SUPREME COURT OF INDIA

Commissioner of Central Excise

Vs.

Maruti Suzuki India Ltd.

C.A.No.5183 of 2004

(Madan B. Lokur and Kurian Joseph JJ.)

03.09.2014

JUDGMENT

MADAN B. LOKUR, J.

1. The question for consideration is whether the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) was right in holding that the High Powered Committee (HPC) constituted under the provisions of Rule 28-C of the Haryana General Sales Tax Rules 1975 (the Rules) had merely deferred payment of sales tax by the Respondent/Assessee and had not granted it any tax concession. In our opinion, the question must be answered in the negative and in favour of the Revenue.

The facts

2. The Assessee is a prestigious unit manufacturing and selling vehicles in the State of Haryana. On 4th October, 2002 the Revenue issued a show cause notice to the Respondent/Assessee on the ground, inter alia, that on the sale of its vehicles for the quarters ending September and December 2001 and March and June, 2002 the Assessee had retained 50% of the sales tax collected by it from its customers. The retention allegedly was on the strength of an entitlement certificate dated 1st August, 2001 issued by the Deputy Excise and Taxation Commissioner in Haryana under the provisions of Rule 28-C of the Rules.

3. Rule 28-C of the Rules reads as follows:

Rule 28-C

Tax concessions, class of industries, period and other conditions. (Section 25A)

(1) Concessions of tax payable under the Acts shall be available to an eligible industrial unit in the manner, for the period and at the scale given hereinafter.

(2) A Unit availing tax concession under this rule shall not be entitled to any other tax concession Under Section 13B or Section 25-A of the Act.

(3)(c) "eligible industrial unit" means

(1) xxx

Note: The eligibility of units in pipeline shall be determined by High Powered Committee in case of prestigious units and by Higher Level Screening Committees in other cases. The decision of High Powered Committee/Higher Level Screening Committee shall be final.

(4) xxx

(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-xxx

Illustration-xxx

(b) Decision about the grant of tax concession to prestigious unit shall be taken by the High Powered Committee on the basis of factors like employments generation, likely revenue, growth of ancillaries, impact on overall industrial growth etc. A prestigious unit shall not be, as a matter of right, entitled to benefits available to other units.

4. The Note below Sub-rule (3) provides that the eligibility of a prestigious unit to a tax concession shall be determined by a High Powered Committee (HPC). There is no dispute that the Assessee is a prestigious unit; that its case was considered by the HPC for the grant of a tax concession; that the HPC took the following decision on 14th June, 2001:

> The relevant facts narrated in the agenda and the report of sub committee held on 29.03.2001 under the Chairmanship of Sh. A.N. Mathur, IAS, was also put up before the committee. After due deliberation the committee approved that MUL be given incentive of first expansion where the company will pay 50% of the tax collected and retain 50%. This would be net of tax on purchases. Maximum benefit permissible on account of first expansion i.e. Rs. 564.35 crores would remain the ceiling. The period of benefit would be extended to 14 years within the existing ceiling of Rs. 564.35 crores and in lieu thereof MUL would waive its claim for tax incentive for all subsequent expansions i.e. for IInd, IIIrd. The incentive would be given only in respect of vehicles rolled out of production capacity of 70,000 vehicles added as a result of first expansion and not to the production augmented by capacity addition of 30,000 vehicles as a result of second expansion.
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> The MUL will start availing the benefit of sales tax concession from the date of entitlement as per Rule 28C. The Entitlement Certificate will be issued by the DETC concerned and MUL will submit the requisite documents for the issuance of entitlement certificate to the DETC concerned.

5. The show cause notice alleged that on a reading of the above decision, Rule 28-C and the entitlement certificate issued to the Assessee, a tax concession of Rs. 564.35 crores could be availed of by the Assessee between 1st August, 2001 and 31st July, 2015. The Assessee could collect sales tax from its customers but was required to deposit only 50% thereof with the exchequer while retaining the balance 50% by way of a tax concession. It was alleged that the retained sales tax was neither actually paid nor actually payable to the State Government. Under these circumstances, the sales tax retained by the Assessee constituted a part of the "transaction value" of the vehicles sold by the Assessee to the customers in terms of the definition of that expression in Section 4(3)(d) of the Central Excise Act, 1944 (hereinafter referred to as the Excise Act).

6. The definition of "Transaction Value" in Section 4(3)(d) of the Excise Act reads as follows:

> "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.

7. Based on the above, it was alleged in the show cause notice that the Assessee had collected and retained about Rs. 22.44 crores from its customers as sales tax. Accordingly, the Assessee was liable to pay excise duty on the assessable value of the vehicles which included the amount of about Rs. 22.44 crores. The Assessee was accordingly asked to show cause why central excise duty be not levied on the assessable value of the vehicles Under Section 11A of the Excise Act and why penalty be not imposed upon the Assessee.

