या उससे कम हो, तो रुपए 200/- का शुल्क एवं जहाँ रकम एक लाख रुपए से अधिक हो, तो रु. 1000/- का शुल्क साथ में भेजा जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

(II) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील (सेसटेट):

Appeal to Customs, Excise, & Service Tax Appellate Tribunal (CESTAT):

- (1) केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत :-

Under Section 35B of Central Excise Act, 1944 / Section 86(1) of Chapter-V of Finance Act, 1994 an appeal lies to:-

- (क) वर्गीकरण एवं मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका के पश्चिम ब्लॉक सं. 3, आर.के. पुरम, नई दिल्ली-1 को;

- (a) The Special Bench of Customs, Central Excise & Service Tax Appellate Tribunal of West Block No.2, R. K. Puram; New Delhi-1, in all matters relating to classification and valuation;

- (ख) उक्त परिच्छेद 1(क) में बताए गए मामलों के अलावा अन्य अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सेसटेट) की पश्चिम क्षेत्रीय पीठ में, तीसरी मंजिल, जय सेन्टर, 34 पी.डी' मेल्लो रोड मस्जिद बंदर (पूर्व), मुंबई - 400 009 को।

- (b) To the West Regional Bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 3rd Floor, Jai Centre, P. D'mello Road, Masjid (E), Mumbai - 400 009, in case of appeals other than as mentioned in para 1 (a) above.

- (2) केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 6 के अंतर्गत निर्धारित किए अनुसार अपीलीय न्यायाधिकरण को अपील प्रपत्र सं. इ.ए-3 में चार प्रतियों सहित अपील दाखिल की जाएगी तथा जहाँ उत्पाद शुल्क / जुर्माना / माँग / प्रतिदाय की राशि रुपए 5 लाख रुपए या उससे कम हो, वहाँ क्रमशः रुपए 1000/- शुल्क, जहाँ रुपए 5 लाख से 50 लाख तक हो, तो रुपए 5000/- तथा जहाँ रुपए 50 लाख से अधिक हो तो रुपए 10,000/- का शुल्क सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्रॉफ्ट के तौर पर साथ में भेजना होगा। यह ड्रॉफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो, जहाँ उक्त न्यायाधिकरण की पीठ स्थित है। स्थगन प्रदान करने के लिए आवेदन-पत्र के साथ रुपए 500/- शुल्क भेजना होगा।

The appeal to the Appellate Tribunal (CESTAT) shall be filed in quadruplicate in Form No. EA-3 as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto Rs.5 lacs, Rs.5 Lacs to 50 Lacs and above Rs.50 Lacs respectively in the form of crossed bank draft in favour of the Assistant Registrar of the Bench, issued by any nominated public sector bank, payable at the place where the Bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो, प्रत्येक मूल आदेश के लिए शुल्क का भुगतान उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी कि लिखा-पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्र सरकार को एक आवेदन किया जाता है।

In case the Order covers a number of Orders-in-Original (O-I-O), fee for each O-I-O should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. as the case may be, is filed to avoid scriptorial work.

- (4) न्यायालय शुल्क अधिनियम, 1970 यथा संशोधित की अनुसूचित-1 मद के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 6 रु. 50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under scheduled-I item of the Court Fee Act, 1975 as amended.

- (5) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में निहित नियमों की ओर ध्यान आकर्षित किया जाता है, जो इन तथा अन्य संबंधित मामलों को नियंत्रित करते हैं।

Attention is also invited to the rules covering these and other related matters contained in the Customs, Central Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.



GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER (APPEALS),
PUNE APPEAL - II CX. (AT GOA),
 CENTRAL EXCISE, CUSTOMS & SERVICE TAX,
 ICE HOUSE, EDC COMPLEX, PLOT NO. 6, PATTO, PANAJI GOA 403 001
 Ph: 0832 - 2438997/ Fax: 0832 - 2437785

Appeal filed by :-

1. **M/s.Laxmi Industries,**
Plot No.M-44, Phase IIIB, Verna Indl.
Estate, Goa-403722. Appellant-1
2. **M/s.Prakash Corrugated Products,**
L-116-B, Phase-III, Verna Indl. Estate Appellant-2
3. **M/s.Mohit Steel Industries Pvt. Ltd.,**
Kundaim Indl. Estate, Goa-403115. Appellant-3
4. **M/s.Online Packaging Pvt. Ltd.,**
S-71 to 73&50, II-B, Verna Indl. Estate,
Goa- 403722. Appellant-4
5. **M/s.West Coast Ingots Pvt. Ltd.,**
Plot No.1, Kundaim Indl. Estate,
Goa- 403115. Appellant-5
6. **M/s.Vel-Vin Packaging Pvt. Ltd.,**
D2/14-15, Corlim Indl. Estate,
Goa- 403110. Appellant-6
7. **M/s.Amigo Extrusions Tech.,**
B-3 to 5, Corlim Indl. Estate,
Goa- 403110. Appellant-7
8. **M/s.Mandovi Castings Pvt. Ltd.,**
Plot No.341, Kundaim Indl. Estate,
Kundaim, Goa Appellant-8
9. **M/s.Anupam Insulating Industries.,**
Plot No.46&47, Phase 3A, Sancoale Indl. Estate,
Zuari Nagar, Goa. Appellant-9
10. **M/s.Paramount Conductors Pvt. Ltd.,**
D 2-3, Sancoale Indl. Estate,
Zuari Nagar, Goa. Appellant-10
11. **M/s.Bharat Conductors Pvt. Ltd,**
Plot No.41, Phase 3A, Sancoale Indl. Estate,
Zuari Nagar, Goa. Appellant-11

V/s

Addl. Commissioner : Central Excise,
ICE House, Patto Plaza,
Panaji, Goa- 403 001. Respondent -1.

