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HIGHLIGHTS

VOLUME 53
AS E-JOURNAL

Neetika Khanna, Advocate

Editors-in-Chief
S.K. Khurana, Kumar Jee Bhat & H.L. Madan

"The decision makers freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation so long as the government does not act in an arbitrary or in an unreasonable manner, the interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated."

– L. Nageswara Rao, J.
[Kerala State Breverages(M&M) Corpn Ltd Vs. P P Suresh. (2019) SCC 710]

Sales Tax Bar Association (Regd.)
Knowledge, Diffusion & Promotion Section
Trade & Taxes Department, 2nd Floor, Bikrikar Bhawan, New Delhi-110002

DELHI
SALES TAX CASES

Containing important decisions of the Supreme Court of India, High Courts, Sales Tax Appellate Tribunal, Other Appellate and Revisional Authorities, Notifications, Circulars, Articles, etc.

Editors-in-Chief
S.K. KHURANA
H.L. MADAN
ASHOK RAI

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of

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From the Desk of the President

I greet all the Members for the forth the coming Budha Purnima. I am happy to present to this August Bar DSTC Part-I of Volume-53 (2015), the mouth piece of STBA containing the judgments of Delhi High Court, orders of Tribunal, various Notifications, Circulars and article on WCT under ISS. Our able Chief Editor Sh. S.K. Khurana and his team with the blessings of Lord Krishna have not only completed the back log of Parts in Vol. 52 (2014) but also intend to come out and bring it in parity with the year 2016, Vol. 54, during the current year in order to match the mode of citation. I salute to his zeal and enthusiasm.

Despite March being a busy month the working activities and participation of our esteemed Bar had no looking back. Systems issues pending for months were resolved through deployment of new applications like updation of TIN and Name in annexure 2A for the year 2013-14; TIN to TAN n vice versa transfer; removal of errors and checks in downloading of statutory forms to some extent and thereby reprieving members / dealers.

From 4th – 6th March, 2016 Bar was represented in International Conference on Rule of Law / sustainable Development Goals organized by National Green Tribunal held at Vigyan Bhawan & inaugurated by Hon'ble Prime Minister Sh. Narendra Modi, Hon'ble CJI Sh. T.S. Thakur and Hon'ble FM Sh. Arun Jaitley.

Monthly Group Discussions on topics of Direct & Indirect Taxes were conducted and chaired by panelists. Smt. Prem Lata Bansal, Sr. Advocate, Sh. Jaspal Singh, Sh. Vasdev Lalwani and Sh. Ravi Kant Chandhok, which benefited the Members at large in resolving their queries.

As members realise that communication and updation service has become regular and fast, even pronouncement of the High court orders are being intimated via WhatsApp. Young members are appreciating our new program "Grooming the Young", a noble venture to develop advocacy skills amongst youth by Sh. H.C. Bhatia which is held every month at 13th floor. We are extending full Co-operation to members in filling up and submission of the verification forms for Advocates who have been enrolled till 2011. Now the last date is 6th June, 2016.

In our Continuous Education Programme, Study Circle Meeting Sh. H.L. Madan, FCA enlightened the members on the intriguing subject of Works Contract under CST; New Composition Scheme / DVAT Rates. Members gained knowledge through this sharing.

This year Festival of colours “HOLI” was celebrated in a unique way. A Hasya Kavi Samelan and Barsane Ki Holi by Dance Troupe from Vrindavan blending the colours of festivity was organized at Pearey Lal Bhawan on 21st March, 2016. Hon’ble Mr. Justice Siddharth Mridul, Judge Delhi High Court; Hon’ble Sh. Sanjay Jain, ASG of India; Sh. S.K. Bagga, Advocate & MLA Delhi Assembly and VAT Commissioner, Sh. S.S. Yadav were the Galaxy of Guests. Around 600 Members and their families regaled the occasion, which was followed by Dilli Ki Chaat and Dinner. It was the largest ever festival celebration in STBA.

Blood has no substitute. Donate Blood Save Life. On 21st April, 2016 a Blood Donation Camp was organized in association with Lions Blood Bank at Bar premises. A total of 63 units were collected, more than the past camps in the Bar. I from the core of my heart thank members and their relatives / friends for active participation in this Noble cause. I thank Sh. Rakesh Kumar, Advocate for its organization.

We are grateful & thankful to all the Members & their families who gave us an overwhelming response in making the 3 days Residential Conference from 29th April–1st May 2016 held at Jim Corbett a GRAND SUCCESS. All together a contingent of 122 people, the largest ever from STBA went for Residential Conference. Our Special Thanks to all the Ld. speakers, who deliberated on the topical issues of I/Tax, DVAT, S/Tax, GST & diffused knowledge to fellow colleagues. Yoga & Palmistry were added Bonanza. Pool side live music, recreation & fellowship at lavish dinner made all participants enjoy the evenings at Corbett Resort. Sincere Thanks to our members Sh. Rakesh Kr (Convenor), Sh. Manoj Kapoor, Ms. Neetika Khanna and Sh. Raj K Batra, Advocates.

Not only in the field of knowledge diffusion, our members participated and represented the Bar but also in Sports arena. STBA Cricket Team participated in N.C. Sikri Memorial Cricket Tournament organized by Hon’ble Mr. Justice A.K. Sikri, Judge Supreme Court of India where in 36 Teams from various Bar Associations and Legal fraternity participated. The tournament which last for around 2 months came to Grand finish on 14th May 2016 at Ferozshah Kotla Ground. Our Cricket Team displayed unity and played till the pre-quarterfinals stage. My special compliments to all Team Members, Captain Sh. Sanjay Mehra and Convenor Sh. Puneet Rai, Advocates.

I extend my Best wishes to all the members for an enjoyable and relaxing summer vacations.

New Delhi
May 16, 2016

Sanjay Sharma
President

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Amnesty Scheme

Writ Petition - Delhi Tax Compliance Achievement Scheme 2013 (Amnesty Scheme) – Claim for waiver of penalty levied u/s 86(12) of DVAT Act on account of denial of exemptions for sale in the course of import u/s 5(2) of CST Act, 1956 by opting amnesty scheme-entire tax and interest determined in assessment paid prior to commencement of amnesty scheme. FAQ issued by department of Trades and Taxes provided for the waiver of penalty in such a case – No reason given by the Deptt. in form DSC 3 for rejection of the claim of waiver of penalty under the amnesty scheme - filed writ petition. The high court considered appropriate to examine the petitioner's entitlement under the Amnesty Scheme instead of setting aside the order in DSC 3 and sending back the matter to department for not revealing of reasons in rejection order refusing amnesty to the petitioner. Petition allowed with remarks "the idea is to incentivise payment of taxes and not disincentivise compliance". Entire tax and interest paid before commencement of scheme ought not to be denied for waiver of penalty.

[Siemens Ltd J-22]

Writ Petition – Delhi Tax Compliance Achievement Scheme, 2013 (Amnesty Scheme) – Validity of the orders passed by designated authority rejecting the petitioners application challenged on account of jurisdiction – Show cause notice issued by Department of Trade & Taxes under clause 8(1) of the Amnesty Scheme beyond one year from the date of filing of declaration also challenged – Being barred by limitation – Court quashed both the orders.

[Jaycon Infrastructure Ltd. J-53]

Best Judgment Assessment

Audit u/s 58 conducted under DVAT Act, 2004 – Ex-parte assessment completed due to non appearance of appellant or his counsel on last hearing due to ill health of the counsel – Several opportunities were earlier allowed to the appellant to produce books of accounts and other records – Appellant

did not produce purchase invoices and books of accounts – All other records produced – Turnover enhanced by 100% on estimated basis without having any material with AO making best judgment assessment – Whether valid. Held – No

Matter remanded to AO.

[Navkar Traders J-257]

Cancellation of 'C' Form

Retrospectively cancellation of 'C'-form – Power to cancel a 'C' – Form under Central Sales Tax Act, 1957 & Rule 5(4) of Central Sales Tax (Delhi) Rules, 2005.

Writ petition filed by petitioner being a selling dealer to challenge the cancellation order of 'C' Form – Whether the petitioner was entitled to file the petition.

Petitioner was essentially concerned about the cancellation of 'c' for m issued to him and constrained to challenge the cancellation of the registration of respondent no. 2 – The court rejected the plea of the revenue that the petitioner did not have locus – Registration was alive of the purchasing dealer on the date of transaction and the 'C'-Form having been validly issued – There could not have been a retrospective cancellation of the 'C'-Form – There was specific provision under rule 5(4) to withhold the 'C' form if some adverse material found by the commissioner but did not empower to cancel the 'C'-Form – The order passed by revenue cancelling 'C'-Form set aside.

[Jain Manufacturing (India) Pvt. Ltd. J-181]

Condonation of Delay

(See also Limitation J-77)

(See also Limitation J-110)

Credit of Sales Tax Payment

Verification and credit of sale tax payment under Delhi Sale Tax Act, 1975 – Burden of proof – Production of photostat copy of tax challan – Records not available with revenue – Banker showed its inability to issue certificate for encashment – Whether in the peculiar circumstances the evidence which had been filed by the appellant being a central government department was admissible? – appellant filed quarterly returns along with requisite tax challan "c" part which was not denied by the revenue – assessment framed and

demand created due to non verification of payment challan for non availability of records – The appellant requested to banker for issuance of certificate being old matter bank records had been destroyed – Revenue argued before the tribunal that burden laid down on appellant to prove – Appellant discharged its burden by filing the photostat copies of "C" parts of the Challan which was deposited in RBI - The appellant referred various judgement relating to the admission of photocopy in absence of original one and substantiated the argument that part "C" of the Challan be admitted unless it was proved that it was not genuine – Appeal allowed.

[Director General Supplies & Disposals J-117]

Declared Goods

Special Leave Petition – Declared goods under section 14 of Central Sales Tax Act, 1956 – Works contract under Karnataka Value Added Tax Act – Iron and steel products were utilized in execution of works contract for reinforcement of cement – The iron and steel products became part of pillar, beams etc. which were all parts of immovable structure – Appellant claimed exemption for iron and steel goods – Revenue argued that the products did not continue as iron and steel but somehow became different goods at the points of accretion and higher rate to be applicable – The appellant argued before the court that iron and steel products continued as declared goods even though they were in a works contract – The court held that the item was not exempt from tax and to be taxed @ 4% as iron and steel.

[Smt. B. Narasamma J-307]

Deemed Export

(See also Sale against 'H' Forms J-228)

Detention of Goods

Power to stop, search and detain goods vehicle under section 61 of Delhi Value Added Tax Act – Appellant was not carrying with him prescribed records – Containers were detained – Appellant filed writ petition before Delhi High Court – The court ordered to release the goods subject to the appellant depositing FDR of Rs. Four lakh.

Revenue imposed penalty of Rs. 704628.00 – Appellant again filed writ petition against penalty order contending that he was not a dealer but only a transporter – The court directed A.A. to conduct an inquiry in this regard on production of documents before him – Assessing Authority passed non

speaking order – The appellant filed objection petition as per direction of High Court – The appellant contended that objections had not been disposed of within 15 days of the notice – Objections have to be deemed to have accepted as per section 74(9) – OHA rejected the objections and upheld the order of assessing authority.

Appellant took plea before VAT Tribunal that requisite documents were filed before inquiry officer and the same were not examined and a non speaking order was passed – Revenue did not find error in the documents filed by appellant – Tribunal found that among consignees only one belonged to Delhi dealer – Revenue did not contradict the case of appellant - Appeal allowed and impugned order set aside and matter remanded back to assessing authority.

[Aar Tee Transport Company Pvt. Ltd. J-268]

Determination

Determination – "Whether the sale of all kinds of scrub pads / scrubbers used by the household for cleaning the household items is covered by entry 84 of Schedule-I of Dvat Act and exempted from VAT"

[Grindwell Norton Ltd. J-303]

Disallowance of Input Tax Credit

Disallowance of Input Tax Credit – Input Tax Credit claimed on the basis of retail invoices – VATO issued notice of default assessment of tax & interest and issued notice of assessment of penalty.

Appellant rightly claimed ITC on fulfillment of substantial conditions as provided under section 9(1) of DVAT Act, 2004 – ITC was denied on mere technical ground that instead of issuing Tax Invoice and TIN No. was not mentioned on the Retail Invoices – Direction issued to revenue to give benefit of ITC.

[J.C.Decaux Advertising India J-380]

Limitation

Limitation on framing assessment and re-assessment under section 32 & 34 of DVAT Act, 2004 – classification of items – Whether the monitors sold by the petitioner fall within the entry 'monitors' in terms of item 3 below entry 41A of the third schedule - Notice of default assessment of tax & interest & notice of assessment of penalty issued tax period wise on the basis of determination order passed by the commissioner in the case of 3rd party – Non compliance

with the requirements were made of section 32(1) – Violation of principle of natural justice – Writ petition-existence of alternative remedy – Petitioner argued that assessment proceedings were not only time-barred but were without jurisdiction – Revenue submitted that section 34(1) related only to an assessment under section 32 and not a self assessment u/s 31(1) of the Act – The court was unable to agree to such a narrow interpretation of word assessment – The court held that all other notices of default assessment issued except Feb & March 2010 were barred by limitation - Whether the entry monitors was broad enough to cover particular types of monitors or whether such special variation of monitors – Various judgments of Supreme Court cited before the court relating to classification of items – Supreme Court reiterated the well settled principle that if in a matter of classification of goods two views were possible, the one favouring the assessee has to be preferred – Revenue had not been able to persuade the court that LCD/LED/TFT monitors sold by the petitioner was not classifiable as monitors – Notice issued under section 59(2) gave no indication for erroneous classification of the monitors as forming the basis for reopening of assessment – Notice of assessment on 31.03.2014 as well as penalty were quashed.

[Samsung India Electronics Private Limited J-1]

Limitation – Condonation of delay - Death of the representative of the company – Appropriate explanation and reasonable cause – Delay of 124 days in filing the appeal before tribunal condoned – Punjab Value Tax Act, 2005, Section 64 – Limitation Act, 1963, Section 5.

[Conell Bros. Co. (India) Pvt. Limited J-77]

Limitation – Territorial jurisdiction – Delay of 2192 days in filing – Condonation of – Appellants were pursuing their remedy in a court – Appeal before Gujarat High Court was filed in time – Entire period, from the time of filing of appeal in the Gujarat High Court till its disposal by that court must be excluded for the purposes of limitation - If that is not done, great injustice and unfairness will result - The court directed that papers in each of appeals be returned to the respective appellant/ their courts for presentation to the competent appellate court, which was bombay high court in this case- thus entire period from the date of filing of appeals in the Gujarat High Court to the date of its disposal by high court was to be excluded – Section 35G of Central Excise Act, 1944.

[Omnitex Industriex (India) Limited J-110]

Mismatach in 2A & 2B

Mismatch occurred in Annexure-2A with Annexure-2B – Notice of assessment of Tax & Interest under Section 32 of Dvat Act notice of assessment of penalt

y u/s 33 read with section 86(10) of the act mistake created on the part of selling dealer but input tax credit was disallowed u/s 9(2) (g) of the appellant – The VAT Tribunal held that unless it was proved beyond doubt that tax was not deposited by the selling dealer ITC could not be reversed. There was no mechanism with the dealer to check whether selling dealer had deposited tax collected from the purchasing dealer - Penalty was imposed without giving notice. It was held that separate notice to show cause was required prior to passing the order - Impugned order set aside and case referred back-appeals allowed.

[CL International J-45]

Mitigation of Penalty

Mitigation of penalty u/s 87(6) of Dvat Act, 2004 – Whether voluntary disclosure of tax deficiency to commissioner in writing during the course of enforcement survey proceedings u/s section 60 of the act and payment of tax deficiency made within 3 working days of the conclusion of survey is enough to mitigate 80% of the penalty – Held yes.

[GTS Exports Pvt. Ltd. J-237]

Penalty

Default assessment of Tax & Interest and Notice of Assessment of penalty u/s 32 & 33 read with section 86(12) of the DVAT Act, 2004-input tax credit disallowed u/s 9(2)(g) on the basis of registration certificates of the selling dealers cancelled w.e.f. 13.04.2010 & 01.04.2010 – cancellation was not notified as envisaged under provisions of section 22(g) of the DVAT Act, 2004 – Objection Hearing Authority had been mistaken on placing reliance on the provisions of section 9(1)(9) and 9(2)(9) – No documents or evidences had been placed on record to establish that the appellant had been aware of the facts of cancellation of registration certificates of the selling dealers or was otherwise in collusion with the selling dealer - Department website did not indicate which date it was published in gazette or hosted – Appeals allowed orders set aside.

[Shree Sidhi Vinayak Traders J-125]

Penalty u/s 86(9) of Delhi Value Added Tax Act 2004 for filing late returns – Reasonable cause – returns were filed late due to the serious health problem of director – Principles of natural justice - No opportunity was provided of being heard – Whether justified. Held – No.

[Equivalent Inks Pvt. Ltd. J-286]

Notice of Assessment of penalty u/s 86(14) of DVAT Act, 2004 for non-filing of DS-2 – Show cause notice issued manually – VATO enforcement reported wrong vehicle no. whereas vehicle no. mentioned in DS-2 was correct – The appellant filed DS-2 online within time prescribed – VATO did not consider that DS-2 was already filed – Maximum penalty imposed u/s 86(14) for Rs.50,000/-.

The Tribunal held that penalty imposed u/s 86(14) was against the provision of law – Further held that penalty was to be leviable u/s 86(9) for violation of notification issued by the Commissioner of VAT u/s 70 of DVAT Act even for non-filing or late filing of DS-2 – The appellant had already filed DS-2 within time and there was no violation of section 86(9) of DVAT Act – Penalty deleted.

