Articles

ASSUMPTION AND PRESUMPTION — TAXING STATUTE

By

CA Rachit Kumar Agarwal

CHARTERED ACCOUNTANT

Rachit Agarwal

Reasons are the flesh and blood of any Adjudication Proceedings. Any assumptions and presumptions must be supported by reasons and corroborative evidence. It is not only the Tax Officers but also the assessee who come to conclusion based on unsupported assumptions and presumptions.

Any order passed based on the assumptions and presumptions without any cogent reason would be treated an Arbitrary Order. It is whether Assessing Officer or the Assessee must reach to conclusion of the case only after all the facts are available and not on the basis of some facts which are not available. In Taxing Statute, there is no space for presumptions and assumptions.

Illustration of Presumptions and Assumptions as follows :

Production Suppression

(1) If there is excess Consumption of Electricity per metric ton of Iron/Steel, it presumed that the production has been suppressed –

Hon'ble High Court at Allahabad in case of *Commissioner of C. Ex., Meerut-I* v. *R.A. Castings Pvt. Ltd*. [2012 (26) S.T.R. 262 (All.)] The Tribunal observed that it is settled principle of law that the electricity consumption cannot be the only factor or basis for determining the duty liability, that too on imaginary basis, especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. We are of the view that the findings of the Tribunal are based on the material on record and they cannot be said to be without any material and perverse.

(2) If the capacity of the Machines are under-capacity, it is presumed that production has been suppressed.

CESTAT Principal Bench, New Delhi in case of *Kuber Tobacco Products Ltd.* v. *C.C.E. Delhi* [2013 (290) E.L.T. 545 (Tri. - Del.)] SLP filed has been dismissed - [*Kuber Tobacco Products Pvt. Ltd.* v. *Commissioner* - 2015 (317) E.L.T. A159 (S.C.)] - Demand could not be confirmed on the assumption that factory was continuously running for 3 shifts/less machines declared/unaccounted manufacture/actual production grossly suppressed, etc. There were 137 machines and production was estimated on the basis of the production capacity of these machines.

(3) If the per unit consumption of raw material is high, the production has been suppressed.

(4) Stock Yield cannot be the basis of Suppression of production.

Hon'ble High Court for Rajasthan in case of *C.C.E & S.T. Udaipur* v. *Mittal Pigment Pvt. Ltd.* [2018 (16) G.S.T.L. 41 (Raj.)] - The evidences in the form of approximation and averaging production as 77.6% and one statement of Shri Agarwal, Director of the appellant company cannot be called a prudent conclusion of the production estimate.

Clandestine Removal

(5) If there is excess consumption of packing material, it is presumed that there is Clandestine removal of goods.

(6) Shortage of Finished Goods -

Star Alloys & Chemicals Pvt. Ltd. v. *C.C.E & S.T., Raipur* [2019 (21) G.S.T.L. 174 (Tri. - Del.)] Shortages, by themselves, cannot lead to the fact of clandestine removals so as to justify confirmation of demands.

(7) Private Records containing the details of removal of goods.

CCE v. *Arsh Casting Pvt. Limited* [2010 (252) E.L.T. 191 (H.P.)], the Hon'ble High Court of Himachal Pradesh held that the private records maintained by the staff of the company cannot be made as the sole evidence to hold that clandestine removal of the goods.

CESTAT Principal Bench, New Delhi in case of *Kuber Tobacco Products Ltd* v. *C.C.E. Delhi* [2013 (290) E.L.T. 545 (Tri. - Del.)] SLP filed has been dismissed [*Kuber Tobacco Products Pvt. Ltd.* v. *Commissioner* - 2015 (317) E.L.T. A159 (S.C.)]The Appellate Tribunal in its majority order had held that in seizure of documents, loose papers were produced without any "written pages". Author of kachha records, loose sheets, hisab books, challans not traced and unavailable for cross-examination and also the documents were not recovered from office or factory/premises of the assessee. Charge of clandestine removal not sustainable.