8. The Assessee submitted a detailed (undated) reply to the show cause notice. The reply was considered by the Revenue and the Assessee was also given a personal

hearing. Thereafter, on a consideration of the facts of the case, the adjudicating authority took the view that the amount of sales tax retained by the Assessee formed a part of the transaction value of the vehicles in terms of Section 4(3)(d) of the Excise Act. It was also held that since the Assessee had violated certain provisions of the Central Excise Rules of 2001 and 2002 it was also liable to a penalty.

9. Accordingly, on 22nd May, 2003 the adjudicating authority determined an amount of about Rs. 7.21 crores as central excise duty payable by the Assessee on the transaction value and also imposed a penalty of Rs. 1 crore on the Assessee.

Decision of the Tribunal

10. Feeling aggrieved, the Assessee preferred an appeal before the Tribunal. The appeal was taken up for consideration by the Tribunal and by an order dated 16th January, 2004, the appeal was allowed.

11. The Assessee contended before the Tribunal that it is not as if it was exempted from payment of sales tax to the extent of 50% collected from the customers but that the payment of sales tax was deferred in the case of the Assessee. Reliance in this regard was placed by the Assessee on Section 25A of the Haryana General Sales Tax Act, 1973 (the Act).

12. Section 25A of the Act reads as follows:

> Section 25A. Deferment of tax. - Notwithstanding anything to the contrary contained in this Act, the State Government, if satisfied that it is necessary and expedient so to do in the interest of industrial development of the State, may defer the payment of tax by such class of industries, for such period, either prospectively or retrospectively, and such to such conditions, as may be prescribed.

13. It was further contended by the Assessee that Rule 28-C was required to be read along with Section 25A of Act and in terms of Sub-rule 5(a) of Rule 28-C read with the entitlement certificate granted to the Assessee, payment of sales tax was deferred and permitted to be converted into capital subsidy to the extent mentioned in the entitlement certificate.

14. It was also argued that the deferment of sales tax in the case of the Assessee was not a concession as contemplated Under Section 13B of the Act. Consequently, since 50% of the sales tax collected by the Assessee from its customers was to be adjusted against the subsidy granted by the State Government, that amount could not be included in the transaction value of the goods.

15. The Tribunal accepted the contentions of the Assessee and held that Rule 28-C prescribed a procedure relating to deferment of tax Under Section 25A of the Act and, therefore, what was granted to the Assessee was a deferment of payment of sales tax and not a sales tax concession. The deferment was for a period of 14 years during which period the amount was adjusted against capital subsidy due to the Assessee, subject to a maximum limit of Rs. 564.35 crores. Instead of the Assessee depositing the amount in the Treasury and the State Government giving the amount back to the Assessee towards capital subsidy the amount was adjusted and therefore it could not be argued that the Assessee was claiming abatement in respect of sales tax not actually paid or payable.

16. The Tribunal accordingly set aside the order passed by the adjudicating authority and held that the Assessee was justified in claiming abatement of the sales tax element retained by it on the sale of vehicles.

Discussion

17. Aggrieved by the order passed by the Tribunal, the Revenue is in appeal before us. The submissions made by the Assessee before the Tribunal were reiterated before us. On the other hand, the Revenue contended that the case of the Assessee was governed by Rule 28-C(5)(b) and not Rule 28-C(5)(a); that the decision of the HPC did not support the case of the Assessee; that the entitlement certificate did not defer any payment of sales tax.

18. A bare reading of Rule 28-C(5)(a) shows that it is clearly inapplicable in the case of the Assessee. That sub-rule ex facie excludes a prestigious unit from its ken ["(except a prestigious unit)"] There is no dispute that the Assessee is a prestigious unit and therefore Rule 28-C(5)(a) is not at all applicable and the Tribunal was completely in error in relying upon this sub-rule. What is applicable

to the present case is Rule 28-C(5)(b) which mentions that the grant of a tax concession to a prestigious unit will be decided by the HPC.

19. The HPC in its decision taken on 14th June, 2001 permitted the Assessee to retain 50% of the sales tax collected from the customers for a period of 14 years subject to a ceiling of Rs. 564.35 crores. There is no mention in the decision of the HPC about adjustment of this amount against any scheme or any capital subsidy. On the contrary, the decision of the HPC is relatable to Rule 28-C(5)(b) which refers to "grant of tax concession to prestigious units" and for the implementation of this decision, an entitlement certificate would be issued to the Assessee. The Revenue is right in its contention that the decision of the HPC clearly does not support the case of the Assessee.