[Ish Kumar & Co. J-357]

Notice of Assessment of penalty u/s 86(10) of DVAT Act, 2004 – Survey of enforcement branch was conducted – Cash and stock variation found – The appellant admitted tax liability and he was asked to give a cheque of Rs. 5,00,000/- – The appellant was assured to give the benefit of 80% of total penalty amount u/s 87(6) of DVAT Act – The department did not deposit the cheque and framed assessment of tax & interest and also imposed penalty u/s 86(10).

Whether the appellant was liable to get the benefit of section 87(6). Even there was lapse of procedure in making the payment but intention of the appellant was to pay the tax. held – yes.

[RKG International Pvt. Ltd. J-363]

(See also Mitigation of Penalty J-237)

Power to Stop, Search & Detain

(See also Detention of Goods J-268)

Pre-Deposit

Waiver of pre-deposit – Conditions to entertainment of appeal u/s 76(4) of Delhi Value Added Tax – First proviso confers powers to entertain the appeal without payment of tax by VAT Tribunal – Default Assessment of Tax & Interest and Notice of Assessment of Penalty issued on account of mismatch – ITC disallowed and passed system generated order without giving opportunity to appellant – The appellant produced copy of accounts and bank certificate certifying tax mentioned in bills have been debited which proved ITC was

rightly claimed – Appellant got a prime facie case and balance of convenience in his favour – Order passed without pre-fixing any condition to deposit.

[M/s. Euro Aircon International J-293]

Re-Assessment

Writ Petition – Challenge to re-assessment proceedings – Direction to revenue to produce records showing recording of reasons to believe that turnover has escaped assessment – Revenue claimed that turnover should have been higher than declared – Worked on the basis of deduction for labour, services and other like charges claimed by the dealer under rule 3(1) & (2) but treating by the revenue as if the same are not ascertainable from the requisite documentation produced – Whether fresh reasons to believe can be accepted as originally it was claimed by revenue that turnover has escaped – But in hearing saying excess deduction has been claimed – Whether the material gathered by DT&T if any, ought to have a live nexus to the formation of belief that there is escapement of turnover from assessment.

Power and jurisdiction of AC (VAT Audit) – Section 67(2) of DVAT Act – No power of delegation as such but power is to issue orders for the due and proper administration of the DVAT Act. – Special Commissioner could not have delegated power in terms of section 67(2) and in particular power of reopening of re-assessment to AC (VAT Audit).

Assessing authority to act independently u/s 34 of DVAT Act 2004 to reopen an assessment and not under the dictates of senior officers – AA prepared note proposing to re-open the assessment followed by approval by several superior officers up to the level of Commissioner VAT – Whether justified.

[ITD-ITD Cem JV J-80]

Refund

Writ under constitution – Delhi Value Added Tax Act, 2004 – Refund- time limitation for framing assessment or reassessment under section 32, 33 & 34 – Applicability of section 9(2)(g) – Notice u/s 59(2) issued again, during the pendency of writ – Whether justified, held – No.

Refund claimed in the returns disallowed – Input Tax Credit also disallowed alleging goods were purchased from cancelled dealers/bogus dealers - VATO carried out default assessment of tax and interest and imposed penalty – Objection Hearing Authority set – Aside the order and referred the case to VATO to record the reasons for disallowance of ITC and to pass fresh orders - No orders passed by VATO within prescribed time - Writ Petition filed seeking

direction to grant refund- notice u/s 59(2) issued to frame fresh default assessment by invoking the provisions of sec 34(1) of the act - The orders were passed demand created and refund disallowed – The petitioner also challenged the fresh orders by amending writ petition - The court held that proceeding sought to be initiated fresh by issuance of notice u/s 59(2) and passing orders were an abuse of law and hereby quashed - Directions were issued to revenue to grant refund with interest.

[Lotus Impex J-137]

Refund under DVAT Act, 2004 – Technical default – Mistake occurred in filing revised return on the part of counsel – Refund amount as showed in original return was not filled under proper column – Assessing authority denied to issue refund. Whether justified held – No.

The appellant claimed refund in original return – Revised return was filed subsequently to enhance Input Tax Credit of unclaimed invoices – The appellant erred in filling revised return and mentioned refund amount of original return under the head other adjustment – Basis of claiming the refund was not disputed – Appeal accepted and direction issued to grant refund with in a period of two months.

[Prime Optics J-371]

Delhi Value Added Tax Act, 2004 – Refund – Writ under Constitution – Interim order passed to issue refund with interest – Notice u/s 59(2) to frame assessment – Power not proper delegated as per section 68(2) – Non issuance of DVAT 50 in the name of officer to pass assessment order – Notice of default assessment of tax and interest and penalty issued creating demand in excess to refund – Violation of principles of natural justice – Illegal orders – Notices of default assessment and interest and penalty quashed – Cost imposed on revenue also given direction to VAT Commissioner to take action on AVATO and Joint Commissioner to recover the cost from the officers and adverse entry may be made in their annual confidential reports.

[Teleworld Mobiles Pvt. Ltd. J-347]

Reversal of Input Tax Credit

Reversal of input tax credit – Circular issued to reverse Input Tax Credit on account of invisible loss of yarn pursuant to manufacturing activities – Writ Petition filed – The court set aside the order of revenue reversing the Input Tax Credit on adhoc basis – Section 18 cannot as an independent provision but subject to restrictions and conditions contained in section 19 of TNVAT Act.

[Sri Renga Polymers J-193]

Review

Review – Prescribing of a pre-condition for entertainment of appeal on merits u/s 76(4) of Delhi Value Added Tax Act – Prima facie case – The petitioner was directed to deposit Rs.10000/- of amount in dispute of Tax & Interest and Rs.5000/- of the amount in dispute of penalty – As condition precedent u/s 76(4) – The petitioner has a strong prima facie case as he cured the irregularity in the invoices and was entitled to ITC – Proof produced that the selling dealer had paid due taxes – The order was modified to deposit a consolidate amount rs.5000/-.

[Malkiat Singh & Sons J-297]

Revision

Jurisdiction – Delhi Sales Tax Act, 1975 – Power of revision – Redesignation of Authority – Power to issue notice u/s 46 of the act was delegated to assistant commissioner – Assistant Commissioner redesignated as deputy commissioner – Notice issued by deputy commissioner – Whether without jurisdiction?

Jurisdiction – Territorial jurisdiction – Assessing Authority Ward 72 framed assessment – Jurisdiction transferred to special zone – Who has jurisdiction to issue notice for suo moto revision? Point of territorial jurisdiction not revised in writ petition – Effect off!

Revision – Power to suo moto revise an order? – Senior officer directed to initiate suo moto revision – Several days after the direction deputy commissioner recorded reasons for initiating suo moto revisional proceeding – Reasons supplied for invoking the power were neither erroneous nor prejudicial to the interest of revenue – Whether justified; Held no.

[Kumagai Skanska HCC ITOCHU Group J-60]

Sale Against 'H' Forms

Deemed export – Exemption u/s 5(3) of Central Sales Tax Act furnishing of H forms – Furnished H Form and bill of lading, bank certificate, packing list, invoices and certificate of foreign exporter – Not produced agreement with foreign buyers – Default Assessment of Tax & Interest and Notice Of Assessment of Penalty issued – Production of agreement foreign buyers not mandatory as per law.

VAT Tribunal held that the order passed by VATO (Audit) and confirmed by OHA set aside and the matter remanded with a direction to decide the matter afresh.

[Nitin International J-228]

Service of Notice

Under Rule 62 of the DVAT Rules, 2005- The manner of service of notices, documents and orders- service of notices issued u/s 59(2) of DVAT Act – Notices uploaded on the website of the Department of Trade & Taxes in the account of the petitioner in accordance with order issued by commissioner under rule 62(1) (vi). – The petitioner could not view the notice posted on the website – Petitioner filed writ and claimed that the notices were not delivered to him in terms of rule 62 of DVAT Rules, 2005. – Whether service of notices was proper as per law. Held – yes.

Validity of orders of Assessment of Tax, Interest and Penalty – Each order was identically worded except for tax periods and figures – Tax paid and turnover assessed shown as zero but tax assessed at Rs 14,43,938/- errors showing on computer system – Non application of mind by AA - Whether such orders could be valid orders as per law – Held no.

[Bajrang Fabrics Pvt. Ltd. J-168]

Service Tax

Rule 5A(2) of the Service Tax Rules, 1994 – Circular No.181/7/2014 – ST dated 10th December, 2014 clarifying for statutory backing of conducting audit u/s 92(4)(k) by Departmental Officers – CAG or Department team cannot undertake an audit of the records of Service Tax assessee – The word 'verify' cannot be construed as power to audit - Circular No. 181/7/2014-ST held to be ultra vires the Act – Court declared CBEC Circular No. 995/2/2015-CX and Service Tax Audit Manual 2015 as ultra vires the Act.

[Mega Cabs Pvt. Ltd. J-147]

Special Leave Petition

Special Leave Petition – Constitutional validity of amendment made under section 19(20) of Tamil Nadu VAT Act with retrospectively – Question of retrospectivity – The petitioner argued that newly inserted provision was confiscatory in nature as well as unreasonable and arbitrary therefore voilative of article 14 and 19(1)(g) of the constitution – High Court by a well reasoned and detailed judgment rightly rejected the contention of the petitioner – Leave in the special leave petition was granted only to limited extent for the question of retrospectivity – The high court had primarily gone by the fact there was no unforeseen or unforeseeable financial burden imposed for the past period – Observation of High Court was not correct – This was clearly a provision which was made for the first time to the detriment of the dealers – Such a provision

therefore, cannot have retrospective effect. The court set aside and struck down Amendment Act 22 of 2010 relating to retrospective effect from 1.01.07.

[Jayam & Co. J-326]

Survey & Search

Power to enter premises and seize records and goods u/s 60 of DVAT Act, 2004 – Enforcement survey – Variation in cash and stock found – Variation in imports in earlier years and in the period of survey was also found – Appellant explained that the cost of material imported included certain expenses - No loose slips or private books etc were seized – Single composite order passed u/s 32 for various tax periods over three financial years no findings given by OHA in his order in this regard – Detailed explanation given by the appellant for cash deposited with the pick up van of HSBC Bank prior to the survey – supported documents produced – stock found excess on survey, no stock taking done by survey team, no work sheet or chart prepared to support valuation. Appellant explained the basis of valuation but revenue failed to give any explanation for the valuation done inspite of repeated requests of the appellant. Whether variation in cash and stock on the facts of the case and in law be assessed as undisclosed turnover. Held – No.

[Burberry India Private Limited J-198]

Enforcement survey under Delhi Value Added Tax Act – VAT on registration charges and logistics charges were not paid – Default Assessment of Tax and Interest and Notice of Assessment of Penalty issued – Charges were in nature of service and post sale charges – Whether covered under the definition of sale price – Held No.

[Asian Motors J-276]

Agreement to defeat the intention and application of this act to be void under section 40A of DVAT Act, 2004 - Whether supply of imported goods as samples to customers free of cost basis or below the fair market price causes revenue loss to the exchequer and is void u/s 40a of DVAT Act, 2004 and whether tax could be levied on landed cost (Purchase Price) of such goods. Held –no.

Variation in stock and cash – Whether non disclosure of stock laying at branch and with the clearing and forwarding agent during survey proceeding or stock was available at head office would be final in all respect and any subsequent explanation during assessment proceedings to explain shortage in stock

and cash would be rejected without proper examination of the case and the evidences produced by the appellant. Held – No.

[Dalmia Continental Pvt Ltd J-245]

Transfer of Right to use Goods

Transfer of Right to Use Goods – pre-deposit – Notice u/s 59(2) of DVAT Act - Writ petition challenging the taxability of the entire turnover for use of the hoardings, panels, display boards , kiosks etc based on ruling made by the commissioner vat u/s 85 of DVAT Act, 2004 – Order by OHA directing deposit of Rs 3.14 cr being 20% of disputed demand of VAT & Interest and notice u/s 59 to produce the documents also challenged - sites were being used by the petitioner for rendering services and no Right to Use the sites had in fact been transferred by the petitioner- merely because the advertisements of the advertisers were displayed on the sites would not necessarily lead to the conclusion that they had acquired the right to use the sites. The court held that transactions entered into by the petitioner it will be difficult to accept the view that the same constituted transfer of right to use the sites in question- the order of the commissioner u/s 85 could not be applied in each case where advertisements were displayed on hoardings, panels etc - the court modified the order and directed the Special Commissioner to consider the objections filed by the petitioner in light of the observations made in this order without insisting on pre-deposit of any amount- matter remitted to assessing authority with regard to the impugned notices under section 59 of the DVAT Act requiring the petitioner to produce documents for the period of 2012-13, direction was given to complete the assessment keeping in view the observations made in the order.

[Tim Delhi Airport Advertising Pvt. Ltd. J-94]

Withholding of 'C' Forms

Withholding of 'C' forms – Intertstate sale under section 3(a) of Central Sale Tax Act – Transaction of transfer of right to use goods-forms were denied to issue on the basis of no movement of goods was proved from Maharashtra to Delhi – Ownership rights in the equipment was vested with lessor – VAT Tribunal dismissed the appeal on conclusion that since the sites of the sale was Delhi and the agreement transferring the right to use the equipment was executed at New Delhi – The court held that mere location or delivery or location of the goods would not determine the sites of sale – In the lease agreement occasioned the movement of goods from one state to another – There was finding of tribunal that the goods moved from Maharashtra to Delhi and were used in the distribution of electricity – The court held that transaction was

deemed to be an interstate sale – The appellant satisfied the pre-condition for issuance of ‘C’ Forms-appeal accepted and VATO was directed to issue ‘C’ forms.

[Tata Power Delhi Distribution Ltd J-32]

Works Contract

Delhi Works Contract Act,1999 – Composition scheme taxability of pure service contracts under the provision of Works Contract Tax Act – Value of pure service contracts were added consequently demand created – Service Contract Agreements revealed that amount received toward AMC did not include to replace the defective parts – No material was passed on – Composition scheme covered the transactions that fallen within the ambit of works contract – Revenue had not placed any incriminating materials to contradict and discredit the contention of appellant while doing the annual maintenance was not part of the contract – Appeal allowed and impugned orders set aside.

[Sleek Sales J-217]

Writs Under Constitution

(See also Limitation J-1)

(See also Amnesty Scheme J-22)

(See also Amnesty Scheme J-53)

(See also Re- assessment J-80)

(See also Transfer of Right to Use Goods J-94)

(See also Refund J-137)

(See also Service of Notice J-168)

(See also Cancellation of ‘C’ Form J-181)

(See also Reverse of Input Tax Credit J-193)

(See also Refund J-347)

[2015] 53 DSTC 1 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

Reserved on: March 30, 2016
Decision on: April 7, 2016

W.P.(C) 2685/2014 & CM No. 5591/2014

Samsung India Electronics Private Limited ... Petitioner

Versus

Government of NCT of Delhi & Ors. ... Respondents

DATE OF JUDGMENT : APRIL 7, 2016

LIMITATION ON FRAMING ASSESSMENT AND RE-ASSESSMENT UNDER SECTION 32 & 34 OF DVAT ACT, 2004 – CLASSIFICATION OF ITEMS – WHETHER THE MONITORS SOLD BY THE PETITIONER FALL WITHIN THE ENTRY 'MONITORS' IN TERMS OF ITEM 3 BELOW ENTRY 41A OF THE THIRD SCHEDULE- NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST & NOTICE OF ASSESSMENT OF PENALTY ISSUED TAX PERIOD WISE ON THE BASIS OF DETERMINATION ORDER PASSED BY THE COMMISSIONER IN THE CASE OF 3RD PARTY – NON COMPLIANCE WITH THE REQUIREMENTS WERE MADE OF SECTION 32(1) – VIOLATION OF PRINCIPLE OF NATURAL JUSTICE – WRIT PETITION-EXISTENCE OF ALTERNATIVE REMEDY – PETITIONER ARGUED THAT ASSESSMENT PROCEEDINGS WERE NOT ONLY TIME-BARRED BUT WERE WITHOUT JURISDICTION – REVENUE SUBMITTED THAT SECTION 34(1) RELATED ONLY TO AN ASSESSMENT UNDER SECTION 32 AND NOT A SELF ASSESSMENT U/S 31(1) OF THE ACT – THE COURT WAS UNABLE TO AGREE TO SUCH A NARROW INTERPRETATION OF WORD ASSESSMENT – THE COURT HELD THAT ALL OTHER NOTICES OF DEFAULT ASSESSMENT ISSUED EXCEPT FEB & MARCH 2010 WERE BARRED BY LIMITATION- WHETHER THE ENTRY MONITORS WAS BROAD ENOUGH TO COVER PARTICULAR TYPES OF MONITORS OR WHETHER SUCH SPECIAL VARIATION OF MONITORS – VARIOUS JUDGEMENTS OF SUPREME COURT CITED BEFORE THE COURT RELATING TO CLASSIFICATION OF ITEMS – SUPREME COURT REITERATED THE WELL SETTLED PRINCIPLE THAT IF IN A MATTER OF CLASSIFICATION OF GOODS TWO VIEWS WERE POSSIBLE, THE ONE FAVOURING THE ASSESSEE HAS TO BE PREFERRED – REVENUE HAD NOT BEEN ABLE TO PERSUADE THE COURT THAT LCD/LED/TFT MONITORS SOLD BY THE PETITIONER WAS NOT CLASSIFIABLE AS MONITORS – NOTICE ISSUED UNDER SECTION 59(2) GAVE NO INDICATION FOR ERRONEOUS CLASSIFICATION OF THE MONITORS AS FORMING THE BASIS FOR REOPENING OF ASSESSMENT – NOTICE OF ASSESSMENT ON 31.03.2014 AS WELL AS PENALTY WERE QUASHED.