(8) If Way bill has not been generated, it is presumed that Tax Invoice may be used multiple times for the removal of goods.

(9) If there is time lag between the date of issue of invoice and data of way bill, it presumed that assessee might be engaged in evasion of tax.

Difference in GSTR 3B and GSTR 2A- Notice of Demand Issued

(10) If there is difference in GSTR 3B and GSTR 2A, it is presumed that tax has not been paid with respect to Input Tax Credit availed. Tax Payment is condition for availing the credit of the Input Tax u/s 16(2)(c) of the CGST Act, 2017.

Difference in GSTR 3B and GSTR 2A- Blocking of Electronic Credit Ledger

(11) If there is difference in the details of supplies as per GSTR 2A and the Input Tax Credit claimed in GSTR 3B, it is presumed that there is no payment of tax or credit has been availed without Invoice.

Reasons for the difference could be many as follows :

(a) Suppliers of the goods have disclosed the Invoice under table B to C instead of B to B.

(b) Registered Person has disclosed the ITC related to Imports in column "All Other ITC" resulting the gap between GSTR 3B and GSTR 2A.

(c) ITC related to a Financial Year has been claimed in succeeding Financial Year. Hence the comparison of ITC claimed in GSTR 3B with details of supplies in GSTR 2A shall give the absurd figure.

(d) ITC related to a month has been claimed in succeeding months.

(e) Supplier has reported his Tax Invoice in a tax period other than the tax period where it is required to be reported.

(f) Registered has first claimed the ITC, however the said ITC has been reversed as the consideration has not been paid and subsequently claimed the ITC upon the payment of the consideration amount. Here the ITC has been reported two times, hence the officer may club both the amount for comparing with the supplies reported in GSTR 2A if the officer is not aware of such facts. Officer may draw the conclusion until the notice has been issued.

Various Analytical Tools are being used and actions are being initiated on the assumption that the tax has not been paid as there is difference between GSTR 3B and GSTR 2A. These actions are not always reasonable.

Confessional Statements of Transporters, Directors, Suppliers, Recipients

If the recipient of the supply has availed the input tax credit on basis of the Tax Invoice of the supplier, whose statement has been recorded that he has issued the Invoice without the actual supply of goods, it could be presumed the entire supply made by him is without the actual movement of the goods.

Hon'ble High Court of Gujarat in case of *C.C.E.* v. *Saaken Alloys Pvt. Ltd.* [2014 (308) E.L.T. 655 (Guj.)] - Confessional statements solely in absence of any cogent evidences cannot make the foundation for levying the Excise duty on the ground of evasion of tax SLP filed against such decision was dismissed [*Commissioner* v. *Saakeen Alloys Pvt. Ltd.* - 2015 (319) E.L.T. A117 (S.C.)].

Hon'ble High Court of Rajasthan in case of *C.C.E & S.T. Udaipur* v. *Mittal Pigment Pvt. Ltd.* [2018 (16) G.S.T.L. 41 (Raj.)]. Any prudent person would not so conclude on extra production by approximation and by a mere statement of the Director of the company. Unless there are further corroborations in the form of documentary evidences, which could be like despatch details for the production, receipt details of the said material, transactions of the sale money, transportation details of such goods, details of additional consumption of electricity for such suppressed production a prudent individual would not agree with the present conclusions of the Revenue.

Extended Period of Limitation

(12) If the Input Tax Credit has been availed in contravention of the provisions of the Act, it would be presumed that there will be applicability of Section 74 of CGST Act, 2017 and extended period of limitation will be applicable. However there is need to prove that is fraud or wilful-misstatement or suppression of facts.

Suppression of the Value

(13) If the supply value of the transaction is lower than the prevalent market value, it presumed that goods are sold at value less than the transaction value.