Asstt. Commissioner : Central Excise
Div-IV, Pioneer Blessings Commercial Complex,
Margao, Goa- 403 601. Respondent -2.

(Signature)

Appeal arising out of Orders-in-Original (1) 05/ADC/GOA/CEX/2015-16 dt.11-08-2015; (2) 06/ADC/GOA/CEX/2015-16 dt.09-09-2015; (3) 08/ADC/GOA/CEX/2015-16 dt.18-09-2015;(4)11/ADC/GOA/CEX/2015-16 dt. 09-10-2015; (5) 09/ADC/GOA/CEX/ 2015-16 dt.18-09-2015; (6)13/ADC/GOA/CEX/2015-16dt.20-10-2015;(7)12/ADC/GOA/CEX/2015-16, dt.21-10-2015 (8) 15/ADC/GOA/CEX/2015-16, dt.20-11-2015 passed by Additional Commissioner of C.Ex. & ST, ICE House, Patto Plaza, Panaji, Goa-403 001 & (9) ACCEX/DIV-IV/11-21/2015-16 Dt.02-11-15; (10) ACCEX/DIV/IV/33-37/2015-16 dt.05-11-15; (11) ACCEX/DIV/IV/22-32/2015-16 dt.02-11-15 passed by the Assistant Commisioner, Central Excise & Service Tax, Division-IV, Goa.

ORDER

M/s. Laxmi Industries and Others, marked as Appellants 1 to Appellants-11 above, have filed this appeal against the aforesaid Orders-in-Original passed by the Additional Commissioner of Central Excise & Service Tax, ICE House, Patto Plaza, Panaji, Goa- 403 001 & Assisstant Commissioner, Central Excise, D-IV, Margao, Goa (hereinafter referred to as '*respondents*' or '*the adjudicating authority*').

2. Appellants are Central Excise registered assesseees, engaged in the manufacture of excisable goods. They are showing in their invoice the sales tax rate as prescribed by the Government of Goa. The appellants were availing the benefits of "Goa Added Tax Deferment- Cum-Net Present Value Compulsory Payment Scheme, 2005 (herein after referred to as the '*said scheme*' under Section 89(2) of the Goa Value Added Tax Act, 2005. Under the scheme the appellants paid only a portion of the amounts of sales tax collected i.e. 25% and retained the balance 75% with them. Appellants were discharging the Central Excise duty after deducting of the full sale tax amount shown in the Central Excise invoice as provided under Rule 4(1) of the Central Excise Rules, 2004. Appellants were issued notices by the Central Excise department alleging that the sales tax amount retained by them under the '*said scheme*' is additional consideration received towards sale of goods and is required to be added to the assessable value for the payment of excise duty under Section 4(1)(a) of the Central Excise Act, 1944. The adjudicating authority has confirmed the demands under Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB/11AA of the Act and imposed penalty under Section 11AC of the Act in all the aforesaid cases.



3. Being aggrieved, the appellants have filed the present appeals on the following common grounds:

A. APPELLANTS ENTITLED TO DEDUCTION OF SALES TAX COLLECTED FROM THE BUYERS UNDER THE ABOVE SCHEME UNDER THE PROVISION OF SECTION 4(1)(a) OF THE ACT:

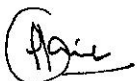
(i) that explanation to Section 4(1) of the Central Excise Act provides for the exclusion of duty of excise, sales tax and other taxes, if any actually paid or payable in respect of the goods sold, from the transaction value.

(ii) The following facts are not disputed by the revenue:

- ❖ Appellants in their invoice shown the value of sales tax charged to the customer as per the applicable rate specified by the Sales Tax department, Government of Goa;
- ❖ The amount on which the Revenue wants to collect excise duty is a sales tax collected by the Appellant from their customers;
- ❖ The amount collected from the customer as Sales tax is deemed to have been paid to the Government of Goa under the said scheme. Letter No. CCT/12-11/2010-2011/1767 dated 01.10.2010 issued by the Commissioner of Commercial Taxes, Panaji, states that the entire sales tax has been paid by the assessee in case of the 'said scheme';
- ❖ It is also not in dispute that the said deferred payment scheme permitted an assessee to discharge the entire sales tax liability under the deferred payment scheme;
- ❖ If the Appellant violates the conditions specified in the scheme then they are liable to pay to the Government of Goa. Thus, the amount retained by the Appellant will come within the meaning of 'amount payable' as stated in explanation to Section 4(1)(a) of the Act for claiming deduction of sales tax from the transaction value.

(iii) that under the provision of Section 89(1) of the Goa Value Added Tax Act, 2005, once the assessee pay the net present value of 25% of the sales tax collected the remaining amount of tax so collected would be **deemed to have been paid to the Government.** The **deeming provision** created by Section 89 of the Goa Value Added Tax Act, 2005 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 Central Excise Act; that it is well established principal of law that the statutory fiction created by these provisions of law has to be given full effect. The appellants place reliance on the following judgments:-

- ❖ ***Industrial Supplies Pvt. Ltd. Vs Union of India - AIR 1980 SC 1858*** - the Supreme Court observed as follows:



"It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction."

❖ In the case of **Union of India Vs Jalyan Udyog** -1993 (68) ELT 9 (SC) - it was observed by the Supreme Court that -

"It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no half-way stop."

❖ In the case of **P.E.K. Alliani Amma Vs Devi** (1996) 4 SCC 76 the Apex Court observed that -

"When an Act of Parliament or a State provides that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not have been so acquired or in existence but for the enactment, the court is bound to ascertain the purpose of which the fiction was created and the parties between whom the fiction was to operate, so that full effect may be given to the intention of the legislature and the purpose may be carried to its logical conclusion."