Facts of the Case

The Petitioner was engaged in the sale of electronic goods, home appliances, consumer durables and information technology products etc.

he was a registered dealer under the DVAT Act and had been paying value added tax as well as filing return on monthly basis under the DVAT Act and corresponding Delhi Value Added Tax Rules, 2005 ('DVAT Rules'). Inter alia the Petitioner sold TFT/LCD/LED monitors. Under Section 4(1)(b) of the DVAT Act in respect of the goods specified in the III Schedule, 5% tax was leviable on the taxable turnover of a dealer. Entry 41 of the Third Schedule covered IT products including computers, telephones and parts thereof, cellular phones and accessories, etc. Entry 41A dealt with the IT products and covered IT products as described in column 2 as covered under the headings or sub-headings mentioned in column 3 of the Central Excise Tariff Act, 1985 ('CET Act'). In the table given below Entry 41A there is an Item at Sl. No. 3 which covers a large range of automatic data processing machines. Specific to the case at hand, it includes "Graphic printer, Plotter, Laser jet printer, key board, Monitor, storage units, floppy disc drive etc." Column 3 gives the central excise tariff heading as 8471. Notes (2) and (3) read as under:

> *Note - (2). Where any commodities are described against any heading or, as the case may be, sub-heading, and the description in this entry and in entry number 84 is different in any manner from the corresponding description in the 84 will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification.*
>
> *Note-(3). Subject to Note (2), for the purpose of any entry contained in this notification, where the description against any heading or, as the case may be, sub-heading, matches fully with the corresponding description in the Central Excise Tariff, then all the commodities covered for the purposes of the said tariff under that heading or sub-heading will be covered by the scope of this notification."*

If an entry did not fall under any of the Schedules, then in terms of the Section 4(1)(d) of the DVAT Act, tax was payable at the rate of 12.5%. Another company dealing with electronic products, i.e., NEC India Private Limited ('NEC') filed, on 8th July 2008, an application under Section 84 of the DVAT Act for determination of the following question:

> *"Whether LCD Monitors, LCD Displays/Plasma Displays are exempt from tax as being meant for educational purposes like books, periodicals and journals including maps, charts and globes which are covered by Entry No.5 of the First Schedule to the Delhi Value Added Tax Act, 2004 and are exempt from tax or the same are covered by Entry No. 41 of the Third Schedule to Delhi Value Added Tax Act, 2004 and are taxable @ 4%?"*

The case of NEC India was that LCD displays/Plasma displays were an integral part of a computer and could not work unless they were attached to a computer and, therefore, were classifiable under Entry 41 of the Third commodities described in this entry and in the entry number Schedule. The case of the Department of Trade & Taxes ('DT&T') on the other hand was that even though there was Serial No. 18 which covered "LCD displays, LED panels and parts thereof", the LCD Monitors were distinct from LCD panels and, therefore, were not classifiable as such under any of the entries in the III Schedule to the DVAT Act. In the determination dated 8th July 2008, the Commissioner DT&T held that since the products in question were not classifiable under Clause (18) of Entry 41-A to the Third Schedule of the DVAT Act and since LCD displays/plasma displays do not find any reference in any of the Schedules, they were unclassified items taxable at the rate of 12.5%. On the basis of the said determination under Section 84 of the DVAT Act, the Petitioner was subjected to audit proceedings for the period 1st April 2009 to 31st March 2011. In terms of the VAT Audit Team report dated 12thJuly 2008 for the period of the audit, the Petitioner was engaged in export, import, trading and stock transfer of various electronic goods, refrigerating goods, mobile phones and accessories. The audit report also did not find any discrepancy in the Petitioner's business as well as its books of accounts. On 25th May 2014, the Petitioner received a letter dated 8th March 2014 from the VATO, Ward-202 (KCS-II) seeking certain documents/information. Reference was made to an earlier letter dated 11thFebruary 2014 which according to the Petitioner it did not receive. That letter sought additional information from the Petitioner under Section 59 of the DVAT Act in respect of sales of LCD/LED/TFT monitors made during the financial year ('FY') 2009-10 and 2010-11. The letter sought information regarding sales made in respect of multipurpose/functional printers during 2009-10 and 2010-11. The letter, however, stated that in the event of non-compliance with the said directions, the sales of LCD/LED/TFT Monitors would be charged tax at the rate of 12.5%. Along with its reply dated 28th March 2014, the Petitioner enclosed details of its sales turnover of Monitors for 2009-10 and 2010-11.The Petitioner states that on 17th April 2014 it received 12 notices of default assessment of tax and interest under Section 32 of the DVAT Act for the period April 2009 to March 2010 raising a demand of more than Rs.15 crores. The petitioner filed writ petition before Delhi High Court.

Held That

The Court observed that the determination by the Commissioner in the case of NEC under Section 84 of the DVAT Act was not binding on the present Petitioner as it was not a party to those proceedings. In the present

case the DT&T had not been able to persuade the Court that LCD/LED/ TFT monitors sold by the Petitioner during the period under consideration was not classifiable as 'Monitors' under Item 3 below Entry 41A of the Third Schedule to the DVAT Act. Turning to the impugned notices in the present case, it was seen that although the VATO was required to be satisfied, for the purposes of Section 32(1) of the DVAT Act as to which of the grounds attracted, the VATO chose to use a standard format order where the first paragraph of the order read as under:

> *"Whereas I am satisfied that the dealer has not furnished returns/ furnished incomplete returns or incorrect returns/furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004/any other reason".*

The photocopy of the original signed order issued by the VATO was perused by the Court. It showed that none of the above alternatives were specifically tick marked by the VATO. It was, therefore, unclear as to the precise ground on which the VATO was proceeding to exercise its powers under Section 32(1) of the DVAT Act. In this context, the observation of the Supreme Court in Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay was significant. There it was observed that

> *"It is well established that when a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court is affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises".*

This was yet another ground on which the default notices of assessment required to be quashed. There was merit in the contention of the Petitioner that the impugned default notices of assessment were also in violation of the principle of natural justice. The notices under Section 59(2) of the DVAT Act issued to the Petitioner asked for additional information in respect of the LCD/LED/TFT Monitors. There was no indication in the said notices regarding any erroneous classification of the monitors as forming the basis for reopening the assessments. There was also no whisper of the determination under Section 84 of the DVAT Act in the case of NEC which, as it transpired, was one of the reasons for reopening the assessments. In other words, the Assessee was not put on notice as to the grounds on which the assessments were sought to be reopened. In similar circumstances, in the context of Section 142 (2A) of the income Tax Act 1961, the Supreme Court in Rajesh Kumar v. Deputy Commissioner of Income Tax (2007) 2 SCC 181 observed in para 26 as under:

> *"[When by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf, compliance with principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution".*

Lastly, on the issue of the existence of an alternative remedy, the Court noted that in the present case the entire proceedings for the months of AY 2009-10 (barring February and March 2010) were barred by limitation. There had also been an obvious violation of the principles of natural justice. In Filterco v. Commissioner of Sales Tax, Madhya Pradesh , a Constitution Bench of the Supreme Court in similar circumstances disapproved of the in limine dismissal of the writ petition by the High Court. Likewise, the Court made similar observations in Durga Enterprises (P) Limited v. Principal Secretary, Government of Uttar Pradesh (2004) 13 SCC 665 and in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1, the Court held as under:

> *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."*

For all of the aforementioned reasons, the impugned notices of assessment dated 31st March 2014 issued to the Petitioner as well as notices of default assessment of penalty of the same date were quashed.

Cases Referred to:

- *Vistar Construction (P) Ltd. v. Union of India 2013 (31) STR 129 (Del)*
- *Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay 26 ITR 736*

- *Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat (1990) 1 SCC 532*
- *Dunlop India Ltd. v. Union of India 1983 (13) ELT 1566*
- *HPL Chemicals Ltd. v. Commissioner of Central Excise 2006 (197) ELT 324 (SC)*
- *Jain Exports Private Limited v. Union of India 1992 (61) ELT 173 (SC)*
- *Sun Export Corporation v. Collector of Customs, Bombay 1997 (93) ELT 641 (SC)*
- *Filterco v. Commissioner of Sales Tax, Madhya Pradesh (1986) 2 SCC 103*
- *Raza Textiles Ltd. v. Income Tax Officer, Rampur (1973) 1 SCC 633*
- *L.G. Electronics India Pvt. Ltd. v. Commissioner, Value Added Tax*
- *H.M. Industries v. Commissioner of Value Added Tax*
- *Writ Petition (C) No. 5231/2014 (ITD-ITD Chem JV v. Commissioner of Trade and Taxes)*
- *Commissioner of Sales Tax v. Agarwal & Co. 1983 (12) ELT 116 (Bom)*
- *Rajesh Kumar v. Deputy Commissioner of Income Tax (2007) 2 SCC 181*
- *Durga Enterprises (P) Limited v. Principal Secretary, Government of Uttar Pradesh (2004) 13 SCC 665*
- *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1*

Present for Petitioner : Mr. S.K. Bagaria, Senior Advocate with Mr. Tarun Gulati, Mr. Shashi Mathews, Mr. Sparsh Bhargava, Ms. Rachana Yadav, Mr. Ankit Sachdeva and Mr. Kishore Kunal Advocates

Present for Respondent : Mr. Gautam Narayan, Additional Standing Counsel for GNCTD with Mr. R.A. Iyer

JUDGMENT

Dr. S. Muralidhar, J.

1. The challenge in this writ petition by Samsung India Electronics Private Limited is to the demand notices of default assessment of tax and interest dated 31st March 2014 under Section 32 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') and the penalty notice of the same date under Section 33 of the DVAT Act issued by the Value Added Tax Officer ('VATO').

Background facts

2. The facts leading to the filing of the present petition are that the Petitioner is engaged in the sale of electronic goods, home appliances, consumer durables and information technology products etc. It is a registered dealer under the DVAT Act and has been paying value added tax as well as filing return on monthly basis under the DVAT Act and corresponding Delhi Value Added Tax Rules, 2005 ('DVAT Rules').

3. *Inter alia* the Petitioner sells TFT/LCD/LED monitors. Under Section 4(1)(b) of the DVAT Act in respect of the goods specified in the III Schedule, 5% tax is leviable on the taxable turnover of a dealer. Entry 41 of the Third Schedule covers IT products including computers, telephones and parts thereof, cellular phones and accessories, etc. Entry 41A deals with the IT products and covers IT products as described in column 2 as covered under the headings or sub-headings mentioned in column 3 of the Central Excise Tariff Act, 1985 ('CET Act').

4. In the table given below Entry 41A there is an Item at Sl. No. 3 which covers a large range of automatic data processing machines. Specific to the case at hand, it includes "Graphic printer, Plotter, Laser jet printer, key board, Monitor, storage units, floppy disc drive etc." Column 3 gives the central excise tariff heading as 8471. Notes (2) and (3) read as under:

> Note - (2). Where any commodities are described against any heading or, as the case may be, sub-heading, and the description in this entry and in entry number 84 is different in any manner from the corresponding description in the Central Excise Tariff Act, 1985, then, only those commodities described in this entry and in the entry number 84 will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification.
>
> Note - (3). Subject to Note (2), for the purpose of any entry contained in this notification, where the description against any heading or, as the case may be, sub-heading, matches fully with the corresponding description in the Central Excise Tariff, then all the commodities covered for the purposes of the said tariff under that heading or sub-heading will be covered by the scope of this notification."

5. If an entry does not fall under any of the Schedules, then in terms of the Section 4(1)(d) of the DVAT Act, tax is payable at the rate of 12.5%.

Determination under Section 84of the DVAT Act

6. Another company dealing with electronic products, i.e., NEC India Private Limited ('NEC') filed, on 8th July 2008, an application under Section 84 of the DVAT Act for determination of the following question:

> "Whether LCD Monitors, LCD Displays/Plasma Displays are exempt from tax as being meant for educational purposes like books, periodicals and journals including maps, charts and globes which are covered by Entry No.5 of the First Schedule to the Delhi Value Added Tax Act, 2004 and are exempt from tax or the same are covered by Entry No. 41 of the Third Schedule to Delhi Value Added Tax Act, 2004 and are taxable @ 4%?"

7. The case of NEC India was that LCD displays/Plasma displays are an integral part of a computer and cannot work unless they are attached to a computer and, therefore, were classifiable under Entry 41 of the Third Schedule. The case of the Department of Trade & Taxes ('DT&T') on the other hand was that even though there was Serial No. 18 which covered

> "LCD displays, LED panels and parts thereof", the LCD Monitors were distinct from LCD panels and, therefore, were not classifiable as such under any of the entries in the III Schedule to the DVAT Act.

8. In the determination dated 8th July 2008, the Commissioner DT&T held that since the products in question were not classifiable under Clause (18) of Entry 41-A to the Third Schedule of the DVAT Act and since LCD displays/plasma displays do not find any reference in any of the Schedules, they were unclassified items taxable at the rate of 12.5%.

Audit proceedings

9. On the basis of the said determination under Section 84 of the DVAT Act, the Petitioner was subjected to audit proceedings for the period 1st April 2009 to 31st March 2011. In terms of the VAT Audit Team report dated 12th July 2008 for the period of the audit, the Petitioner was engaged in export, import, trading and stock transfer of various electronic goods, refrigerating goods, mobile phones and accessories. The audit report also did not find any discrepancy in the Petitioner's business as well as its books of accounts.

10. On 25th May 2014, the Petitioner received a letter dated 8th March 2014 from the VATO, Ward-202 (KCS-II) seeking certain documents/

information. Reference was made to an earlier letter dated 11th February 2014 which according to the Petitioner it did not receive. That letter sought additional information from the Petitioner under Section 59 of the DVAT Act in respect of sales of LCD/LED/TFT monitors made during the financial year ('FY') 2009-10 and 2010-11. The letter sought information regarding sales made in respect of multipurpose/functional printers during 2009-10 and 2010-11. The letter, however, stated that in the event of non-compliance with the said directions, the sales of LCD/LED/TFT Monitors would be charged tax at the rate of 12.5%. Along with its reply dated 28th March 2014, the Petitioner enclosed details of its sales turnover of Monitors for 2009-10 and 2010-11.

Default Assessments

11. The Petitioner states that on 17th April 2014 it received 12 notices of default assessment of tax and interest under Section 32 of the DVAT Act for the period April 2009 to March 2010 raising a demand of more than Rs.15 crores.

12. In the impugned notice it was stated that the Petitioner had sold IT related TFT/LCD/LED Monitors by charging VAT at 4% or 5% although the said item is not covered under the Third Schedule to the DVAT Act. Asserting that it has to be classified only under the residuary entry, the demand notice also made a reference to the determination order passed at the instance of NEC. The Petitioner was asked to make payment of the tax and arrears before 30th April 2014. On the same day, the VATO also issued the impugned penalty notices under Section 33 of the DVAT Act for the period April 2009 to March 2010. Pursuant to the receipt of the impugned notices, the Petitioner sent a letter dated 24th April 2014 to the VATO stating, *inter alia,* that no show cause notice was issued to them asking why LCD/LED/TFT Monitors should not be treated as unclassified and charged VAT at 12.5%, that they were not confronted with the determination dated 8th July 2008 in the case of M/s. NEC India Pvt. Ltd. and therefore, the notice of default assessment and demand of tax, interest and penalty were in violation of the principles of natural justice. When no response was forthcoming, the Petitioner filed the present writ petition seeking the reliefs referred to hereinbefore.

13. At the first hearing of this writ petition on 29th April 2014, the Court, while directing notice to be issued to the Respondents, restrained the Respondents from passing final orders in respect of the impugned notices and stayed all further proceedings pursuant thereto.

Stand in the counter affidavit

14. The stand of the GNCTD in its counter affidavit, in the first place, is that the Petitioner has an efficacious alternative remedy by filing objections under Section 74 of the DVAT Act before the Objection Hearing Authority (OHA). If not satisfied with the said determination, the Petitioner could file an appeal before the Appellate Tribunal, Value Added Tax (‘AT’). It is pointed out that initially the Petitioner was issued notice under Section 59(2) of the DVAT Act on 11th February 2014 and again on 8th March 2014 seeking additional information about the sales details of LCD/LED/TFT Monitors. The said notice also stated that if the Petitioner failed to comply with the said notice, the sales shown in the returns filed would be treated that of LCD/LED/TFT Monitors on the sale of which tax of 12.5% has to be levied.

15. On merits it is submitted by the Respondents that the notice of default assessment/order dated 31st March 2014 passed by the assessing authority was a reasoned one which analysed the information provided by the Petitioner. The determination of Section 84 of the DVAT Act in the case of NEC was in the public domain and well known to all concerned dealers. They were well aware that the rate of tax applicable on the goods in question was 12.5%. It is submitted that the term ‘year’ as defined Section 2(1)(zp) of the DVAT Act means the financial year from the first day of April to the last date of March. The notices had to be issued before the completion of four years after the concerned year, i.e., March 2010. Therefore, the assessments could be made under Section 32 of the DVAT Act up to 31st March 2014 and, therefore, were within time.

Submissions of counsel for the Petitioner

16. Mr. S.K. Bagaria, learned Senior counsel for the Petitioner, first pointed out that the re-opening of the assessments was time-barred on a collective reading of Section 31 (1) read with Sections 32 and 34 of the DVAT Act. He pointed out that the returns, when originally filed, were accepted by the DT&T and therefore were deemed to be assessments in terms of Section 31 (1). So construed, the notices of default assessments for most of the months of the AY 2009-2010, barring the months of February and March 2010, were barred by limitation.