C.C.E. & S.T., Noida v. *Sanjivani Non-Ferrous Trading Pvt. Ltd*. [2019 (365) E.L.T. 3 (S.C.)] -

Tribunal held that assessment in this case has to be taken as having been made purely on the basis of LME bulletin without any corroborative evidence of imports at or near that price which is not permissible under law. We, therefore, set aside the impugned order and allow the appeal. Held that no fault can be found with the order passed by the Tribunal setting aside the additional demand created against the assessee.

Commissioner of Customs, Calcutta v. *South India Television (P) Ltd.* [2007 (214) E.L.T. 3 (S.C.)] The charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Before rejecting the invoice price the Department has to give cogent reasons for such rejection. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods.

Attachment of Bank Account subsequent to Search, Ineligible ITC, Third Party Proceedings

(14) Search has been conducted in the assessee premises and order for provisional attachment of the bank account has been passed presuming that he would not be able to pay the tax once the order is passed with demand of tax.

In the High of Gujarat in case of *Kushal Ltd.* v. *Union of India* [2020 (34) G.S.T.L. 203] - Hon'ble Court quashed the order of provisional attachment of the bank account on the ground that for giving effect of Section 83, proceedings must be pending u/s 62, 63,64,67,73 or 74 of the GST Act.

In a Writ Petition filed before High Court of Bombay by *Gehna Trading LLP* [TOG-95-HC-BOM-GST-2020] - Attachment Order was quashed which was passed on the basis of proceedings initiated against the third party.

2020 (34) G.S.T.L. 3 (Bom.) - Bombay High Court - *Kaish Impex Private Limited* v. *Union of India*, The Principal Chief Commissioner CGST- Summon was issued to the Petitioner on the basis of proceedings which was initiated against the third party. Section 83 does not provide for an automatic extension to any other taxable person from an inquiry specifically launched against a taxable person under these provisions.

Registration Matters

(15) If the Application Cancellation of the Registration is accepted, it is at times assumed that department will not be able to recover the tax upon any assessment.

(16) If certain Real Estate Projects are going on and the revenue is expected to arise, the assessee is required to obtain the registration.

Oswal Agro Mills Ltd. v. *Collector of Central Excise* [1993 (66) E.L.T. 37 (S.C.)] -

There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor anything can we delete but it should be interpreted and construed as per the words the Legislature has chosen to employ in the Act or Rules. There is no room for assumption or presumptions.

Supreme Court in *Commissioner of Sales Tax, Uttar Pradesh* v. *Modi Sugar Mills*, 1961 (2) SCR 189 at 198 :–

> "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."

Supreme Court in the case of *Union of India and Ors.* v. *Ind-Swift Laboratories Limited* - (2011) 4 SCC 635 = 2011 (265) E.L.T. 3 (S.C.) summarised the legal position thus :–

"20. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in *CST* v. *Modi Sugar Mills Ltd.* wherein this Court at AIR para 11 has observed as follows :

> "11. …..In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

21. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "or" by an "and" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is well founded that once the said credit is taken the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit Rules."

Hon'ble High Court of Madhya Pradesh in case of *Vasu Clothing Pvt. Ltd.* v. *Union of India* [2019 (22) G.S.T.L. 163 (M.P.)] -

44. The Hon'ble Supreme Court has enunciated in similar words the principle of interpretation of taxing laws as under : –

> 'Bhagwati, J. stated the principles as follows : "In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter" [*A.V. Fernandez* v. *State of Kerala*, AIR 1957 SC 657, p. 661].
>
> Shah, J., has formulated the principles thus: "Interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency" [*Sales Tax Commissioner* v. *Modi Sugar Mills*, AIR 1961 SC 1047, p. 1051].
>
> K. Iyer, J., more recently observed : "Taxation consideration may stem from administrative experience and other factors of life and not artistic visualisation or neat logic and so the literal, though pedestrian interpretation must prevail" [*Martand Dairy and Farm* v. *Union of India*, AIR 1975 SC 1492, p. 1494], Before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section [*Commissioner of Wealth-tax, Gujarat* v. *Ellis Bridge Gymkhana*, AIR 1998 SC 120, pp. 125, 126]'.