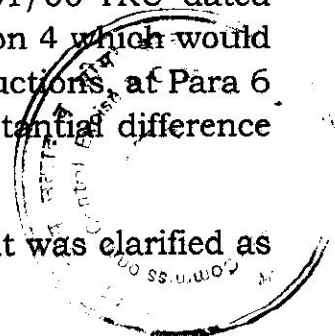
Similar view taken in **State of Bombay v. Pandurang Vinayak** - AIR 1953 SC 244 and **CIT v Bai Vina** - 1965 (58) ITR 100 (Guj).

In view of the above, they have "paid" to the Sales Tax department Government of Goa the entire sale tax amount. Reliance in this connection is placed on copy of the letter no. CCT/12-11/2010-2011/1767 dated 01.10.2010 issued by the Commissioner of Commercial Taxes, Panaji vide stating that the entire sales tax has been paid by the assessee in case of the 'said scheme'. Hence Appellant is entitled for the deduction of the entire sales charged and paid to the Sales Tax department Government of Goa under the provision of Section 4(1) of the Central Excise Act, 1944.

(iv) that when the provisions of new Section 4 was brought into force with effect from 01.07.2000, the Central Board of Excise and Customs had clarified (vide TRU Letter 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, at Para 6 thereof, it has been clarified that there is no substantial difference between the old section 4 and new section 4.

9.3 Further, vide Paras 10 & 11 of the cited letter, it was clarified as follows:

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"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."

Similarly under the provisions of section 43B of the Income Tax Act, 1961, also deductions have been allowed for payment of sales tax under a deferment scheme. CBDT Circular No.496 dated.25.09.1987 reported at (1988) 169 ITR (Stat) 53 fortifies the above fact. Accordingly, in subsequent Circular No.674 dated.29.12.1993, reported at (1994) 205 ITR (Stat) 119, the CBDT has reaffirmed that the amount of sales tax liability converted into loans may be allowed as deduction in the assessment from the previous year. Thus the amount retained by the Appellant will come within the meaning of 'amount payable' as stated in Section 4(1)(a) of the Act.

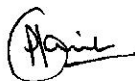
- (v) that the decision of Hon'ble Supreme Court in the case of *Super Syntex and Maruti Suzuki* case were materially different compared to the above referred deferred sales tax incentive scheme. The machinery provision to pay sales tax collected by the assessee under the deferred sales tax scheme as per net present value was absent in the statutory provisions contained under the Act which is under challenge before the Hon'ble Supreme Court. In fact the Hon'ble Supreme Court has not addressed the issue of deeming provision under the State Vat Act which provides that on pre mature payment, sales tax payable after specified periods as per deferment scheme will be treated as deemed to have paid the entire amount to the State Government. It is well settled that no decision can be read ignoring the facts of that case and the points which arise for determination in that case. All the observations made in a judgment are to be understood with reference to the context in which they are made. The essence of a decision is to be carved out from the conjoint reading of the facts, the scheme of the Act under consideration, points for consideration and the decision arrived thereon. The



concept of a ratio decidendi has been elaborately explained by the Supreme Court in the case of **Union of India and Others v. Dhanwanti Devi and Others** (1996) 6 SCC 44.

- (vi) Without prejudice to the above, Appellants submits that the Hon'ble Supreme Court in the case of **Super Syntex (I) Ltd.** had remanded the matter back to the Tribunal. Thus, the matter has not been concluded. Also, it is given to understand that against the above referred order, a review petition (Vide RC No. 1002/2014) has been filed before Hon'ble Supreme Court.
- (vii) In view of the submission made above, Appellants submit that Central Excise duty has been correctly discharged by them in respect of the goods cleared and that no additional excise duty is payable by them.
- B.** the term "*consideration for sale*" is what passes from buyer to the seller and not the other way round. As such, consideration should typically flow from the buyer whereas in the instant case the consideration is flowing from State Government (as the State Government has issued the scheme). Hence the amount retained cannot be considered as 'consideration' for the purpose of Central Excise Law. Reliance in this connection is placed on Hon'ble Supreme Court in the case of **Sony India Ltd.** 2004-TIOL-43-SC-CX. This submission is made without admitting that the amount retained under the sales tax deferment scheme is additional consideration.
- C.** They have contended that without prejudice to above even assuming that the retained amount is a consideration for sale as held by the adjudicating authority, the said amount is in the nature of discount given by the State Government to the assessee in respect of that transaction in order to arrive at the net present value of the deferred payment; that the discounted value is agreed between the Government and assessee as per the term of the scheme; that under the provision of the Central Excise law, discount given in respect of sale is a permissible deduction from the transaction value. Hence the same is otherwise not liable to Central Excise duty.
- D.** Without prejudice to the above Appellant submit that they are not enlarging the scope of deeming provision to another Act but only submitting that statutory fiction created by the provisions of law has to be given full effect. The Ld. Additional Commissioner in the impugned order has not given full effect to the deeming provision created in the Sales Tax law. In the impugned order the Ld. Additional Commissioner has traveled into another law (i.e. Sales Tax Law) to come to different conclusion as regards the Sales tax paid to the Goa Government than what is provided in that law.
- E. EXTENDED PERIOD AND PENALTY IS NOT INVOKABLE IN THE PRESENT CASE:**

Without prejudice to the above even assuming without admitting any duty is payable Appellants make the following submissions as



regards to why the order of the Ld. Additional Commissioner setting aside the extended period of limitation and penalty in the present case is legally not sustainable-

➤ Appellant has relied upon on the following documents to submit their claim that the facts were to the knowledge of the department:

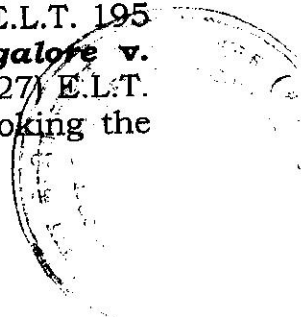
- Copy of the minutes of the meeting Regional Advisory Committee of the Commissionerate of Customs & Central Excise, Goa, held on 27.06.2007. The fact that the assessee in Goa were availing the Goa Added Tax Deferment-Cum-Net Present Value Compulsory Payment Scheme was to the knowledge of the revenue. Further the revenue were themselves not sure of the excise duty liability on the same.
- Copy of F.No. V/30/18(A)/06-CX.1 dated from the office of the Commissioner of Customs and Central Excise to the Goa Small Industries Association.
- Letter No. CCT/12-11/2010-2011/1767 dated 01.10.2010 fro the Office of the Commissioner of Commercial Taxes Panaji to the Commisioner of Central Excise, Customs and Service Tax, Goa.