17. Mr Bagaria next pointed out that when a thorough audit was conducted by the DT&T of the Petitioner’s business in 2012, no discrepancy was found. The notice dated 8th March 2014 issued by the VATO only sought information under Section 59(2) of the DVAT Act. This notice was

received on 25th March 2014. The earlier letter dated 11th February 2014 was not received by the Petitioner. There is no indication in the said notice of the VATO having invoked powers under Section 32 of the DVAT Act for reopening an assessment. There was no show cause notice issued to the Petitioner seeking reasons why the LCD/LED/TFT Monitors should not be treated as an unclassified item and rate of 12.5% VAT applied to them. Likewise, the Petitioner was not provided with the copy of the determination order dated 8th July 2008 passed by the Commissioner at the instance of NEC. The Petitioner was, in any event, not party to the said determination. Under Section 84 of the DVAT Act, the said determination was *in personam* and not *in rem*. Reliance was placed on the decisions in *Vistar Construction (P) Ltd. v. Union of India 2013 (31) STR 129 (Del)* and *Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay 26 ITR 736*.

18. Mr. Bagaria submitted that what was covered by Item 3 below Entry 41-A to the Third Schedule was 'Monitor' and the LCD/LED/TFT Monitors sold by the Petitioner did fall within the purview of the said Entry and, therefore, were chargeable to tax only at 5%. There was no ambiguity in the Entry for it to have any other meaning. Relying on the decision in *Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat (1990) 1 SCC 532*, Mr. Bagaria submitted that LCD/LED/TFT Monitors did not cease to be Monitors and that unless the DT&T could establish that the Monitors in question can no longer be brought under the existing tariff entries 'resort cannot he headed to the said statutory items'. Reliance was also placed on the decisions in *Dunlop India Ltd. v. Union of India 1983 (13) ELT 1566; HPL Chemicals Ltd. v. Commissioner of Central Excise 2006 (197) ELT 324 (SC)* and *Jain Exports Private Limited v. Union of India 1992 (61) ELT 173 (SC)*. Relying on the decision in *Sun Export Corporation v. Collector of Customs, Bombay 1997 (93) ELT 641 (SC)*, it was submitted that the interpretation that favours the Assessee must be preferred.

19. It was submitted by Mr Bagaria that the Respondents' plea of the existence of an alternative remedy should not be entertained as the proceedings were not only time-barred but were without jurisdiction. Reliance is placed on the decisions in *Filterco v. Commissioner of Sales Tax, Madhya Pradesh (1986) 2 SCC 103* and *Raza Textiles Ltd. v. Income Tax Officer, Rampur (1973) 1 SCC 633*.

Submissions of counsel for the Respondents

20. Countering the above submissions, Mr. Gautam Narayan, learned Additional Standing counsel for the Respondents, submitted that the correct way to interpret Section 34 in light of Section 32 of the DVAT Act

was to compute the expiry of the period of four years from the end of the year. The word 'assessment' in Section 34 (1) DVAT Act related only to an assessment under Section 32 of the DVAT Act and not a self-assessment under Section 31(1) of the Act.

21. Referring to the decision in *L.G. Electronics India Pvt. Ltd. v. Commissioner, Value Added Tax* (decision dated 21st January 2014 in W.P. (C) 213/2014), Mr Narayan submitted that the Petitioner had an alternative efficacious remedy of filing the objections before the OHA and if still aggrieved to file an appeal before the AT. He submitted that there is no particular reason why the Petitioner should be permitted to directly approach this Court in a writ petition under Article 226 of the Constitution. He submitted that the points regarding limitation and classification could well be urged before the OHA.

22. Turning to the merits of the case Mr Narayan submitted that the action to reopen the assessment was taken only after notice was issued under Section 59(2) of the Act and only after the authorised representative of the Petitioner appeared and submitted the sales details. He submitted that while Item 3 of Entry 41A of Third Schedule did mention 'Monitor', it did not mention LCD/LED/TFT Monitors and the same was, therefore, treated as an unclassified item. Admittedly, the dealer had sold the said Monitors by collecting tax of 4% instead of 12% and, therefore, was liable to pay the differential amount of tax and the corresponding interest.

Limitation

23. The first question to be considered is whether the demands raised against the Petitioner by means of the impugned notices of default assessments are barred by limitation.

24. To begin with, the scheme of the DVAT Act requires to be understood. Under Section 30 of the DVAT Act, no claim can be made by the Commissioner for the payment by a person of an amount of tax, interest or penalty or other amount in the nature of tax, interest or penalty "except by the making of an assessment for the amount."

25. Sections 31, 32 and 34 of the DVAT Act read thus:

"**31. Self assessment.-**required under section prescribed information and the rules

(1) Where a return is furnished by a person as 26 or section 27 of this Act which contains the and complies with the requirements of this Act

(a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;

(b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and

(c) the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.

(2) No assessment shall arise under sub-section (1) of this section, if the Commissioner has already made an assessment of tax in respect of the same tax period under another section of this Act.

32. Default assessment of tax payable.-

(1) If any person

(a) has not furnished returns required under this Act by the prescribed date; or

(b) has furnished incomplete or incorrect returns; or

(c) has furnished a return which does not comply with the requirements of this Act; or

(d) for any other reason the Commissioner is not satisfied with the return furnished by a person; the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year.

(1A) If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.

(2) Where the Commissioner has made an assessment under this section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.

(3) Where the Commissioner has made an assessment under this section and further tax is assessed as owed, the amount of further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due.

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

34. Limitation on assessment and re-assessment.-

(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from

(a) the date on which the person furnished a return under section 26 or sub-section (1) of section 28 of this Act; or

(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

Provided that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person.

26. Under Section 31(1) of the DVAT Act, once a return is furnished by the registered dealer under Section 26 and 27 of the Act, which is compliant with all the requirements of the DVAT Act and DVAT Rules, then three consequences follow:

(a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;

(b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and

(c) the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.

27. The word 'assessment', although not defined under the DVAT Act, includes self-assessment. Section 31(1)(a) of the DVAT Act makes this explicit and deems that an assessment is taken to have been made by the Commissioner "on the day on which the return is furnished".

28. Turning next to Section 32 of the DVAT Act, this talks of default assessment of the tax. There are four contingencies under which Section 32(1) of the DVAT Act gets attracted. These are:

(a) where returns as required under this Act have not been furnished by the prescribed date; or

(b) incomplete or incorrect returns have been furnished; or

(c) the return furnished does not comply with the requirements of the DVAT Act; or

(d) for any other reason the Commissioner is not satisfied with the return furnished.

29. Where the a dealer has not furnished returns as envisaged under Section 32 (1) (a) of the DVAT Act, then the Commissioner, for reasons to be recorded in writing, can 'assess' the taxable turnover using his 'best judgment' . Where in terms of Section 32 (1)(b), (c) or (d) of the DVAT Act, the dealer has furnished incomplete returns that do not satisfy the requirements of the Act or for any reason the return filed is not satisfactory then the Commissioner will 'reassess' to the best of his judgment the amount of net tax due for the tax period.

30. Section 34 of the DVAT Act spells out the maximum period within either an assessment or, where the circumstances so warrant, a reassessment under Section 32 of the DVAT Act can be made. The outer limit for either is four years from "the end of the year comprising of one or more tax period for which the person furnished a return under Section 26 or 28 of the Act or the date on which the Commissioner made an assessment of the tax for the tax period **whichever is earlier**" (emphasis supplied).

31. Although Mr. Narayan urged that Section 34(1)(b) of the DVAT Act talks only of a Commissioner making an assessment under Section 32 of the DVAT Act, the Court is unable to agree to such a narrow interpretation

of the word 'assessment'. Given the context in which it occurs, and the scheme and structure of Section 31 (1) of the DVAT Act, a self-assessment would also be another form of assessment. As already noted, under Section 31(1)(a) of the DVAT Act, such self-assessment is deemed to be an assessment made by the Commissioner on the date on which the return is furnished. This can be a date different from the end of the year comprising a tax period.

32. In the present case, the Assessee was filing monthly returns and, therefore, the limitation for the purposes of Section 34 of the DVAT Act would have to be reckoned from the date of the filing of the return by way of self assessment. The Petitioner has calculated the limitation on the above basis in a tabular form as under:

Month & Year	Original Return Filed on	Four years completed on
April 2009	23rd May 2009	22nd May 2013
May 2009	23rd June 2009	22nd June 2013
June 2009	24th July 2009	23rd July 2013
July 2009	21st August 2009	20th August 2013
August 2009	24th September 2009	23rd September 2013
September 2009	23rd October 2009	22nd October 2013
October 2009	25th November 2009	24th November 2013
November 2009	23rd December 2009	22nd December 2013
December 2009	23rd January 2010	22nd January 2014
January 2010	26th February 2010	25th February 2014
February 2010	27th March 2010	26th March 2014
March 2010	24th April 2010	23rd April 2014

33. The DT&T, however, contends that for all of the aforementioned months, the four year period would come to an end only on 31st March 2013 and, therefore, it has time till then to complete the assessment in terms of Section 34(1)(b) of the DVAT Act.

34. The Court is unable to accept with the above submission of the DT&T. Given the overall scheme of the DVAT Act and Section 31, 32 and 34 in particular, the Court accepts the manner of computation of the four year period as depicted by the Petitioner. The notices for reopening of the assessment for the months comprising the Assessment Year 2009-10 ought to have been issued before the expiry of the respective dates

as shown in the above table. Barring the reopening of the assessments for February and March 2010, where the dates of the notices of default assessment were prior to the completion of four years, i.e., 26th March and 23rd April 2014, in respect of all other returns by way of self-assessment made by the Petitioner from April 2009 to January 2010, the re-opening of the assessment was sought to be done on a date after the expiry of the four-year period.

35. In *H.M. Industries v. Commissioner of Value Added Tax* (decision dated 26th September 2014 in ST.Appl. 32/2013), this Court held that unless the conditions of Section 32(1) of the DVAT Act are satisfied, default assessment cannot be made and if made will be liable to be struck down. In a recent decision dated 14th May 2015 in Writ Petition (C) No. 5231/2014 (*ITD-ITD Chem JV v. Commissioner of Trade and Taxes*) it was emphasised by this Court that for invoking the powers under Section 34 read with Section 32 of the DVAT Act, the jurisdictional pre-conditions must be satisfied.

36. The reasons for re-opening have to be recorded in writing by the Commissioner. In particular the reasons must indicate which of the four contingencies in Section 32(1) of the DVAT Act stand attracted in the facts and circumstances of the case. In the present case, since the first proviso to Section 34 of the DVAT Act has not even been invoked, there was no possibility of invoking the extended period of limitation, i.e., beyond the expiry of four years. The phrase 'whichever is earlier' occurring in Section

34 (1) of the DVAT Act is an indication that the date on which the Petitioner makes an assessment in terms of Section 31(1)(a) of the DVAT Act is crucial for determining the expiry of the limitation of four years for completion of the reassessment.

37. In that view of the matter, the Court is satisfied that barring the default notices of assessment pertaining to the months of February and March 2010, all the other notices of default assessment issued for the remaining months of AY 2009-10 by the impugned notices dated 31st March 2014 are barred by limitation and deserve to be set aside on that ground.

Classification of 'Monitors'

38. The Court next proceeds to examine the central issue of whether the monitors sold by the Petitioner fall within the entry 'Monitors' in terms of Item 3 below Entry 41A of the Third Schedule. As already noticed, that Entry does not specify LCD/LED/TFT Monitors. The question that then arises is whether the Entry 'Monitors' is broad enough to cover particular types of monitors or whether such special varieties of monitors should be

treated as unclassified and brought under the residuary entry to be taxed at 12.5%.

39. As was cautioned by the Supreme Court in *Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat* (*supra*), the residuary entry ought not to be lightly resorted to. In that case the Court was concerned with Item 26-AA(iv) of the Central Excise Tariff which talks of 'pipes and tubes (including blanks therefor) all sorts whether rolled, forged etc.' The Appellants there were manufacturing pipe fittings such as elbows, bends and reducers. The question was whether such articles would fall under Item 26-AA(iv) or under the residuary Tariff Item 68. In that context, it was observed by the Supreme Court in para 4 of the said order that "only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry". It was held that Tariff Item 26-AA(iv) encompasses all sorts of pipes and tubes. Therefore, there was no reason why a similar item cannot be prescribed as pipes and tubes. Likewise, in the present case, it is not shown by the DT&T that LCD/LED/TFT Monitors cannot be brought under the broad classification of 'Monitors'.

40. In *Jain Exports Private Limited v. Union of India* (*supra*), it is held that 'coconut oil' without qualifying words would cover both edible as well as non-edible (commercial or industrial) varieties. It is found in that case that in Appendix 9 to the Import Policy of 1980-81 there was no classification of coconut oil. In the circumstances, it was held that all varieties of coconut oil should be taken as covered by the term. There was no occasion to assume that Appendix 9 para 5(1) covered only the edible variety of coconut oil.

41. In *Commissioner of Sales Tax v. Agarwal & Co. 1983 (12) ELT 116 (Bom)*, the question was whether 'milk' occurring in Entry 36 of Schedule A of the Bombay Sales Tax Act, 1959 includes 'milk powder' as well. It was held that milk would not only include milk in liquid form but all types of milk. It was held that while looking at the words of an Entry in the Sales Tax legislation, it was permissible to examine the legislative history of the said Entry. It was pointed out that "while interpreting a general term used for describing any commodity in any fiscal legislation, the general term so used covers that commodity or item or article in all its forms and varieties". It was accordingly observed that "milk in powder form can be looked upon as a result of this continually evolving technology. There is no reason why it should be excluded from the generic term 'milk'."

42. In *Dunlop India Ltd. v. Union of India* (*supra*), it was reiterated that

> "when an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be

against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause".

43. In *HPL Chemicals Ltd. v. Commissioner of Central Excise* (*supra*), the question was of classification of 'denatured salt'. The Court disagreed with the Department of Excise in that case that the said product was classifiable under the residuary Heading No. 38.23 and not Heading 25.01 of the Central Excise Tariff Act, 1985 which was a specific heading. The Court observed as under:

> "This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride."

44. In *Sun Export Corporation v. Collector of Customs, Bombay* (*supra*), the Supreme Court reiterated the well settled principle that if in a matter of classification of goods two views were possible, the one favouring the Assessee has to be preferred.

45. In this context, the Court would like to observe that the determination by the Commissioner in the case of NEC under Section 84 of the DVAT Act was not binding on the present Petitioner as it was not a party to those proceedings.

46. In the present case the DT&T has not been able to persuade the Court that LCD/LED/TFT monitors sold by the Petitioner during the period under consideration is not classifiable as 'Monitors' under Item 3 below Entry 41A of the Third Schedule to the DVAT Act. Non-compliance with the requirements of Section 32

47. Turning to the impugned notices in the present case, it is seen that although the VATO was required to be satisfied, for the purposes of Section 32(1) of the DVAT Act as to which of the grounds attracted, the VATO chose to use a standard format order where the first paragraph of the order reads as under:

> "Whereas I am satisfied that the dealer has not furnished returns/ furnished incomplete returns or incorrect returns/furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004/any other reason".

48. The photocopy of the original signed order issued by the VATO was perused by the Court. It showed that none of the above alternatives were specifically tick marked by the VATO. It is, therefore, unclear as to the precise ground on which the VATO was proceeding to exercise its powers under Section 32(1) of the DVAT Act. In this context, the observation of the Supreme Court in *Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay* (*supra*) is significant. There it is observed that

> "It is well established that when a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises".

49. This is yet another ground on which the default notices of assessment require to be quashed.

Violation of principles of natural justice

50. There is merit in the contention of the Petitioner that the impugned default notices of assessment were also in violation of the principle of natural justice.

51. The notices under Section 59(2) of the DVAT Act issued to the Petitioner asked for additional information in respect of the LCD/LED/ TFT Monitors. There was no indication in the said notices regarding any erroneous classification of the monitors as forming the basis for reopening the assessments. There was also no whisper of the determination under Section 84 of the DVAT Act in the case of NEC which, as it transpired, was one of the reasons for reopening the assessments. In other words, the Assessee was not put on notice as to the grounds on which the assessments were sought to be reopened.

52. In similar circumstances, in the context of Section 142 (2A) of the income Tax Act 1961, the Supreme Court in *Rajesh Kumar v. Deputy Commissioner of Income Tax (2007) 2 SCC 181* observed in para 26 as under:

> "[When by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf, compliance with principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution".

Existence of Alternative Remedy

53. Lastly, on the issue of the existence of an alternative remedy, the Court notes that in the present case the entire proceedings for the months of AY 2009-10 (barring February and March 2010) are barred by limitation. There has also been an obvious violation of the principles of natural justice.

54. In *Filterco v. Commissioner of Sales Tax, Madhya Pradesh (supra)*, a Constitution Bench of the Supreme Court in similar circumstances disapproved of the *in limine* dismissal of the writ petition by the High Court. Likewise, the Court made similar observations in *Durga Enterprises (P) Limited v. Principal Secretary, Government of Uttar Pradesh (2004) 13 SCC 665* and in *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1*, the Court held as under:

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

Conclusion

55. For all of the aforementioned reasons, the impugned notices of assessment dated 31st March 2014 issued to the Petitioner as well as notices of default assessment of penalty of the same date are hereby quashed.

56. The writ petition is allowed with costs of Rs. 20,000 which will be paid by the Respondents to the Petitioner within four weeks. The pending application is disposed of.