20. Pursuant to the decision of the HPC, the Assessee was issued an entitlement certificate in Form ST 72B of the Rules. The entitlement certificate reads as follows:

> Form ST 72B
> [See Rule 28C(3)(d), (8)(a)(c)]
>
> ENTITLEMENT CERTIFICATE Under Rule 28C of the Haryana General Sales Tax Rules, 1975
>
> It is hereby certified that the industrial unit in the name and style of M/s. Maruti Udyog Limited, Gurgaon (Place) office address 11th Floor, Jeewan Parkash, 25 Kasturba Gandhi Marg, New Delhi-1 holding registration certificate No. 1818132 under the Haryana General Sales Tax Act, 1973, with date of validity from 25.01.1993 is entitled to tax concession in accordance with the provisions of Rule 28C, for the period from 01.08.2001 to 31.07.2015
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> 2. Subject to the provisions of Rule 28C, this certificate is valid for the period Capture below Image properly

From the date of issue of entitlement Certificate	Quantity of tax concession authority	Signature of the issuing of the certificate	Signature, name and status of the holder
01.08.2001 to 31.07.2015	564.35 Crores		

3. This certificate is entered at Serial No. 5 of page 5 of the register in form ST 74-B.

4. This certificate shall be deemed to have been cancelled from date on which the benefit of tax concession expires.

5. In case of cancellation/withdrawal of the entitlement certificate, the unit shall be liable to make payment of the tax concession availed by it in accordance with Clause (d) of Sub-rule (13) of Rule 28C.

6. Class of good/products manufacture: "Vehicles".

7. Subject to condition that incentive would be given only in respect of vehicles rolled out of production capacity of 70,000 vehicles added as a result of first expansion and not to the production augmented by capacity addition of 30,000 vehicles as a result of second expansion.

Deputy Excise and Taxation Commissioner,
Name J.S. Ahlawat
District Gurgaon (East)
Dy. Excise of Taxation Commissioner
GURGAON

Date of issue 01.08.2001
Place Gurgaon

21. A bare reading of the entitlement certificate also does not give any indication of deferment of tax or capital subsidy. On the contrary, it only refers to a "tax concession" for the period from 1st August, 2001 to 31st July, 2015 and the quantum of tax concession is mentioned as Rs. 564.35 crores. The entitlement certificate issued to the Assessee is clearly in line with the decision of the HPC and also does not support the case of the Assessee.

22. However, to buttress his case, learned Counsel for the Assessee referred to a representation made by the Assessee to the Commissioner, Commercial Sales Tax Department in the State Government on 15th September, 2001 and the response received by it on or about 22nd October, 2001. The response received by the Assessee clarified that the amount allowed to be retained by the Assessee on the basis of the entitlement certificate would be retainable as capital subsidy and not as an exemption from sales tax. This response was sent by the Joint Director (legal) from the office of the Prohibition, Excise & Taxation Commissioner of the State Government.

23. We are not able to appreciate the authority of the Joint Director to issue such a response which is clearly not supported by the decision of the HPC taken on 14th June, 2001 nor is it in consonance with the entitlement certificate issued to the Assessee nor is it in consonance with Rule 28-C(5)(b). As mentioned above there is nothing in the decision of the HPC or the entitlement certificate to indicate that 50% of the sales tax retained by the Assessee on the sale of its vehicles was liable to be adjusted against any capital subsidy entitlement of the Assessee.

24. Learned Additional Solicitor General contended that Section 13B of the Act which relates to the power to exempt certain class of industries from payment of tax is also relevant. We are not inclined to consider this submission since the very basis on which the Tribunal has proceeded namely the application of Rule 28-C(5)(a) is not only incorrect but the Tribunal has overlooked the decision of the HPC and the entitlement certificate apart from overlooking Rule 28-C(5)(b).

25. Finally, our attention was drawn to a circular dated 30th June, 2000 issued by the Central Board of Excise and Customs. This circular was issued in view of the coming into force of Section 4 of the Excise Act (as amended) from 1st July, 2000.

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 Assesses 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.
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> 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.

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

29. In our opinion, the Tribunal misdirected itself in law on several counts and erroneously decided the appeal in favour of the Assessee and, therefore, the order of the Tribunal is set aside.

30. It was eventually submitted by learned Counsel for the Assessee that on the facts and in the circumstances of the case penalty ought not to be imposed upon the Assessee particularly since the Assessee bona fide believed on the basis of the correspondence entered into with the Revenue that the 50% sales tax retained by it was adjustable against capital subsidy and also that there was at least the decision of the Tribunal in its favour in regard to the entitlement of the Assessee. We agree with learned Counsel only to the extent that since the Assessee had succeeded before the Tribunal, it would not be appropriate to saddle it with any penalty.

Conclusion

31. Accordingly, while we restore the order of the adjudicating authority dated 22nd May, 2003 and set aside the order of the Tribunal dated 16th January, 2004, we set aside the penalty imposed on the Assessee.

32. The appeal is allowed to the above extent. There will be no order as to costs.