Besides that Appellant has reflected the details of the same in the invoice as well as in the books of account. Hence allegation of suppression with the intent to evade payment of duty is not sustainable in the present case.

➤ They have submitted that the issue involved is of interpretation of law. Hence extended period is not invocable. Reliance in this connection is placed on the following judgments:-

- (i) The Apex Court in case of **Continental Foundation Joint Venture**, reported in 2007 (216) E.L.T. 177 (S.C.) has held that when there is scope for entertaining doubt on some points on account of conflicting decisions of the Tribunal or High Courts, longer limitation period under proviso to Section 11A(1) would not be invocable.
- (ii) **Collector of Central Excise v. HMM Limited** reported in 1995 (76) E.L.T. 497 (S.C.) have held that for invoking the extended period under proviso to Section 11 A (1) of the Central Excise Act, specific omissions and commission which would constitute a deliberate suppression of facts with intention to evade payment of duty must be spelt out in the show cause notice. In the present case no specific allegations of commission or omission amounting to suppression of facts with intent to evade payment of duty have been made.
- (iii) **Padmini Products v. CCE** reported in 1989 (43) E.L.T. 195 (S.C.) and **Collector of Central Excise, Bangalore v. Karnataka Agro Chemicals** reported in 2008 (227) E.L.T. 12 (S.C.), wherein it has been held that for invoking the

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extended period under proviso to Section 11A(1) of the Central Excise Act, some positive evidence showing deliberate suppression of relevant facts, wilful misstatement or contravention of the provisions of the Central Excise Act, 1944 or of the Rules made thereunder with intention to evade payment of duty is required and mere failure or negligence of the manufacturer to take out licence or pay duty where there was scope for doubt that goods were not dutiable is not sufficient for invoking longer limitation period.

- (iv) **CCE Vs Chemphar Drugs & Liniments** - 1989 (40) ELT 276 (SC) - it has been held that extended period of limitation of five years is applicable only when something positive other than mere inaction or failure on the part of the manufacturer is proved.
- (v) In the case of **Tamilnadu Housing Board Vs CCE** - 1994 (74)ELT-9(SC)-held that where there was scope of doubt whether duty was payable or not, it is not 'intention to evade payment of duty'. Suppression means not providing information which the person is legally required to state, but is intentionally or deliberately not stated.
- That the Hon'ble Supreme Court in the case of **Rainbow Industries v. CCE**, 1994 (74) ELT 3 has held that in order for the extended period to apply, two ingredients must be present - willful suppression, mis declaration etc. and the intention to evaded duty. The court in catena of cases has held that intention to evade payment of duty is not mere failure to pay duty. It must be something more i.e. that the assessee must be aware that duty was leviable and he must deliberately avoided payment of duty. In the present case the Ld. Commissioner (A) has given a clear finding that there was neither proof of any suppression nor of any mala fide to evade payment of appropriate duty.
- that court have in catena of cases have held that penalty is not imposable when the issue involved is of interpretation of law,
- (i) **Larsen & Tourbo Ltd. v. CCE**, 2007 (211) E.L.T. 513 (S.C.).
- (ii) **CCE Vs Explicit Trading & Marketing (P) Ltd.** - 2004 (169) ELT 205 (T) *Maintained by the Supreme Court* - 2009 (240) ELT A16 (SC).
- (iii) **CCE v. Gujarat Narmada Fertilizers Co Ltd.**, 2009 (240) ELT 661 (SC).
- (iv) **CCE v. Maruti Sizuki India**, 2014 (307) ELT 625 (S.C.).
- (v) **U.O.I v. Rajasthan Spinningand Weaving Mills** 2009(238) ELT 3 (S.C.) - In this case the Hon'ble Supreme Court has held that mandatory penalty under Section 11AC of Central Excise Act, 1944 not applicable to every case of non-payment or short-payment of duty. It is applicable only when there is willful suppression with the intent to evade payment of duty. In the present case the Ld. Commissioner (A) has held that there is neither proof of any suppression nor any mala fide to evade payment of appropriate duty as the issue is of interpretation where the matter was decided in favour of the

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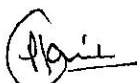
Respondent which was reversed by the Hon'ble Supreme Court.

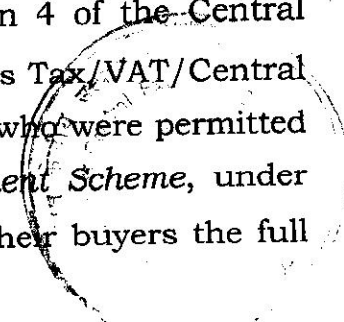
- Without prejudice to above even assuming without admitting that any duty is payable, Appellant submits that penalty is not imposable for bona fide mistake. Reliance in this connection placed on Hon'ble Supreme Court decision in the case of **CCE, Vapi V/s Kisan Mouldings Ltd.**-2010(260) ELT-167(S.C.)