[2015] 53 DSTC 22 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

W.P.(C) 3937/2015 & CM APPLs 7035/2015 (for stay),
8055/2015 (modification of order dated 22nd April 2015)

Siemens Ltd ... Petitioner

Versus

The Commissioner,
Department of Trade and Taxes & anr ... Respondents

DATE OF JUDGMENT : MARCH 16, 2016

Writ Petition-Delhi Tax Compliance Achievement Scheme 2013 (Amnesty Scheme) – Claim for waiver of penalty levied u/s 86(12) of DVAT Act on account of denial of exemptions for sale in the course of Import u/s 5(2) of CST Act, 1956 by opting Amnesty Scheme-entire tax and interest determined in assessment paid prior to commencement of Amnesty Scheme. FAQ issued by Department of Trades and Taxes provided for the waiver of penalty in such a case-No reason given by the Deptt. in Form DSC 3for rejection of the claim of waiver of penalty under the Amnesty Scheme.-Filed Writ Petition. The High Court considered appropriate to examine the petitioner's entitlement under the Amnesty Scheme instead of setting aside the order in DSC 3 and sending back the matter to Department for not revealing of reasons in rejection order refusing Amnesty to the Petitioner. Petition allowed with remarks "the idea is to incentivise payment of taxes and not disincentivise compliance" . Entire tax and interest paid before commencement of scheme ought not to be denied for waiver of penalty.

Facts of the Case

The Petitioner received an order for supply of building technology goods that were manufactured/available outside India. Consequent upon the said order the petitioner placed an identical order on the foreign

supplier and effected a 'sale in the course of import' u/s 5(2) of CST Act, and claimed exemption in the return filed under the DVAT Act. The AA disallowed the above exemption for want of documents in support of the claim. OHA remanded the matter to AA to frame fresh assessment after verifying books of accounts and documents submitted by the dealer in support of the claim. AA reframed the assessment and part exemption was allowed in absence of complete supporting documents . Tax, and interest were levied under the CST Act and penalty was also imposed u/s 86(12) of the DVAT Act. Petitioner stated that he paid the entire tax and interest as he was unable to produce all the documents as these were misplaced due to frequent merger and demerger of the Co. The Petitioner however filed an appeal before VAT Tribunal against order of the penalty after rejection of his objection by OHA. During the pendency of the appeal before the Tribunal, Delhi Govt. announced an Amnesty Scheme by which dealers were allowed for the waiver of the penalty if they paid tax and interest as per assessment order during the continuation of the scheme. Commissioner VAT also hosted on the website of the Department of Trade and Taxes Frequently asked question with their replies. In Q. No.13 of FAQ the waiver of the penalty was permitted even if the dealer had paid Tax and interest prior to the commencement of the Scheme. The petitioner filed an application for the waiver of the penalty by opting the Amnesty Scheme but the same was refused by rejecting the application without giving any reasons in the order in Form DSC-3.Aggrieved by the above rejection of application, the petitioner filed writ petition.

Held That:

It appeared to the court that the main purpose of the Amnesty Scheme was to incentivise self- compliance by the dealer with the tax demand. While it was true that the Petitioner had paid tax and interest for the period in question even prior to the Amnesty Scheme, the fact remained that the Petitioner had challenged the levy of the penalty for the same period and the said challenge was pending in the appeal before the A T. As rightly pointed out by the Petitioner, it was anomalous that the person who paid part tax and interest would be entitled, while calculating the tax dues, under clause 3 of the Amnesty Scheme to seek waiver of penalty whereas the person who paid tax and interest and challenged the levy of penalty would not be entitled to seek waiver. In other words the Scheme was sought to be interpreted in such a manner that compliance with part of the demand, i.e, payment of tax and interest but not penalty, would make a person ineligible to the Amnesty Scheme qua the penalty amount under the challenge whereas a person who defaulted in paying the tax and interest as well as penalty would be entitled to the benefit of the Amnesty Scheme and claim waiver of the penalty. While it was true that there was a disclaimer in the

FAQs which stated that a correct legal interpretation of the Scheme itself should be referred, in the Court's view, the stand taken by the Respondents in the FAQs was consistent with the object of the Amnesty Scheme would constitute an instance of contemporaneaexpositio and would bind DT&T. The Court found that no reasons had been given by the Department in the so called order in Form DSC 3 for rejecting the claim of the Petitioner. However, instead of setting aside the said order on that ground alone, and sending the matter back to the Respondent for a final decision, the Court considered it appropriate to examine the question of the Petitioners entitlement to be considered under the Amnesty Scheme in the proceeding itself, particularly in view of the stand taken by the Respondents on the interpretation of the clause 2 (1) (d) of the Amnesty Scheme. The Court noted that the DT &T had not denied that the Petitioner satisfied the other conditions under the Amnesty Scheme. In other words, the Petitioner fell within the ambit of Explanation I to clause 2 (1) (d) and outside the scope of Explanation 3 thereof. The Court was of the view that it would be anomalous for a defaulter of payment of tax, interest and penalty to avail of the Amnesty Scheme but not one who had defaulted only in the payment of penalty. The idea was to incentivise the payment of taxes and not to disincentivise compliance. The Petitioner having paid the tax and interest , ought not to be denied the Amnesty Scheme only because the penalty was the subject matter of challenge by it before the AT. Since in any event the case of the Petitioner did not fall under the Explanation 3, the penalty could be considered as forming part of the tax dues and from that point of view it could be said that there was only a part payment thereof before 31st August 2013. This was the interpretation that the DT & T itself recognised in the FAQs. It was held that the Petitioner was entitled to claim the benefit of the said Amnesty Scheme. Consequently, a direction was issued to the Respondents to pass an order granting waiver of the penalty levied on the Petitioner thereby allowing its claim under the Amnesty Scheme.

Present for Petitioner : Mr. Gajendra Maheshwari with Ms. Swati Thapa, Advocates.

Present for Respondent : Mr. Satyakam, Additional Standing counsel

ORDER

1. This writ petition by the Petitioner, Siemens Limited, seeks quashing the Form DSC-3 dated 23rd July 2014 issued by the Respondents rejecting the Petitioner's request under the Delhi Tax Compliance Achievement Scheme 2013 ('Amnesty Scheme') for waiver of penalty for the quarters II, III and IV for the year 2006-07.

2. The claim of the Petitioner for waiving the penalty under the Amnesty Scheme of the Department of Trade & Taxes ('DT&T'), Government of National Capital Territory of Delhi ('GNCTD') [Respondent No. 1] forms the subject matter of the petition.

3. The Petitioner, which is engaged in the business of trading in goods across the sectors like power and gas, wind power and renewable, power generation services energy management, mobility and building technology, is a dealer registered in Delhi under the Delhi Value Added Tax Act, 2004 ('DVAT Act')

4. It is stated that the building technology business which was originally acquired by the Petitioner was demerged and a new company, i.e., Siemens Building Technology Private Limited ('SBTPL') was formed. On 1st January 2007, SBTPL was again merged with the Petitioner herein as a going concern.

5. Under the aegis of the demerged concern in the year 2006-07, an order was received by the Petitioner for supply of building technology goods that were manufactured/available outside India. Consequent upon the said order, the Petitioner placed an identical order on the foreign supplier and effected a 'sale in course of import' under Section 5 (2) of the Central Sales Tax Act, 1957 ('CST Act'). Correspondingly, in the returns filed under the DVAT Act, an exemption was claimed in respect of the above sales.

6. A default assessment order was passed by the Value Added Tax Officer ('VATO') on 12th July 2010 disallowing the above exemption on the ground that the turnover was relatable to the 'direct exports to foreign countries from Delhi' and was not supported by any documents proof. The Petitioner's objection against the aforementioned assessment order was disposed of by the Objecting Hearing Authority ('OHA') by an order dated 10th May 2011 with a direction to the VATO to frame a fresh assessment order after verifying the books of accounts and the supporting documents available with it in view of the sale conducted under Section 5 (2) of the CST Act, i.e., High Seas Sale and Sale Occasioning Import. Further, the interest and penalty levied were quashed.

7. Consequent upon the remand and the fresh hearing, the VATO passed rectification orders dated 13th July 2012 separately for the four quarters for the year 2006-07 and partly allowed the exemption claimed to the extent that the turnover was not supported by the documents. Tax and interest were levied under the CST Act and penalty under Section 86 (12) of the DVAT Act was also imposed. The Petitioner states that since it was

unable to trace all the documents in view of the difficulty in tracking the files due to frequent transfer of records during the mergers and demergers, it decided to pay the tax and interest as determined by the rectification orders.

8. However, as far as the penalty was concerned, the Petitioner preferred an appeal before the OHA, i.e., the Special Commissioner-I. This appeal was rejected by the OHA by an order dated 1st February 2013 on the ground that the Petitioner had subsequently deposited the tax and interest. Aggrieved by the aforementioned order dated 1st February 2013, the Petitioner filed an appeal before the Appellate Tribunal ('AT'), Value Added Tax, New Delhi.

9. During the pendency of the aforementioned appeal, the DT&T, GNCTD announced an Amnesty Scheme. Section 107 was inserted under the DVAT Act with effective from 12th September 2013 and it reads as under:

> "107. Amnesty Scheme(s)- Notwithstanding any to the contrary contained in this Act and Rules thereto, the Government may by notification in the official gazette, notified Amnesty Scheme(s) covering payment of tax, interest, penalty or any other dues under the Act, which relate to any period ending before 1st day of April, 2013, and subject to such conditions and restrictions as may be specified therein, covering period of limitation, rates of tax, tax, interest, penalty or any other dues payable by a class of dealers or classes of dealers or all dealers."

10. By a notification dated 20th September 2013 the Amnesty Scheme was notified. Section 2 (1) (d) of the Amnesty Scheme defined 'tax dues', as under:

"(d) "tax dues" means-

(i) tax due or payable by the dealers, registered or required to be registered, under the Act or the Central Sales Tax Act, 1956 for the period beginning from the 1st day of April 2005 and ending on the 31st day of March 2013, but not paid or partly paid till the 31st day of August 2013 and calculated in accordance with sub-Clause (1), (2) and (3) of clause 3 of the Scheme' and

(ii) tax due and payable under the Central Sales Tax Act, 1956 or the erstwhile Delhi Sales Tax Act 1975 (43 of 1975) or the

Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999) or the Delhi Sales Tax on Right to Use Goods Act, 2002 (Delhi Act 13 of 2002) or the Delhi Tax on Entry of Motor Vehicles into Local Areas Act, 1994 (Delhi Act 4 of 1995) for the period prior to 1st April 2005, but not paid or partly paid till the 31st day of August 2013 and calculated in accordance with sub-Clause (4) of clause 3 of the Scheme; and

(iii) tax due and payable by a person who is liable to deduct tax at source under Section 36A of the Act in accordance with the provisions of said Section for the period 1st day of April 2005 and ending on 31st day of March 2013 but not paid or partly paid till the 31st day of August 2013, and calculated in accordance with sub-clause (5) of clause 3 of this Scheme.

Explanation I – "Tax dues" includes the amount of tax assessed in terms of notice of assessment or assessment order issued under any of the Acts referred to in this sub-clause, whether pending in objection/revision before the objection hearing authority (OHA) or in appeal/revision before appellate authority/Tribunal or any higher court, including writ petition and special leave petition.

Explanation.-2- Where a notice of assessment or assessment order has been issued to a person in respect of some default(s), the term "tax dues" shall also include tax dues relating to default(s) not covered in the notice of assessment or assessment order for the same tax period.

Explanation.-3- This Scheme does not cover cases of notice of assessment of penalty issued under any of the relevant Acts and without having any relation to tax deficiency."

11. Further para 3 of the Amnesty Scheme sets out the procedure for calculation of tax dues and the relevant portion thereof reads as under:

"3. Procedure for Calculation of Tax Dues- (1) Tax dues in respect of sub-clause (i) of clause 2(l)(d) by the dealer on whom notice of assessment under section 32 of the Act has not been served shall be calculated by him in the following manner;

(i) The dealer shall first determine the commodity wise taxable turnover in respect of which declaration is to be made under this Scheme;

(ii) He shall then ascertain the rate of tax of that commodity applicable as per Schedules appended to the Act for the period under declaration.

(iii) Tax dues shall be calculated by multiplying the rate of tax as per item (ii) above in respect of every class of commodity stated at item (i) above."

12. An amendment was made to the Amnesty Scheme by a further notification dated 30th January 2014 whereby clause 3 (2) of the Scheme was amended to insert after the word 'demand', the words 'or the demand of penalty in relation to such tax dues'. Further at the end of sub-clause and before the explanation, the following words were added: 'The dealer shall however not be entitled to claim any refund by virtue of such waiver'.

13. The Petitioner filed an application before the Nodal Officer under the Amnesty Scheme on 26th December 2013 on the strength of Question No. 13 of the Frequent Asked Questions ('FAQ') which provided for waiver of penalty. The Petitioner informed that it had already paid the demand of tax and interest in terms of the rectification orders. The said application was examined in terms of clause 4 of the Amnesty Scheme and was rejected on 13th December 2014. The Petitioner received acknowledgment of discharge by Form DSC-3 dated 23rd July 2014 issued by the Respondent rejecting the Petitioner's application under the Amnesty Scheme.

14. Aggrieved by the above rejection of application, the Petitioner filed the present writ petition.

15. At the first hearing, i.e., on 22nd April 2015 notice was issued in this writ petition. On 5th May 2015 the Court directed that the Respondent should not take any coercive measures. The Respondent has since filed a reply to which a rejoinder has been filed by the Petitioner.

16. Mr. Gajendra Maheshwari, learned counsel for the Petitioner, submitted that the Petitioner's case is answered by the FAQs issued by the DT&T explaining the Amnesty Scheme. Mr. Maheshwari further submitted that under Explanation 1 to Clause 2(1)(d) of the Amnesty Scheme, the term 'tax dues' was extended to the cases pending in the appeal before the AT. The case of the Petitioner did not fall within the ambit of Explanation 3 to Clause 2 (i) (d) of the Scheme which states that the Scheme will not cover the cases of assessment of penalty without having any relation to tax deficiency. In the present case amount of penalty was levied on the amount of tax deficiency. Question 13 of the FAQ makes it clear that even when the

penalty is challenged but the tax and interest is paid, the dealer is entitled to avail the benefit of the Amnesty Scheme. He submitted that there was no rational basis to justify the denial of the benefit of the scheme. He pointed out that even though the Respondent gave no reasons for rejecting the Petitioner's application for waiver of penalty, and no appeal was preferred against it, remanding the matter to the authorities for a fresh decision.

17. Countering the above submissions, Mr. Satyakam, learned Additional Standing counsel for the Respondents submitted that although the reasons have been spelt out in the order rejecting the claim of the Petitioner under the Amnesty Scheme, the Petitioner was not entitled to claim any such benefit. According to Mr. Satyakam, even in terms of the amended clause (2) (1) (d) of the Amnesty Scheme, the amount of penalty which alone was challenged before the Appellate Authority did not form part of the 'tax dues'. He submitted that the FAQs were not binding on the Respondents and had no legal basis. Further, it is the case of the Respondent that the Petitioner did not fall within the ambit of the Amnesty Scheme. He further submitted that the FAQs carried an unambiguous and clear disclaimer that "this paper is an attempt to answer the frequent queries in a simple language. For an authentic legal interpretation, the Scheme itself should be referred."

18. Mr. Satyakam submitted that where the tax and interest has been fully paid prior to 31st August 2013, one of the pre-requisites for applicability of the Amnesty Scheme is not satisfied. In other words, unless the tax and interest was either not paid or partly paid as on 31st August 2013 the question of applicability of the Amnesty Scheme did not arise. He illustrated this submission by giving an example of Rs. 100 as tax, Rs. 50 as interest and Rs. 100 penalty. Of this the tax and interest are fully paid by 31st August 2013 and a sum of Rs. 50 is paid towards penalty. According to Mr Satyakam, in such instance the penalty paid would be adjusted towards the tax due but there would be no waiver of the balance penalty. Even where the tax and interest are paid and no penalty is paid and such penalty is challenged, then the dealer would not be entitled to avail of the Amnesty Scheme. The dealer would not be entitled to either refund of any excess amount or waiver of penalty.

19. Having considered the above submissions, it appears to the Court that the interpretation sought to be placed by the Respondents on the relevant clause is not consistent with the overall purpose of the Amnesty Scheme. The main purpose was to incentivise self-compliance by the dealer with the tax demand. While it is true that the Petitioner had paid tax and interest for the period in question even prior to the Amnesty Scheme,

the fact remains that the Petitioner had challenged the levy of penalty for the same period and the said challenge is pending in the appeal before the AT. As righty pointed out by learned counsel for the Petitioner, it is anomalous that the person who pays part tax and interest would be entitled, while calculating the tax dues, under clause 3 of the Amnesty Scheme to seek waiver of penalty whereas the person who paid the tax and interest and challenged the levy of penalty would not be entitled to seek waiver. In other words the Scheme is sought to be interpreted in such a manner that compliance with part of the demand, i.e., payment of tax and interest but not penalty, would make a person ineligible to the Amnesty Scheme qua the penalty amount under challenge whereas a person who defaults in paying the tax and interest as well as penalty would be entitled to be benefit of the Amnesty Scheme and claim waiver of penalty.

20. Reading of FAQ Nos. 2 and 13 brings out the approach of DT&T. The answers provided therein recognize the claims for waiver of penalty even where there has been an excess payment of tax or payment of an advance tax. The said FAQ Nos. 2 and 13 read as under:

> "Q2: In case of survey cases where default assessment is pending, and where advance cheque has been collected by the enforeem. ent team at the time of survey and encashed; can such advance, payment be adjusted from the amount of tax deficiency stated by the team in its report? If yes, where the amount of advance tax is more than the tax dues, can that excess payment be carry forward by the declarant and adjusted from his future tax liability?
>
> Yes, the advance tax collection can be adjusted by the declarant from his tax dues. Any excess payment can also be adjusted from his future VAT liability. However, he shall file the relevant details along with the DSC-1.
>
> Also, what about the case where the dealer admits his tax liability and deposits the same within 3 days of the survey?
>
> It would not be applicable since Section 87 (6) was inserted w.e.f. 1st April 2013 and the Amnesty Scheme covers the tax dues upto 31st March 2013.
>
> Q.13. Where tax and interest have been admitted and paid, however, penalty is under challenged? Can VVAS be applied for amount of penalty in relation to such tax? If yes, how DSC-1 to be filed since nothing would be payable?