4. Shri Rajeeva Srivastava, Advocate appeared for personal hearing and reiterated the grounds of appeal. He added that the issue stand settled in their favour in case of **CCE Vs. Bhushan Steel Ltd., 2015-TIOL-2242-CESTAT-MUM**. The Hon'ble Tribunal based on fact provisions similar to deeming provision and provisions of NPV scheme allowed the assessee appeal. The Hon'ble Tribunal has in the said order, which is similar to their case has held that the Hon'ble Supreme Court decision in the case of M/s. Super Synotex (O2014-TIOL-19-SC), M/s. Maruti Suzuki India Ltd. are distinguishable.

5. Copy of the Appeal filed by the assessee was forwarded to the respondent on 19-10-2015 for sending para-wise comments, if any, within 15 days. However, the respondent-department has not replied as on date, hence I am proceeding to decide the matter on the basis of facts and records before me.

5.1 The facts in short are that the manufactures, permitted to operate under the Sales Tax Deferment Scheme, were allowed to charge and collect from their buyers the full applicable rate of Sales Tax/Central Sales Tax/VAT on the sales of manufactured goods, but were also allowed to defer the payment of sales tax/VAT to a future date; however, by applying the concept of Net Present Value[NPV], they were permitted to discharge only 25% of the amount of Sales Tax/VAT to the Sales Tax Department in the present, where upon they were 'deemed' to have paid their entire tax liability of future. In effect, for the current sales, they paid only 25% sales tax, and thus retained 75% of the Sales Tax/VAT collected from the Customers. The limited issue before me is whether the assessable value under Section 4 of the Central Excise Act, 1944 would exclude the entire amount of Sales Tax/VAT/Central Sales Tax or otherwise, in case where the manufacturers, who were permitted by State of Goa to operate under the *Sales Tax Deferment Scheme*, under which they were are allowed to charge and collect from their buyers the full





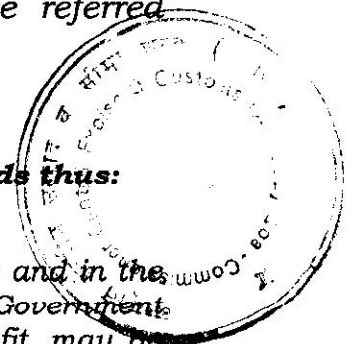
applicable rate of Sales Tax/VAT/Central Sales Tax on the sales of manufactured goods, but defer the payment of tax to a future date and were also given an option, subject to eligibility, of paying only 25% of the amount of Sales Tax/VAT to the Sales Tax Department, an amount, stated to have been arrived by the applying the concept of Net Present Value on the said future amount as part of a capital incentive scheme of the State and upon such payment, their entire future Sales Tax/VAT/Central Sales Tax liability are 'deemed' to have been discharged? On identical issues, the matter was decided by this office vide Order-in-Appeal No. GOA-EXCUS-000-APP-052 to 065 -14-15 dated 17-03-2015, in which my findings in relevant para are reproduced below:

“6.5 A careful study of these provisions of Section 4 of the said Act and Circular of the Board clearly lead us to conclude that the expression 'actually paid or payable' have a specific connotation in the statute and these must be given full effect. It is discernible that the expression 'concessional' and 'normal' have been used in the Circular in a specific context of the use of expression 'actually paid or payable' used in the statute. The expression 'concessional' has been used to denote any special benefit granted to an assessee. However, the word 'concessional' is not limited to 'exemption'. Deferred payment is also a concession given under Sales Tax or VAT Scheme and is adequately covered by the expression 'payable', considering that the sales tax or VAT is 'not exempted' but payable at a later time (tax deferred), though already collected by these assesses from the buyers. I have taken note that the State Government of Goa framed the "Goa Sales Tax Deferment-cum-Net Present Value Compulsory Payment Scheme, 2001" drawing powers from the proviso to Section 15 of the Goa Sales Tax Act, 1964, under which the eligible unit could opt to take the benefit under the Scheme which was to be equal to the tax deferred relating to balance unexpired period reduced by net present value [N.P.V.] and treating the remaining amount of tax collected as deemed to have been paid. Subsequently, Section 89(1) of the Goa Value Added Tax, 2005 contained the similar provision. Both the above referred Sections are reproduced below:

Proviso to Section 15 of the Goa Sales Tax Act, 1964 reads thus:

"provided that notwithstanding anything contained in this Act and in the rules made thereunder, but subject to such conditions as the Government or the Commissioner, as the case may be, if it or he thinks fit, may by

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general or special order specify, where the **dealer** to whom **incentive** under the Goa Sales Tax Deferment-cum- Net Present Value compulsory Payment Scheme, 2001 has been granted by virtue of **eligibility certificate**, and when respective Net Present Value has been deposited in accordance with the provisions of this Act and the Rules **made thereunder, the remaining amount of tax collected shall be deemed to have been paid**"

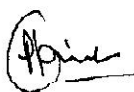
(emphasis added)

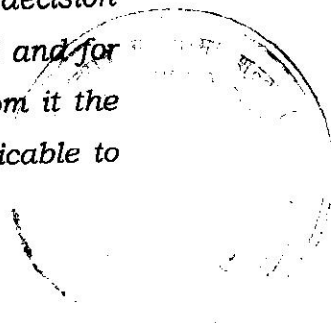
Section 89(1) of the Goa Value Added Tax, 2005 reads as under

"Notwithstanding anything contained in this Act, Rules or Notifications, but subject to such conditions as the Government may by general or by special order in the Official Gazette, specify, where the dealer to whom the benefit under the Goa Sales Tax Deferment-Cum-Net Present Value Compulsory Payment Scheme 2003 has been granted and when respective Net Present Value as provided in the said Scheme has been deposited in accordance with the provisions of this Act or earlier law or rules made there under, **the balance amount of net tax payable/output tax payable, shall be deemed to have been paid.**"

(Emphasis added)

6.6 While the respondent-department has treated that for the purposes of central excise, the amount collected but not paid to the State Government is includible in the assessable value of the excisable goods, the Appellants has contended that once tax is deferred, as per the CBEC Circular mentioned above, this amount is covered as 'payable' and is not includible in the assessable value and that payment of 25% of the tax so deferred as 'Net Present Value' under Net Present Value Compulsory Payment Scheme, which is in the nature of capital subsidy, tantamount to deemed payment of the entire amount, and on this basis they have sought to distinguish the cases already decided by the Hon'ble Supreme Court in the case of "Commissioner of Central Excise, Jaipur-II vs. Super Synotex (India) Ltd. reported in 2014 (301) E.L.T. 273 (SC)". Conspicuously, I find that the Hon'ble Supreme Court, also decided independently (by a different bench) the case of "Commissioner of Central Excise vs. Maruti Suzuki India Ltd. reported in 2014 (307) E.L.T. 625 (SC)", wherein it is held that the transaction value was required to be calculated by including amount of Sales tax retained by assessee as per Section 4(3)(d) of Central Excise Act, 1944, but the Appellants have glossed over this case in their arguments, notwithstanding the fact that the Stay Order was issued keeping in view the latter case, pending at that time before the Hon'ble Supreme Court. I have taken note of the case of **Union of India and Others v. Dhanwanti Devi and Others (1996) 6 SCC 44**, cited by the Appellants, which emphasizes that the only thing in a Judge's 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 decidendi; and that every judgment must be read as applicable to



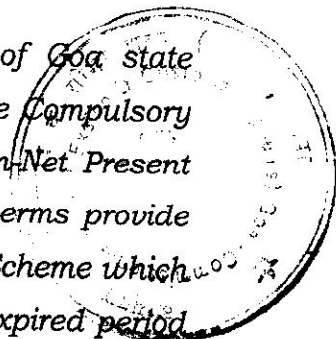


the particular facts proved, or assumed to be proved, and also that it is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. So, the main point of argument here is that in the case of Super Synotex (India) Limited reported at 2014-TIOL-19-SC-CX the Hon'ble Supreme Court examined the law and facts in the context of Rajasthan Sales Tax Incentive Scheme, 1989, whereby incentive was granted to industrial units based on the eligibility certificate issued by the said State Government. Under that Scheme eligible units holding certificate were entitled to retain 75% of the sales tax collected and remit only balance 25% to the sales tax department; and that the said scheme has been interpreted by the Supreme Court as an incentive scheme; that the Supreme Court concludes that for period after 01.07.2000, unless the sales tax is "**actually paid**" to the sales tax department, no deduction shall be permitted and accordingly, the in the facts of the case under consideration and in light of the Rajasthan Sales Tax Scheme, only 25% of the sales tax collected was taken as paid to the State Exchequer and the balance amount was taken as 'retained' by the assessee. In this context, the Supreme Court held that the assessee is bound to pay excise duty on the said balance sum. The main ground for decision for adding the amount 'not paid' to the State's exchequer is that the Supreme Court has held that there was an amendment to the definition of "transaction value" as defined under Section 4(3)(d) of the Central Excise Act, 1944 and hence, according to the Supreme Court, the earlier Circular of 1998 has lost its relevance. The main plank of Appellant's contention before me is that the Rajasthan Sales Tax Scheme did not provide for the 'deemed' payment of Sales Tax/VAT and thus, it differed on material fact and hence the ruling cannot become a precedent to the present case.

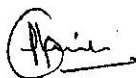
6.7 This brings me to examine the legal fiction of 'deemed payment' created in proviso to Section 15 of the Goa Sales Tax Act, 1964 and in Section 89(1) of the Goa Value Added Tax, 2005, and its implication on the scope of transaction value defined under Section 4(3)(d) of the Central Excise Act, 1944.

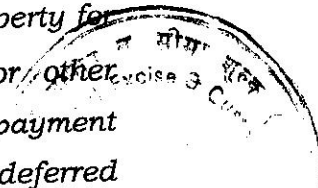
6.8 There is no doubt that the aforesaid Acts of Goa state provide for Goa Sales Tax Deferment-Cum-Net Present Value Compulsory Payment Scheme 2001 and Goa Sales Tax Deferment-Cum-Net Present Value Compulsory Payment Scheme 2003, which in clear terms provide that the eligible unit could opt to take the benefit under the Scheme which was to be equal to the tax deferred relating to balance unexpired period.