Yes, the dealer can file DSC-1, along with proof of payment of tax and interest, to avail the benefit?"

21. While it is true that there is a disclaimer in the FAQs which states that a correct legal interpretation of the Scheme itself should be referred, in the considered view of the Court, the stand taken by the Respondents in the FAQs is consistent with the object of the Amnesty Scheme would constitute an instance of *contemporanea expositio* and would bind the DT&T.

22. The Court finds that no reasons have been given by Respondent No. 2 in the so-called order dated 23rd July 2014 in DSC Form 3 for rejecting the claim of the Petitioner. However, instead of setting aside the said order on that ground alone, and sending the matter back to Respondent No. 2 for a fresh decision, the Court considers it appropriate to examine the question of the Petitioner's entitlement to be considered under the Amnesty Scheme in this proceeding itself, particularly in view of the stand taken by the Respondents on the interpretation of clause 2 (1) (d) of the Amnesty Scheme.

23. The Court notes that the DT&T has not denied that the Petitioner satisfied the other conditions under the Amnesty Scheme. In other words the Petitioner falls within the ambit of Explanation I to clause 2 (1) (d) and outside the scope of Explanation 3 thereof. The Court is of the view that it would be anomalous for a defaulter of payment of tax, interest and penalty to avail of the Amnesty Scheme but not one who has defaulted only in the payment of penalty. The idea is to incentivise payment of taxes and not dis-incentivise compliance. In the case on hand, the Petitioner having paid the tax and interest, ought not to be denied the Amnesty Scheme only because the penalty is the subject matter of challenge by it before the AT. Since in any event the case of the Petitioner does not fall under Explanation 3, the penalty can be considered as forming part of the tax dues and from that point of view it can be said that there was only a apart payment thereof before 31st August 2013. This is the interpretation that the DT&T itself recognised in the FAQs.

24. For the aforementioned reasons, the impugned order dated 23rd July 2014 passed by Respondent No. 2 rejecting the claim of the Petitioner is set aside.

25. It is held that the Petitioner is entitled to claim the benefit of the said Amnesty Scheme. Consequently, a direction is issued to the Respondents to pass an order not later than two weeks from today granting waiver

of penalty levied on the Petitioner thereby allowing its claim under the Amnesty Scheme.

26. The petition is allowed in the above terms. The pending applications also stand disposed of. Order be given *dasti*.

[2015] 53 DSTC 32 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

ST.APPL. 16/2008

Tata Power Delhi Distribution Ltd ... Petitioner

versus

Commissioner of Sales Tax, Delhi & Ors ... Respondents

Date of Order : March 11, 2016

WITHHOLDING OF 'C' FORMS – INTERTSTATE SALE UNDER SECTION 3(A) OF CENTRAL SALE TAX ACT – TRANSACTION OF TRANSFER OF RIGHT TO USE GOODS-FORMS WERE DENIED TO ISSUE ON THE BASIS OF NO MOVEMENT OF GOODS WAS PROVED FROM MAHARASHTRA TO DELHI – OWNERSHIP RIGHTS IN THE EQUIPMENT WAS VESTED WITH LESSOR – VAT TRIBUNAL DISMISSED THE APPEAL ON CONCLUSION THAT SINCE THE SITES OF THE SALE WAS DELHI AND THE AGREEMENT TRANSFERRING THE RIGHT TO USE THE EQUIPMENT WAS EXECUTED AT NEW DELHI – THE COURT HELD THAT MERE LOCATION OR DELIVERY OR LOCATION OF THE GOODS WOULD NOT DETERMINE THE SITES OF SALE – IN THE LEASE AGREEMENT OCCASIONED THE MOVEMENT OF GOODS FROM ONE STATE TO ANOTHER – THERE WAS FINDING OF TRIBUNAL THAT THE GOODS MOVED FROM MAHARASHTRA TO DELHI AND WERE USED IN THE DISTRIBUTION OF ELECTRICITY – THE COURT HELD THAT TRANSACTION WAS DEEMED TO BE AN INTERSTATE SALE – THE APPELLANT SATISFIED THE PRE-CONDITION FOR ISSUANCE OF 'C' FORMS-APPEAL ACCEPTED AND VATO WAS DIRECTED TO ISSUE 'C' FORMS

Facts of the Case

TPDL was a registered dealer under the Delhi Sales Tax Act, 1975 ('DST Act') [now under the Delhi Value Added Tax Act, 2004] as well as the CST Act. It took some equipment viz., , an LT Load Management System, on lease basis from M/s. RMS Automation Systems Limited, Nasik ('RASL'), Respondent No. 2 herein under a lease agreement dated 25th May 2000. The said lease agreement was originally entered into between RASL [as Lessor] and the Delhi Vidyut Board ('DVB") [Lessee], the predecessor of the Appellant. After the restructuring of DVB, with the Appellant having succeeded the DVB, the latter's rights and liabilities under

the aforementioned lease agreement vested in the Appellant. It is stated that in terms of the above agreement, the equipment in question was sent by RASL, the Lessor in Maharashtra to the Appellant, the Lessee in Delhi. By the 46th Constitutional Amendment, Article 366 of the Constitution was amended whereby clause (29A) was inserted to provide that transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration, would be deemed to be 'sale'. RASL raised monthly invoices upon the Appellant for the lease charges after duly charging sales tax under the CST Act. For furnishing RASL with the 'C' Forms, the Appellant applied to the Sales Tax Officer/VAT Officer (Ward 63) for the years 2002-03 and 2003-04.It may be mentioned here that the above application was also made for the year 2005-06 and 'C' Form for the said year which was initially refused, was ultimately allowed in appeal. The Appellant further stated that for the years 2004-05 and 2006-07,'C'Forms in relation to the aforementioned lessee for payment made pursuant to the very same lease agreement between RASL and the Appellant had been issued by the VAT Officer. Therefore, the present case only concerned the denial of 'C' Forms for the years 2002-03 and 2003-04. The reasoning for the VAT Officer declining the request by the order dated 7th July 2006 was that there was no movement of goods from Maharashtra to Delhi during the relevant tax period, and that the ownership rights in the equipment still vested in RASL. As far as years 2002-03 and 2003-04 were concerned, the appeal filed by the Appellant was rejected by the OHA i.e., the Deputy Commissioner on the same ground. The further appeal by the Assessee was dismissed by the AT by the impugned order primarily on the ground that the transaction was not an inter-state sale.

This appeal by the Tata Power Distribution Limited ('TPDL') [earlier known as North Delhi Power Limited ('NDPL')] under Section 9 (2) of the Central Sales Tax Act, 1956 ('CST Act') read with Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') was directed against the impugned order dated 14thJuly 2008 passed by the Appellate Tribunal (AT) dismissing the appeal of the Appellant. The AT upheld the order dated 30th November 2006 of the Objection Hearing Authority ('OHA') which in turn upheld the order dated 7th July 2006 of the Sales Tax Officer/VAT Officer, (Ward 63) declining to issue 'C' forms to the Appellant for the year (for Rs. 98,21,612), 2003-04 (for Rs. 1,33,96,344) and 2005-06 (for Rs. 1,01,53,180).

Held That

The Court categorically ruled that the mere location or delivery of the goods would not determine the situs of sale. Where the property in the

goods passed from the seller to the purchaser would differ from case to case. Where the lease agreement occasioned the movement of goods from one State to another then, clearly it would partake of an inter-state sale within the meaning of Section 3 (a) of the CST Act. It was only when the goods were available in the State and the agreement for transfer of the property in goods from the seller to the buyer was executed at that place it could be said that the situs of the sale was where the agreement was entered into. However, as far as the present case was concerned, there was a clear finding in the order of the AT itself that "there was also no doubt about the facts, the goods did move from Maharashtra to Delhi and were used in the distribution of electricity." The equipment was in fact sent from Maharashtra to Delhi for use by the Appellant (Lessee) in Delhi and this movement was occasioned by the lease agreement which was entered into in Delhi. Even going by the decision of the Supreme Court in 20th Century Finance Corporation Limited v. State of Maharashtra, it could not possibly be said that the situs of the sale was Delhi only because the agreement was entered into in Delhi. There could be no doubt that the lease agreement in the present case resulted in the movement of the goods from one State of another, and therefore, answers description of the inter-State trade under Section 3 (a) of the CST Act.Respondents sought to place reliance on the decision of the Division Bench of the Andhra Pradesh High Court in G.S. Lamba and Sons v. State of Andhra Pradesh 2015 (324) ELT316 (AP) which in turn referred to 20th Century Finance Corporation Limited v. State of Maharashtra and the decision in Bharat Sanchar Nigam Limited v. Union of India. In the first place, the Court noted that the facts of the case in G.S. Lamba and Sons v. State of Andhra Pradesh did not involve an inter-state sale at all. Para 3 of the said judgment stated that the contracts in question were for providing transportation service for ready-mix concrete by hiring specially designed transit mixers. These transit mixers were "never transferred and the effective control over running and using of these vehicles, as well as the disciplinary control over the drivers, always remained with the Petitioners." Therefore, the decision in G.S. Lamba and Sons v. State of Andhra Pradesh was distinguishable on facts. Even the decision in Bharat Sanchar Nigam Limited v. Union of India was concerned with the question as to whether transferring the right to use the telephone instrument/apparatus fell within the description of sale under Section 2 (h) of the Uttar Pradesh Trade Tax Act, 1948. It was held that while giving a telephone connection may result in the transfer of a right to use the goods, there was no such transfer of the right to use where what was provided was a telephone service. The Court was unable to appreciate how the decisions in Bharat Sanchar Nigam Limited v. Union of India or G.S. Lamba and Sons v. State of Andhra

Pradesh was relevant to the issue on hand.Turning to the case , the lease agreement entered into between RASL and DVB had occasioned the movement of goods from Maharashtra to Delhi. The said transaction was deemed to be an inter-state sale within the meaning of that expression in Section 3 (a) of the CST Act. Consequently, question No. 1 was answered in the negative, i.e., in favour of the Appellant and against the Department. It was held that the AT was not correct in law in holding to the contrary.As far as question No. 2 was concerned, it was not the case of the Department that the Appellant did not satisfy the pre-conditions for issuance of 'C' Forms. The Appellant was a registered dealer and the goods in question find mention in the registration certificate as required for the use in the electricity generation and distribution. Consequently, there was no valid ground to deny the Appellant 'C' Forms in relation to the lease transactions undertaken with RASL during the years 2002-03 and 2003-04. The order dated 30th November 2006 of the OHA and the order dated 14thJuly 2008 of the AT hereby set aside. The VAT Officer was directed to issue 'C' Forms as requested by the Appellant for the transactions of the years 2002-03 and 2003-04.

Cases Referred to:

- *20th Century Finance Corporation Limited v. State of Maharashtra (2000) 6 SCC 12*
- *Bharat Sanchar Nigam Limited v. Union of India (2006) 3 SCC 1*
- *Bengali Immunity Co. Ltd v. State of Bihar AIR 1955 SC 661*
- *G.S. Lamba and Sons v. State of Andhra Pradesh 2015 (324) ELT 316 (AP)*
- *Bharat Sanchar Nigam Limited v. Union of India (supra)*

Present for Petitioner	:	Mr. M.P. Devnath, Mr. Abhishek Anand and Mr. Yogendra Aldak, Advocates.
Present for Respondent	:	Mr. Siddharth Dutta, Advocate for R-1/CST Mr. Sudhir Kumar, Advocate for R-2/GNCTD. Ms. Rama Ahluwalia, Advocate for R-3/State of Maharashtra.

Dr. S. Muralidhar, J:

1. This appeal by the Tata Power Distribution Limited ('TPDL') [earlier known as North Delhi Power Limited ('NDPL')] under Section 9 (2) of the

Central Sales Tax Act, 1956 (‘CST Act’) read with Section 81 of the Delhi Value Added Tax Act, 2004 (‘DVAT Act’) is directed against the impugned order dated 14th July 2008 passed by the Appellate Tribunal (‘AT’) dismissing the appeal of the Appellant. The AT upheld the order dated 30th November 2006 of the Objection Hearing Authority (‘OHA’) which in turn upheld the order dated 7th July 2006 of the Sales Tax Officer/VAT Officer, (Ward 63) declining to issue ‘C’ forms to the Appellant for the year (for Rs. 98,21,612), 2003-04 (for Rs. 1,33,96,344) and 2005-06 (for Rs. 1,01,53,180).

2. TPDL is a registered dealer under the Delhi Sales Tax Act, 1975 (‘DST Act’) [now under the Delhi Value Added Tax Act, 2004] as well as the CST Act. It took some equipment viz., , an LT Load Management System, on lease basis from M/s. RMS Automation Systems Limited, Nasik (‘RASL’), Respondent No. 2 herein under a lease agreement dated 25th May 2000. The said lease agreement was originally entered into between RASL [as Lessor] and the Delhi Vidyut Board (‘DVB”) [Lessee], the predecessor of the Appellant. After the restructuring of DVB, with the Appellant having succeeded the DVB, the latter’s rights and liabilities under the aforementioned lease agreement vested in the Appellant. It is stated that in terms of the above agreement, the equipment in question was sent by RASL, the Lessor in Maharashtra to the Appellant, the Lessee in Delhi.

3. By the 46th Constitutional Amendment, Article 366 of the Constitution was amended whereby clause (29A) was inserted to provide that transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration, would be deemed to be ‘sale’. RASL raised monthly invoices upon the Appellant for the lease charges after duly charging sales tax under the CST Act. For furnishing RASL with the ‘C’ Forms, the Appellant applied to the Sales Tax Officer/VAT Officer (Ward 63) for the years 2002-03 and 2003-04.

4. It may be mentioned here that the above application was also made for the year 2005-06 and ‘C’ Form for the said year which was initially refused, was ultimately allowed in appeal. The Appellant further states that for the years 2004-05 and 2006-07, ‘C’ Forms in relation to the aforementioned lessee for payment made pursuant to the very same lease agreement between RASL and the Appellant have been issued by the VAT Officer. Therefore, the present case only concerns the denial of ‘C’ Forms for the years 2002-03 and 2003-04.

5. The reasoning for the VAT Officer declining the request by the order dated 7th July 2006 was that there was no movement of goods from Maharashtra to Delhi during the relevant tax period, and that the ownership

rights in the equipment still vested in RASL. As far as years 2002-03 and 2003-04 were concerned, the appeal filed by the Appellant was rejected by the OHA i.e., the Deputy Commissioner on the same ground. The further appeal by the Assessee was dismissed by the AT by the impugned order primarily on the ground that the transaction was not an inter-state sale. In coming to the said conclusion the AT referred to the decisions of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra (2000) 6 SCC 12* and *Bharat Sanchar Nigam Limited v. Union of India (2006) 3 SCC 1.* The AT came to the conclusion that since the situs of the sale was Delhi and the agreement transferring the right to use the equipment was executed at New Delhi on 25th May 2000 between RASL and DVB, the said transaction could not be said to be an inter-state sale. Consequently, the AT held that the Appellant could not seek for issuance of 'C' Forms under the CST Act.

6. This Court has heard the submissions of Mr. M.P. Devnath, learned counsel for the Appellant, Mr. Siddharth Dutta, learned counsel for Respondent No. 1 (the Commissioner), Mr. Sudhir Kumar, learned counsel for Respondent No. 2 (the GNCTD) and Ms. Rama Ahluwalia, learned counsel for Respondent No. 3 (State of Maharashtra).

7. While admitting this appeal on 22nd October 2008, the following questions of law were framed for consideration:

(1) Whether the AT was correct in law in holding that the transfer of right to use equipment under the impugned transaction was not an interstate sale even though the goods moved from Maharashtra to Delhi pursuant to the lease agreement dated 25th May 2000?

(2) Whether the only pre-condition for issuance of C-Form is that the buyer is a registered dealer and the goods are mentioned in his registration certificate as required for use in electricity generation and distribution?

8. To begin with a reference may be made to the definition of expression 'tax on the sale or purchase of goods' under Article 366 (29-A) which was inserted by the 46th Amendment of the Constitution, published in the Official Gazette on 2nd February 1983. The relevant portion reads as under:

> "29A "tax on the sale or purchase of goods" includes- (a) to (b)......
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable
>
> (e)...... (f)......

> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made"

9. This was simultaneous with the insertion of Entry 92-A in the Union List (List I) in the Seventh Schedule to the Constitution which reads thus:

> "92-A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce."

10. This has to be read along with Entry 54 in the State List (List II) which reads as under:

> "54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I."