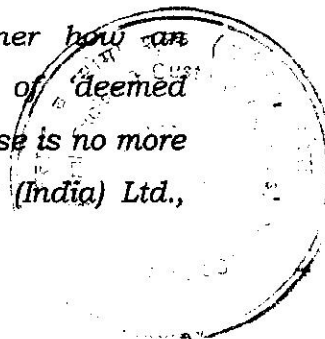


reduced by net present value [N.P.V.] and treating the remaining amount of tax collected/the balance amount of net tax payable/output tax payable, as deemed to have been paid. I have also noted that in P.E.K. Kalliani Amma V/s K. Devi (1996) 4 SCC 76 the Hon'ble Apex Court has observed that full effect must be given to the statutory fiction and it should be carried to its logical conclusion and that in the case of Union of India V/s Jalyan Udyog 1993 (68) E.L.T 9 (SC) the Supreme Court held that "It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no half-way stop." At the same time, I find that such fiction is not boundless and will have its scope within reasonable limits. James Lords Justice in ex parte, Walton, In re, Levy (1881) 17 Chance, D. 746 speaks on deeming fiction as: "When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." Further, in Szoma vs. Secretary of State for the Department of Work and Pensions (2006) 1 All ER 1 (at 25), the Court held, it would be quite wrong to carry this fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all. The intention of a deeming provision, in laying down a hypothesis is that the hypothesis shall be carried so far as necessary to achieve the legislative purpose but no further, as also cited in the cases of DEG Deutsche Institutions and another vs. Kosby (2001) 3 All ER 878 and State of U.P. vs. Hari Ram AIR 2013 SC 1793. There is no doubt that the Tax Deferment Scheme of the type before me, is an incentive/concessional scheme, which the Appellants has objected, perhaps as they have equated concession/incentive only with exemption, drawing from the Super Synotext case, supra, which is not correct. If a tax is payable now, but is allowed to be deferred, this is also a concession granted by the government. 'Concession' is a commonly understood word and has several shades of meaning. The Courts permit to accept appropriate dictionary meaning of an expression. It is held in the case of that as defined under Oxforddictionaries.com, the word 'concession' means: a thing that is granted, especially in response to demands; the action of conceding or granting something; a gesture made in recognition of a demand or prevailing standard; preferential allowance or rate given by an organization (like tax concessions); a reduction in the price of something for a certain category of person: the right to use land or other property for a specified purpose, granted by a government, company, or other controlling body; etc. In the light of above, I find that deferred payment scheme is also a concession granted by the state. So far this deferred amount is concerned, there is no doubt that such deferred amount is





covered by the expression 'actually payable' used in Section 4(3)(d) of the Central Excise Act, 1944 and the CBEC Circular of 30.6.2000, *supra*. Their comes the application of the concept of the Net Present Value which is brought from the "Time value of money" which dictates that time has an impact on the value of cash flows; that cash flows of nominal equal value over a time series result in different effective value cash flows that makes future cash flows less valuable over time. In other words, when there is series of cash flow (deferred sales tax payable in the present case) the cash flow in the present is the most valuable, with each future cash flow becoming less valuable than the previous cash flow. Thus, a cash flow today is more valuable than an identical cash flow in the future. Normally, NPV has three variables: cash flow, rate of return (interest) and time. By fixing 25% to calculate NPV of deferred tax, the state has neither disclosed the rate of interest (rate of return) nor the time for each transaction. Assuming that this was done for simplicity of calculation, such application of NPV simply converts something what was 'actually payable' to something 'actually paid'. The deeming provision in the Sales Tax/VAT Acts, *supra*, has its limited application to these Acts alone. It is not acceptable to enlarge the scope of this deeming provision to another Act and to transfuse its consequences to other taxing statute. I say so because when the expressions 'deemed' in Goa State's statute is confronted by the expression 'actual' in the Union's tax statute, the latter shall prevail because a deeming provision of another statute cannot render 'actually paid or 'actually payable' redundant. The intention of a deeming provision is limited to sales tax purposes and granting of capital incentive to industries and it should not be read beyond that to supersede the provisions of Central Excise Act, 1944, which has incorporated the expression 'actually paid' and 'actually payable' with an intention to distinguish what are 'not actually paid' or 'not actually payable'. Thus, by converting the deferred sales tax (which was actually payable) into Net Present Value (NPV), the outcome is that the NPV has become sales tax 'actually paid'. Thus, there cannot be any overriding construction of the deeming provisions over the 'actual'. Thus, the 'deeming' provision contained in does not impact materially the valuation provisions of the Central Excise Act, 1944 to distinguish it from the decision of Super Synotex (India) Ltd. and Maruti Suzuki India Ltd., *supra*. It would be inappropriate, in my view, to bring forward the manner how an assessment under Income Tax considers the question of 'deemed payment'. Be that so as it may, rest of the question in the case is no more *res integra*. To recapitulate, in the case of Super Synotex (India) Ltd., *supra*, the Hon'ble Supreme Court has held:



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.

6.9 *In the decision above, it is also held by the Supreme Court that the period prior to 01.07.2000, an assessee is not liable to pay central excise on the amount of sales tax retained and this shall be followed in the present appeals as well.*

6.10 *Also, in the case of Maruti Suzuki India Ltd., supra, the Hon'ble Supreme Court has held:*

27. *Insofar as the present case is concerned, there is no doubt that 50% of the sales tax collected was retained by the assessee and was not actually paid to the exchequer nor was it actually payable since the HPC permitted the assessee to retain that amount.*

28. *Therefore, whichever way the issue is looked at, the fact remains that the assessee retained with it 50% of the sales tax collected from its customers and it was neither actually paid to the exchequer nor was it actually payable to the exchequer. That being the position, the transaction value was required to be calculated by including the amount of about Rs. 22.44 crores retained by the assessee.*

6.12 *Considering that under the Net Present Value Compulsory Payment Scheme, the respective appellants 'actually paid' 25% of the sales tax by converting a full deferred tax 'actually payable' in future by applying Net Present Value concept, I hold that the balance 75% of the total tax collected by them shall be included in the assessable value determined under Section 4 of the Central Excise Act, 1944 in respective cases. Accordingly, each of the appeal filed by the respective appellants is devoid of any merit, except where demand pertains to the period prior to 01.07.2000 and is liable to be dismissed."*

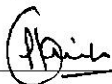
5.2 The appellant has, however, placed on record the case of **CCE Vs. Bhushan Steel Ltd., 2015-TIOL-2242-CESTAT-MUM**, where the Hon'ble