11. One of the transactions that is covered by the aforementioned amended definition of 'sale' in terms of Article 366 (29-A) of the Constitution is a transaction of sale whereunder the right to use an equipment for valuable consideration is transferred to a lessee by a lessor. It is deemed to be a sale by the lessor in favour of the lessee. Where such sale partakes character of inter-state sale then it is the Parliament which alone has the competence to collect sales tax to the exclusion of the States. Section 2 (g) (iv) of the CST Act defines 'sale' to include transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

12. Section 3 of the CST Act which defines 'inter-state sale' reads thus:

> **"When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce:-**
>
> A sale or purchase of goods shall be deemed to take place in the course of inter-State or commerce if the sale or purchase –
>
> (a) occasions the movement of goods from one State to another; or
>
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation I – where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2- Where the movement of goods commences and terminates in the same time it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

13. Section 8 of the CST Act set outs the rates of tax on sales in the course of inter-State trade or commerce. Section 9 of the CST Act talks of levy and collection of tax and penalties. Section 9 (1) which is the charging section as far as inter-State sales is concerned, reads as under:

"9. **Levy and Collection of Tax and Penalties**.—(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of Section 3, shall be levied by the Government of India and the tax so levied shall be collected by the Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced

Provided that, in the case of sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of Section 6, the tax shall be levied not collected---

(a) where such subsequent sale has been effected by a registered dealer in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes 1 of clause (a) of sub- section (4) of Section 8 in connection with the purchase of such goods; and

(b) where such subsequent sale has been effected by an unregistered dealer in the State from which such subsequent sale has been effected.

14. A collective reading of the aforementioned provisions reveals that three kinds of transactions are outside the purview of State Sales Tax, i.e.,

sale outside the State; sale in the course of import or export of goods; and a sale in the inter-State trade.

15.1 The question as to whether a transaction of lease occasioning the movement of goods from one state to another, which was an inter-state 'deemed' sale, could be declared to be an intra-state sale because of the location of the goods within the state at the time of the transfer of the right to use the goods was the subject matter of the decision of the Constitution Bench of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*). The question arose in the context of dealers registered under the various State Sales Tax Legislations, for e.g., Maharashtra, Uttar Pradesh, Rajasthan, Andhra Pradesh, Haryana, Karnataka and Tamil Nadu, who had entered into master lease agreements for leasing diverse machinery/equipment in terms of which, the dealers would place purchase orders on the suppliers or manufacturers for supply of individual items or equipment. The dealers disbursed the value of equipment to the suppliers, who at their instance, delivered the equipment to the lessees at specified locations for use. After the equipment was delivered and put to use, a supplementary lease schedule was executed by the lessee acknowledging due receipt of the lease equipment. Such supplementary lease deeds formed an integral part of the master lease agreement. Several States amended their respective sales tax legislation to levy tax on the transactions of transfer of the right to use goods on the basis that the goods were located at the time of their use within their States irrespective of the place where the lease agreement may have been executed. The question that arose was whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the fact that (a) the contract of transfer of right to use has been executed outside the State; (b) sale had taken place in the course of inter-State trade; and (c) sales are in the course of export or import into Indian territory. The case of the dealers was that the State Legislatures could not frame their respective laws so "as to convert an outside sale or a sale in the course of import or a sale in the course of inter-State trade or commerce into a sale inside the State."

15.2 After referring to the case law, then the Constitution Bench of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*) held as under:

> "20. .... the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce, as held in *Bengali Immunity Co. Ltd v. State of Bihar AIR 1955 SC 661*. Further, the State legislature cannot by law, treat sales outside the State and

sales in the course of import as 'sales within the State' by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature, i.e. Parliament to fix the location of sale by creating legal fiction or otherwise."

15.3 The Constitution Bench further held as under:

"24. ..... where situs of sale has not been fixed or covered by any legal fiction created by the appropriate legislature, the location of sale would be place where the property in goods passes. The Constitution Bench held, that it was the passing of the property within the State that was intended to be fastened on for the purpose of determining whether the sale was "inside" or "outside" the State."

15.4 The Supreme Court further held as under:

"...the location or delivery of goods within the State cannot be made a basis for levy of tax on sales of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the State would not be the situs of deemed sale for levy of tax if the transfer of right to use has taken place in another State. Therefore, the contention, on behalf of the respondents that there would be no completed transfer of right to use goods till the goods are delivered is to prevail, then the respondents are further required to show that the contract of transfer of right to use goods is also entered into in the said State in which the goods are located or delivered for use. The State cannot levy a tax on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of right to use, but the same would not be the condition precedent for a contract of transfer of right to use goods. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located the situs of such sale would be where the property in goods passes, namely, where the contract is entered into."

15.5 It further held as under:

"28........where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties,

> it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed."

15.6 Of the conclusions arrived at by the Constitution Bench in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*), those in para 35 (a) to (e), which are relevant for the purposes read as under:

> "35. As a result of the aforesaid discussion our conclusions are these:
>
> (a) The State in exercise of power under Entry 54 of List II read with Article 366 (29A) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.
>
> (b) The appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e. where the written agreement transferring the right to use is executed.
>
> (c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.
>
> (d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.
>
> (e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in Clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial."

16. A careful reading of the above decision of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*)

reveals that the Court categorically ruled that the mere location or delivery of the goods would not determine the situs of sale. Where the property in the goods passed from the seller to the purchaser would differ from case to case. Where the lease agreement occasioned the movement of goods from one State to another then, clearly it would partake of an inter-state sale within the meaning of Section 3 (a) of the CST Act. The observation in para 25 of *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*) has to be read as a whole. It is only when the goods are available in the State and the agreement for transfer of the property in goods from the seller to the buyer is executed at that place it can be said that the situs of the sale is where the agreement is entered into. However, as far as the present case is concerned, there is a clear finding in the order of the AT itself that "there is also no doubt about the facts, the goods did move from Maharashtra to Delhi and were used in the distribution of electricity." The equipment was in fact sent from Maharashtra to Delhi for use by the Appellant (Lessee) in Delhi and this movement was occasioned by the lease agreement which was entered into in Delhi. Even going by the decision of the Supreme Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*) it cannot possibly be said that the situs of the sale was Delhi only because the agreement was entered into in Delhi. There can be no doubt that the lease agreement in the present case resulted in the movement of the goods from one State of another, and therefore, answers description of the inter-State trade under Section 3 (a) of the CST Act.

17. Learned counsel for the Respondents sought to place reliance on the decision of the Division Bench of the Andhra Pradesh High Court in *G.S. Lamba and Sons v. State of Andhra Pradesh 2015 (324) ELT 316 (AP)* which in turn referred to *20th Century Finance Corporation Limited v. State of Maharashtra* (*supra*) and the decision in *Bharat Sanchar Nigam Limited v. Union of India* (*supra*). In the first place, the Court notes that the facts of the case in *G.S. Lamba and Sons v. State of Andhra Pradesh* (*supra*) did not involve an inter-state sale at all. Para 3 of the said judgment states that the contracts in question were for providing transportation service for ready-mix concrete by hiring specially designed transit mixers. These transit mixers were "never transferred and the effective control over running and using of these vehicles, as well as the disciplinary control over the drivers, always remained with the Petitioners." Therefore, the decision in *G.S. Lamba and Sons v. State of Andhra Pradesh* (*supra*) is distinguishable on facts. Even the decision in *Bharat Sanchar Nigam Limited v. Union of India* (*supra*) was concerned with the question as to whether transferring the right to use the telephone instrument/apparatus fell within the description of sale under Section 2 (h) of the Uttar Pradesh Trade Tax Act, 1948. It was held that

while giving a telephone connection may result in the transfer of a right to use the goods, there was no such transfer of the right to use where what is provided is a telephone service. The Court is unable to appreciate how the decisions in *Bharat Sanchar Nigam Limited v. Union of India* (*supra*) or *G.S. Lamba and Sons v. State of Andhra Pradesh* (*supra*) is relevant to the issue on hand.

18. Turning to the case on hand, the lease agreement entered into between RASL and DVB has occasioned the movement of goods from Maharashtra to Delhi. The said transaction is deemed to be an inter-state sale within the meaning of that expression in Section 3 (a) of the CST Act. Consequently, question No. 1 is answered in the negative, i.e., in favour of the Appellant and against the Department. It is held that the AT was not correct in law in holding to the contrary.

19. As far as question No. 2 is concerned, it is not the case of the Department that the Appellant does not satisfy the pre-conditions for issuance of 'C' Forms. The Appellant is a registered dealer and the goods in question find mention in the registration certificate as required for the use in the electricity generation and distribution. Consequently, there was no valid ground to deny the Appellant 'C' Forms in relation to the lease transactions undertaken with RASL during the years 2002-03 and 2003-04. The order dated 30th November 2006 of the OHA and the order dated 14th July 2008 of the AT are hereby set aside. The VAT Officer is directed to issue 'C' Forms as requested by the Appellant for the transactions of the years 2002-03 and 2003-04, not later than two weeks from today. The Appellant will in turn provide those C Forms to RASL forthwith without unnecessary delay. This takes care of the grievance of Respondent No. 2 regarding not being issued 'C' Forms.

20. The appeal is disposed of in the above terms but, in the facts and circumstances of the case, with no orders as to costs.

21. Order be given *dasti.*

[2015] 53 DSTC 45 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand, Member (A) and M. S. Wadhwa, Member (J)]

Appeal Nos.266-267/ATVAT/15-16

CL International
43/41, Road No.41, Punjabi Bagh West,
New Delhi-110 028. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

DATE OF ORDER : 17.02.2016

MISMATCH OCCURRED IN ANNEXURE-2A WITH ANNEXURE-2B – NOTICE OF ASSESSMENT OF TAX & INTEREST UNDER SECTION 32 OF DVAT ACT NOTICE OF ASSESSMENT OF PENALTY U/S 33 READ WITH SECTION 86(10) OF THE ACT MISTAKE CREATED ON THE PART OF SELLING DEALER BUT INPUT TAX CREDIT WAS DISALLOWED U/S 9(2) (G) OF THE APPELLANT – THE VAT TRIBUNAL HELD THAT UNLESS IT WAS PROVED BEYOND DOUBT THAT TAX WAS NOT DEPOSITED BY THE SELLING DEALER ITC COULD NOT BE REVERSED. THERE WAS NO MECHANISM WITH THE DEALER TO CHECK WHETHER SELLING DEALER HAD DEPOSITED TAX COLLECTED FROM THE PURCHASING DEALER-PENALTY WAS IMPOSED WITHOUT GIVING NOTICE. IT WAS HELD THAT SEPARATE NOTICE TO SHOW CAUSE WAS REQUIRED PRIOR TO PASSING THE ORDER-IMPUGNED ORDER SET ASIDE AND CASE REFERRED BACK-APPEALS ALLOWED.

Facts of the Case

1. Brief facts of these appeals were that the appellant was engaged in the business of trading and export of rice, ghee, magi, cigarette and chips etc. The appellant was registered with the department having TIN No.07540178752.

2. The VATO, Ward-56 had passed an ex-parte order of tax and interest u/s 32 of the Delhi Value Added Tax Act (in short DVAT Act) dated 15.06.2015 raising a demand of Rs.39,738/- including interest of Rs.5,849/- for fourth quarter of 2013-14. The VATO also passed an order of assessment of penalty u/s 33 read with section 86 (10) of the DVAT Act vide order dated 15.06.2015 raising a demand of Rs.33,889/- for fourth quarter of 2013-14.

3. The impugned order of tax, interest and penalty have been passed without giving any opportunity to the appellant and the same have been passed in a mechanical way without application of mind. That it was pertinent to mention here that the appellant had duly paid all his taxes in time and no taxes were due from the appellant.

Held that

Now the question arised in the facts and circumstances of the present case, ITC was rightly denied to the appellant without giving any opportunity of hearing to him. On the basis of facts of the present case, it can be said that it was a case of mismatch but unless it was proved beyond doubt that corresponding output tax was not deposited by the selling dealer, in our considered view, ITC cannot be denied to the appellant. For this purpose it was necessary for the concerned VATO to issued notices before framing assessment against the appellant. Provisions of section 9 (2)(g) can only be attracted when selling dealer had failed to deposit the tax collected from the purchasing dealer. But in the present case only on the basis of mismatch in online return submitted by appellant and selling dealer, tax, interest and penalty have been imposed. Appellant had rightly submitted that there was no mechanism with appellant to know whether the selling dealer had submitted correct particulars or he had deposited the tax collected from the purchasing dealer, as Hon'ble High Court observed in the case of Shanti Kiran. According to appellant, he was expected to file the tax invoice of purchases. Revenue side had not challenged that these tax invoices were not genuine. Appellant had complied with the provisions of section 9 to claim the benefit of ITC. In these circumstances, appellant had been wrongly punished for no fault of him before framing assessment. Notices should have been given to the selling dealer to confirm whether he had deposited tax recovered from the appellant, then only VATO should have framed assessment. The selling dealer M/s. Sai Vending Services Limited was also a registered dealer of the department. Only one invoice No.RSS/21 dated 20.02.2014 was not shown by him in his Annexure-2B while rest purchases, which were made by the appellant, had been shown in Annexure-2B by the selling dealer. VATO was supposed to enquire about this invoice before framing the disputed assessment. No reasoned order had been passed by the OHA. He should have summoned relevant record from the selling dealer because primary duty to deposit tax lies on the selling dealer.

Appellant during the course of arguments, submitted that he complied with the conditions of section 9 (1), so benefit of ITC was wrongly denied to him. In this regard, in support of his arguments, he referred to the Hon'ble Supreme Court judgment in case of Commissioner of Central Excise, Jalandhar Vs. Kay Kay Industries (2013) 295 ELT 177 in which Hon'ble Court held as follows:

> *"When there is prescribed procedure and that has been duly followed by the manufacturer of final product, we do not perceive any justifiable reason to hold that assessee appellant had not taken reasonable care as prescribed in the notification".*

On the basis of aforesaid discussion, The VAT Tribunal held that tax and interest was wrongly imposed by the VATO and confirmed by the OHA in these circumstances, without giving notice to the selling appellant.

So far as imposition of penalty was concerned, because it was consequential so it was also wrongly imposed. Appellant had also referred to the judgment of Hon'ble Delhi High Court in Bansal Dye Chem Pvt. Ltd., Vs. Commissioner, Value Added Tax, Delhi to support his argument that penalty proceedings are separate proceedings without giving notices and opportunity of hearing, penalty was wrongly imposed. On the basis of above judgments. The Tribunal held that a separate notice to show cause why penalty should not be imposed and without opportunity of hearing, penalty order should not have been passed. Appeals allowed.

Cases Referred to:

- *Commissioner of Central Excise, Jalandhar Vs. Kay Kay Industries (2013) 295 ELT 177*
- *Bansal Dye Chem Pvt. Ltd., Vs. Commissioner, Value Added Tax, Delhi*

Present for the Appellant : Shri R.K. Aggarwal, Advocate

Present for the Respondent : Shri M.L. Garg, Advocate/Govt. Counsel

ORDER

1. These two appeals have been filed challenging the impugned order dated 18.09.2015 passed by the VATO, hereinafter called the Objection Hearing Authority (in short OHA) who vide this order rejected the objections and upheld the default assessment of tax and penalty order passed by VATO,Ward-56 vide order dated 15.06.2015.

2. Brief facts of these appeals are that the dealer is engaged in the business of trading and export of rice, ghee, magi, cigarette and chips etc. The dealer is registered with the department having TIN No.07540178752.

3. The Ld. VATO, Ward-56 had passed an ex-parte order of tax and interest u/s 32 of the Delhi Value Added Tax Act (in short DVAT Act) dated 15.06.2015 raising a demand of Rs.39,738/- including interest of Rs.5,849/- for fourth quarter of 2013-14. The Ld. VATO also passed an order of assessment of penalty u/s 33 read with section 86 (10) of the DVAT Act vide order dated 15.06.2015 raising a demand of Rs.33,889/- for fourth quarter of 2013-14.

4. The impugned order of tax, interest and penalty have been passed without giving any opportunity to the appellant and the same have been passed in a mechanical way without application of mind. That it is pertinent to mention here that the appellant had duly paid all his taxes in time and no taxes were due from the appellant.

5. The impugned order of tax, interest and penalty dated 15.06.2015 have been passed on pretext "Cross checking of the purchase related data filed by the dealer online in Annexure-2A with Annexure-2B filed by respective selling dealers reveals that more input tax credit has been claimed than the corresponding output tax, if any, reported by the selling dealer. The dealer thus claimed excess input tax credit in violation of the provisions of clause (g) of sub-section (2) of section 9 of the DVAT Act and is therefore liable for default assessment as per clause (c) and (d) of sub-section (1) of section 32 of the DVAT Act".

6. So far as penalty is concerned, it was observed that false, misleading and deceptive regarding the amount of input tax credit claimed. Hence the dealer is liable to pay penalty under the provisions of sub-section (10) of section 86 of the DVAT Act.

7. That the appellant had filed separate objections before the Ld. OHA against default assessment of tax, interest and penalty. The appellant during the course of hearing submitted before the Ld. OHA that the appellant made purchases of chips through various invoices from M/s. Sai Vending Services Limited having TIN No.07970158291 during the fourth quarter of 2013-14 and out of which a sale bearing Invoice No.RSS/21 dated 20.02.2014 had not been taken by M/s. Sai Vending Service Limited in Annexure 2A at the time of submitting fourth quarter of 2013-14 return. Since the appellant also produced various evidences including of M/s. Sai Vending Service Limited and bank statement for proving that payment of input tax in invoice had been duly made to the selling dealer even then Ld. OHA failed to appreciate the legal position and facts of the case that tax, interest and penalty imposed by the Ld. VATO were not as per law and the appellant could not be penalized for mistake of selling dealer and there is no mechanism with the objector to ascertain whether the selling dealer has submitted the correct particulars and rejecting objections of the appellant filed against the orders of the VATO. Hence present appeals have been filed before this Tribunal on following, among other grounds:

(i) Because the OHA has failed to appreciate that the Assessing Authority has passed an ex-parte order, which is not an order in the eyes of law and Ld. OHA confirmed the order passed by the Assessing Authority, which is bad in law.

(ii) Because OHA has not given any reason for dismissing the objections of the appellant.

(iii) Because Ld. OHA failed to appreciate that the appellant cannot be punished for fault of selling dealer.