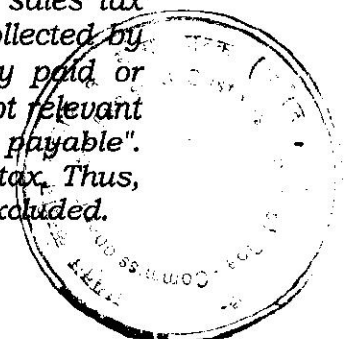
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Tribunal was dealing with similar NPV Scheme (Net Present Value Scheme) with deeming provisions about tax payment under Maharashtra Sales Tax/VAT Acts and allowed the assessee's appeals or rejected the department's appeals, as the case might be. The Hon'ble Tribunal has distinguished the decisions of the Hon'ble Supreme Court decision in the case of M/s. Super Synotex (O2014-TIOL-19-SC), M/s. Maruti Suzuki India Ltd. I find that Section 94(2) of the MVAT Act, 2002 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** and this has been discussed by the Hon'ble Tribunal in the aforesaid order, and I also find that the said provision is almost identical Scheme as under Section 15 of the Goa Sales Tax Act, 1964 (proviso) and Section 89(1) of the Goa Value Added Tax, 2005 cited earlier. The deeming provision about payment of tax has been addressed by the Hon'ble CESTAT, though the discussion has not touched the precedence of 'actually or payable' over 'deeming' under different Acts, as discussed by me in the OIAs mentioned above. Yet, I find that the Hon'ble Tribunal has taken a stand, in respect of similar legal provisions that sales tax is required to be deducted from the assessable value where for payment of central excise duty. In para 37, after examining the case of Hon'ble Supreme Court in the case of M/s. Super Synotex, *supra*, the Tribunal has observed and held:

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/assesseees 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.





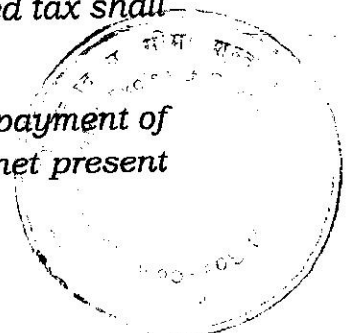
5.3 The Tribunal has held that this aspect of deeming provision is *sub-silentio* in Supreme Court decisions and has followed the case of Union of India v. Dhanwanti Davi, reported in 1996 (6) SCC 44, where the Apex Court held "It is not everything said by a Judge while giving judgment that constitutes 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". Having done so, the Hon'ble Tribunal has taken up all the contentions. Two relevant aspects are discussed in Para 39 and 40 of the said order, which is also application to the Goa Sales Tax Act and Goa VAT Act vis-à-vis Central Excise Act, 1944 concerning valuation:

39. The only issue in the present case is that the manufacturer assesseees 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

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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 charged 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.

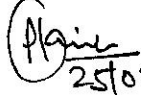
5.4 In the present cases also, the amounts of sales tax actually payable in respective cases have not been varied by the Sales Tax Authorities. Hence, the above analysis of law is valid in the present case as well. The

Arise

upshot is that the *ratio decidendi* in the case of CCE, Raigarh v/s Uttam Galva Steels Ltd. and Bhushan Steel & Others reported in 2015-TIOL-2242-CESTAT-MUM is applicable to the present case, and I am bound by the judicial discipline. The Hon'ble Supreme Court in the case of Union of India Vs. Kamlakshi Finance Corporation – 1991(55) E.L.T. 433(SC) (cited in Para 3.1 above), has clearly observed that *“the order of the appellate authority is not “acceptable” to the department – in itself an objectionable phrase – and the subject matter of the appeal can be no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to the assessee and chaos in administration of tax laws”*. This means that even if the respondent-department prefers an appeal before the Supreme Court against this order of Hon'ble CESTAT, at this stage, I am obliged to follow the decision, notwithstanding the fact that there might be different interpretation in the matter, as in my earlier orders-in-appeals. Accordingly, following the principles of judicial discipline, I hold that the demand of central excise duty is liable to be set aside in each case.

6. Once I hold that the appellants are not liable to pay central excise duty, the question of consequent actions like limitation, interest and penalty do not arise. This is based on the general law maxim *sublato fundamento, cadit opus* (means the foundation being removed, the structure falls). I am, therefore, not delving into the various arguments and cases laws relating to other aspects concerning limitation, interest and penalty etc. put forward by both sides.

7. In view of the above, I set aside the impugned orders and allow the respective appeals with consequential relief, if any.


25/02/2016
(PAWAN KUMAR SINHA),
Commissioner (Appeals),
Pune Appeal-II CX. (at Goa).


F. No: A-81/CEX/GOA/2015-16 1324

Dated: 25.02.2016

BY R.P.A.D

CERTIFIED TRUE COPY

1. **M/s. Laxmi Industries,**
Plot No.M-44, Phase IIIB, Verna Indl.
Estate, Goa-403722..


OFFICE OF THE
COMMISSIONER (APPEALS)
CENTRAL EXCISE AND SERVICE TAX
PUNE APPEAL-II CX. (AT GOA)

2. **M/s. Prakash Corrugated Products,**
L-116-B, Phase-III, Verna Indl. Estate
3. **M/s. Mohit Steel Industries Pvt. Ltd.,**
Kundaim Indl. Estate, Goa-403115.
4. **M/s. Online Packaging Pvt. Ltd.,**
S-71 to 73&50, II-B, Verna Indl. Estate,
Goa- 403722.
5. **M/s. West Coast Ingots Pvt. Ltd.,**
Plot No.1, Kundaim Indl. Estate,
Goa- 403115.
6. **M/s. Vel-Vin Packaging Pvt. Ltd.,**
D2/14-15, Corlim Indl. Estate,
Goa- 403110.
7. **M/s. Amigo Extrusions Tech.,**
B-3 to 5, Corlim Indl. Estate,
Goa- 403110.
8. **M/s. Mandovi Castings Pvt. Ltd.,**
Plot No.341, Kundaim Indl. Estate,
Kundaim, Goa
9. **M/s. Anupam Insulating Industries.,**
Plot No.46&47, Phase 3A, Sancoale Indl. Estate,
Zuari Nagar, Goa.
10. **M/s. Paramount Conductors Pvt. Ltd.,**
D 2-3, Sancoale Indl. Estate,
Zuari Nagar, Goa.
11. **M/s. Bharat Conductors Pvt. Ltd,**
Plot No.41, Phase 3A, Sancoale Indl. Estate,
Zuari Nagar, Goa.

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