(iv) Because Ld. OHA failed to appreciate that the primary duty to tax u/s 3 of the DVAT Act is of selling dealer and therefore appellant cannot be punished for mismatched caused due to mistake of selling dealer.

(v) Because Ld. OHA failed to appreciate that no notice has been given to selling dealer to enquire about mismatch before passing the impugned order despite the appellant is having invoice of selling dealer in his possession.

(vi) Because Ld. OHA failed to appreciate that the appellant has claimed input as per section 9 (1) of the DVAT Act.

(vii) Because selling dealer is duly registered with the department and there is no mechanism with the appellant to ascertain whether the selling dealer has submitted correct particulars in his return.

(viii) Because the appellant has taken all the due care while submitting the return of fourth quarter 2013-14, which is expected from a prudent person.

(ix) Because Ld. OHA has not passed speaking order while dismissing objections which is bad in law and therefore impugned order of Ld. OHA are liable to be quashed on this ground alone.

(x) Because the OHA has erred in law and on facts that penalty procedure is automatic and it is quasi criminal in nature and without giving any opportunity to the dealer imposed penalty in consequential to default assessment of tax and interest which is highly illegal, unjust, arbitrary and bad in law.

(xi) Because there is no concealment on the part of dealer while submitting return. The appellant has submitted correct return and claimed input tax credit as per provisions of the DVAT Act.

On the basis of above facts and ground of appeal, it has been prayed that impugned order dated 18.09.2015 passed by the Ld. OHA be set aside and present appeals be allowed.

8. These appeals have been heard after compliance of order dated 31.12.2015 u/s 76 (4) of the DVAT Act.

9. Heard to Shri R.K. Aggarwal, Advocate on behalf of appellant and Shri M.L. Garg on behalf of Revenue and perused the file and the judgments cited by the appellant's Ld. Counsel in support of his arguments on the basis of which these appeals are being disposed off as follows.

10. These appeals relate to fourth quarter 2013-14. Tax, interest and penalty were imposed by the Ld. VATO vide order dated 15.06.2015. On cross checking of the purchase related data filed by the dealer online in Annexure-2A with Annexure 2-B filed by the respective selling dealer, Ld. VATO found that it reveals that more ITC has been claimed than the corresponding output tax reported by the selling dealer. According to VATO the dealer thus has claimed excess ITC in violation of the provisions of section 9 (2)(g) of the DVAT Act. So tax to the tune of Rs.33,889/-, interest Rs.5,849/- and penalty to the tune of Rs.33,889/- was imposed on the appellant, which was confirmed by the Ld. OHA. So appellant filed these appeals.

11. So the short controversy which we have to decide is whether in these circumstances tax, interest and penalty were rightly imposed by the Ld. VATO? In this regard section 9 (2)(g) of the DVAT Act is important which was amended with effect from 01.04.2010 and which is as follows :

> *"Section 9(2)(g) – No tax credit shall be allowed to the dealer or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period".*

12. So from the bare perusal of this provision, it is clear that before 01.04.2010 it was not mandatory to claim the benefit of ITC unless output tax was deposited by the selling dealer. Because present controversy relates to fourth quarter of 2013-14, hence amended provision section 9(2)(g) would be applicable.

13. Now the question arises in the facts and circumstances of the present case, ITC was rightly denied to the appellant without giving any opportunity of hearing to him. On the basis of facts of the present case, it can be said that it is a case of mismatch but unless it is proved beyond doubt that corresponding output tax was not deposited by the selling dealer, in our considered view, ITC cannot be denied to the appellant. For

this purpose it was necessary for the concerned VATO to issued notices before framing assessment against the appellant. Provisions of section 9 (2)(g) can only be attracted when selling dealer had failed to deposit the tax collected from the purchasing dealer. But in the present case only on the basis of mismatch in online return submitted by appellant and selling dealer, tax, interest and penalty have been imposed. Appellant has rightly submitted that there is no mechanism with appellant to know whether the selling dealer has submitted correct particulars or he had deposited the tax collected from the purchasing dealer, as Hon'ble High Court observed in the case of Shanti Kiran. According to appellant, he was expected to file the tax invoice of purchases. Revenue side has not challenged that these tax invoices are not genuine. Appellant has complied with the provisions of section 9 to claim the benefit of ITC. In these circumstances, in our view appellant has been wrongly punished for no fault of him before framing assessment. Notices should have been given to the selling dealer to confirm whether he has deposited tax recovered from the appellant, then only Ld. VATO should have framed assessment. The selling dealer M/s. Sai Vending Services Limited is also a registered dealer of the department. Only one invoice No.RSS/21 dated 20.02.2014 was not shown by him in his Annexure-2B while rest purchases, which were made by the appellant, have been shown in Annexure-2B by the selling dealer. Ld. VATO was supposed to enquire about this invoice before framing the disputed assessment. No reasoned order has been passed by the Ld. OHA. He should have summoned relevant record from the selling dealer because primary duty to deposit tax lies on the selling dealer.

14. Appellant Ld. Counsel, during the course of arguments, submitted that he complied with the conditions of section 9 (1), so benefit of ITC was wrongly denied to him. In this regard, in support of his arguments, he referred to the Hon'ble Supreme Court judgment in case of *Commissioner of Central Excise, Jalandhar Vs. Kay Kay Industries (2013) 295 ELT 177* in which Hon'ble Court held as follows:

> "When there is prescribed procedure and that has been duly followed by the manufacturer of final product, we do not perceive any justifiable reason to hold that assessee appellant had not taken reasonable care as prescribed in the notification".

15. According to appellant, he had taken all reasonable care at the time of claiming input tax credit, so it was wrongly denied to him.

16. On the basis of aforesaid discussion, we are of the view that tax and interest was wrongly imposed by the Ld. VATO and confirmed by the Ld. OHA in these circumstances, without giving notice to the selling dealer.

17. So far as imposition of penalty is concerned, because it is consequential so it was also wrongly imposed. Appellant has also referred to the judgment of Hon'ble Delhi High Court in *Bansal Dye Chem Pvt. Ltd., Vs. Commissioner, Value Added Tax, Delhi* to support his argument that penalty proceedings are separate proceedings without giving notices and opportunity of hearing, penalty was wrongly imposed. On the basis of above judgments, we hold that a separate notice to show cause why penalty should not be imposed and without opportunity of hearing, penalty order should not have been passed.

18. On the basis of aforesaid discussion, we set aside the impugned order passed by the Ld. OHA and remand the matter back to the concerned VATO to reframe tax, interest and penalty afresh after giving opportunity of hearing to the appellant and after verifying from the selling dealer whether he has deposited output tax in the matter. Appellant is directed to appear before the concerned VATO on 3rd March 2016 who will dispose off the matter in the light of observations made in this order as soon as possible.

19. Order pronounced in the open court.

20. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

21. File be consigned to record room.

[2015] 53 DSTC 53 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Justice S. Muralidhar and Justice Vibhu Bakhru]

W.P.(C) 2314/2015 & CM No. 4147/2015 (For Stay)
W.P.(C) 2398/2015 & CM No. 4301/2015 (For Stay)
W.P.(C) 2536/2015 & CM No. 4530/2015 (For Stay)
W.P.(C) 3909/2015

Jaycon Infrastructure Ltd. ... Petitioner
Tirath Ram Ahuja Pvt. Ltd. ... Petitioner
Ahluwalia Contracts (India) Ltd. ... Petitioner
Ahluwalia Contracts (India) Ltd. ... Petitioner

Versus

Commissioner of Trade & Taxes, Delhi & Ors. ... Respondent

Date of Order : April 28th, 2016

WRIT PETITION – DELHI TAX COMPLIANCE ACHIEVEMENT SCHEME, 2013 (AMNESTY SCHEME) – VALIDITY OF THE ORDERS PASSED BY DESIGNATED AUTHORITY REJECTING THE PETITIONERS APPLICATION CHALLENGED ON ACCOUNT OF JURISDICTION – SHOW CAUSE NOTICE ISSUED BY DEPARTMENT OF TRADE & TAXES UNDER CLAUSE 8(1) OF THE AMNESTY SCHEME BEYOND ONE YEAR FROM THE DATE OF FILING OF DECLARATION ALSO CHALLENGED – BEING BARRED BY LIMITATION – COURT QUASHED BOTH THE ORDERS.

Facts of the Case

The four petitioners availed Amnesty Scheme by submitting their applications. The said applications of 3 petitioners were processed by the Department of Trade & Taxes and were issued discharge certificates in Form DSC-3 providing immunity as per Clause 5 of the Amnesty Scheme. Later on, in exercise of powers under Clause 8(1) of the Amnesty Scheme Show Cause Notices were issued by respective Additional Commissioners to all the petitioners even to those whom DSC-3 were already issued referring to their having made claims which were not admissible and were liable to be rejected by Department of Trade & Taxes. The petitioners appeared before the Additional Commissioners / Designated Authorities and made their submissions. Subsequently, the Additional Commissioners directed the assessing authorities to carry out rectification for all the relevant years for which said petitioners have applied under Amnesty Scheme. This led to these writ petitions. Meanwhile, orders for assessment of tax and penalty

u/s 32 & 33 were also passed. High Court directed the Respondents to not give effect to the said assessment orders. The petitioners filed writ petitions challenging orders u/s 32 & 33 of DVAT Act, 2004 as well.

Held

The Respondents were unable to produce before the Court an order issued by the Commissioner delegating the power. In the circumstances, the Court negatived the plea that the Commissioner could have authorised a VATO to exercise such powers without issuing a specific order of delegation of such power.

The Court was satisfied that the impugned orders rejecting Petitioners applications could not have been passed by an Additional Commissioner who has been declared as Designated Authority in exercise of the powers under Clause 8 of the Amnesty Scheme, which power only could have been exercised by the Commissioner, VAT and particularly in the absence of any order issued by the Commissioner under Section 68 (1) of the DVAT Act delegating such power to any other VAT officer.

The Petitioners were candid that in response to the SCNs none of the Petitioners raised a specific objection to the power and jurisdiction of the Additional Commissioner to either issue the SCN or to adjudicate it. However, as rightly pointed out by them, since this goes to the very root of the matter and involves a pure question of law, the Petitioners cannot be precluded from urging it before the Court.

The Court also noted that under Clause 8(3) of the Amnesty Scheme, SCN under Clause 8(1) would have to be issued within one year from the date of filing of the declarations by the applicants. Admittedly, that period of one year in all these cases had elapsed. Therefore, it was not possible for the Court to place the said applications before the Commissioner for a fresh decision.

For the aforementioned reasons, the impugned orders issued by the Additional Commissioners rejecting the applications of each of the Petitioners in exercise of the power under Clause 8 of the Amnesty Scheme were quashed. All other actions taken or orders passed by the Respondents pursuant to the said impugned orders were also accordingly declared to be invalid.

Cases Referred to:

- *Yongnam Engineering & Construction (Private) Limited v. Commissioner, Delhi Value Added Tax*

Present for Petitioner	:	Mr. S. Ganesh, Senior Advocate with Mr. Ruchir Bhatia, Advocate.
Present for Respondent	:	Mr. Peeyoosh Kalra, Additional Standing counsel with Ms. Sona Babbar

Order

Dr. S. Muralidhar, J.:

1. The common question that arises in all these writ petitions concerns the validity of orders passed by the 'Designated Authority' rejecting the Petitioners' applications under the Delhi Tax Compliance Achievement Scheme, 2013 (hereafter 'Amnesty Scheme').

2. Under Section 107 of the Delhi Value Added Tax Act, 2004 ('DVAT Act'), the Government of the National Capital Territory of Delhi ('GNCTD') is empowered to notify, in the official gazette, amnesty scheme(s) covering payment of tax, interest, penalty or any other dues under the DVAT Act relating to any period ending before 1st April 2013 subject to such conditions and restrictions as may be specified therein.

3. Pursuant thereto the Amnesty Scheme was notified by the GNCTD on 20th September 2013. Under clause 2(c) of the Amnesty Scheme, the 'Designated Authority' is defined to mean an officer not below the rank of Joint Commissioner as notified by the Commissioner, Value Added Tax (VAT) for the purposes of the Amnesty Scheme.

4. The Court has been shown an 'order-instruction' issued by the Department of Trade and Taxes ('DT&T') through the Special Commissioner (HR) dated 30th April 2014 naming 7 Additional Commissioner s(T&T) of various zones as 'Designated Authority' for the disposal of applications received under the Amnesty Scheme for their respective zones/branches with immediate effect. The order states that it has been issued with prior approval of the Commissioner (T&T).

5. Each of the Petitioners in these writ petitions availed of the Amnesty Scheme by submitting applications. In the case of the Petitioner in Writ Petition (C) Nos. 2536/2015 and 3909/2015, the applications were filed for the years 2006-07, 2007-08 and 2008-09 on 28th February 2014 and for the years 2009-10, 2010-11, 2011-12 and 2012-13 on 18th February 2014. Likewise, the Petitioner in Writ Petition (C) No. 2314/2015 filed applications

for the years 2009-10, 2010-11, 2011-12 and 2012-13 on 18th February 2014 and in Writ Petition (C) No. 2398/2015, the applications were filed for the years 2010-11, 2011-12 and 2012-13 on 5th February 2014.

6. It is stated that as far as the Petitioner in Writ Petition (C) Nos. 2536/2015 and 3909/2015 is concerned, the applications filed were processed by the DT&T and a discharge certificate in DSC-3 was issued on 20th June 2014 for all the years for which the applications were filed providing immunity as per Clause 5 of the Amnesty Scheme. Similarly, a discharge certificate in DSC-3 was issued to the Petitioner in Writ Petition (C) No. 2398/2015 on 19th August 2014. However it is stated in Writ Petition (C) No. 2314/2015 that the Petitioner was not issued a discharge certificate in DSC-3 as stipulated in Clause 4 of the Amnesty Scheme.

7. At this stage it must be noted that Clause 4 of the Amnesty Scheme sets out in detail the procedure for making of the declaration and payment of tax dues. Under Clause 4(1), the declaration is expected to be made to the Designated Authority before the time specified therein. Under Clause 4(2), the Designated Authority issues an acknowledgment of the receipt of the declaration in Form DSC-2. Under Clause 4(6), the declarant shall furnish to the Designated Authority details of all payments made from time to time under the Amnesty Scheme. Under Clause 4(7), the acknowledgment of discharge of dues is issued to the declarant by the Designated Authority within 15 days in Form DSC-3 provided that the declarant had furnished the details of full payment of the declared tax dues payable under Clause 4(4).

8. Clause 5(2) of the Amnesty Scheme states that the declaration made under Clause 4(1) shall be conclusive upon issuance of acknowledgment of discharge under Clause 4(7) and no matter shall be reopened or reassessed or reviewed thereafter in any proceedings under the Amnesty Scheme or under the DVAT Act before any authority or Court. However, this is made subject to the provisions of Clause 8 which deals with the failure to make true declaration.

9. Clause 8 of the Amnesty Scheme reads as under:

“8. Failure to make true declaration

(1) Notwithstanding anything contained in clause 5 of the Schen1e, where the Commissioner has, for a period beginning from 1st April, 2009, reasons to believe that the declaration was false in material particulars, he may, for reasons to be recorded in writing, serve notice on the declarant in respect of such declaration requiring him to show cause as to why he should

not be required to pay the tax dues unpaid or short-paid as per the provisions of the Scheme.

(2) If the Commissioner is satisfied, for reasons to be recorded in writing, that the declaration made by the dealer was substantially false,

(i) he shall within three months of service of notice under sub-clause (1) make assessment of tax and penalty under section 32 and 33 of the Act, as if that dealer had never made declaration under this Scheme. However, the dealer shall be entitled to the credit of tax paid by him under this Scheme; and

(ii) such dealer may be proceeded under sub-section (2) of section 89 of the Act for furnishing of false declaration.

(3) No notice shall be issued under sub-clause (1) of this clause after the expiry of one year from the date of declaration."

10. In the present writ petitions, each of the Petitioners, including the Petitioners in Writ Petition (C) Nos. 2398/2015, 2536/2015 and 3909/2015 who had initially been issued the discharge in From DSC-3, received a show cause notice ('SCN') referring to their having made claims which were not admissible and which were liable to be rejected by the DT&T. Each of the SCNs was issued by the respective Additional Commissioners acting as Designated Authority but purportedly in exercise of the powers under Clause 8(1) of the Amnesty Scheme.

11. The Petitioners responded to the said SCNs and appeared before the respective Designated Authorities. Subsequently, orders were passed by the Designated Authorities rejecting the applications of each of the Petitioners under the Amnesty Scheme.

12. In case of the Petitioner in Writ Petition (C) No. 2536/2015 and 3909/2015, the impugned order was passed by the Additional Commissioner on 11th February 2015. The Additional Commissioner directed the assessing authority to carry out rectification of assessments for all the relevant years for which the said Petitioner has applied under the Amnesty Scheme. This led the said Petitioner to approach this court through Writ Petition (C) No. 2536/2015 seeking to quash the order dated 11th February 2015.

13. Meanwhile, orders for assessment and penalty under Section 32 and 33 of the DVAT Act were passed for the years 2006-07 to 2008-09. By

an order dated 13th March 2015 in Writ Petition (C) No. 2536/2015, this court directed the Respondents to not give effect to the above mentioned assessment orders. Subsequently, the Petitioner filed Writ Petition (C) No. 3909/2015 challenging the orders passed under Section 32 and 33 of the DVAT Act.

14. The impugned orders passed in the other writ petitions were likewise issued by the concerned Additional Commissioner in similar fashion.

15. The short question that arises for consideration of the Court is whether the rejection of the applications of the Petitioners by the Additional Commissioners acting as 'Designated Authority' was without jurisdiction inasmuch as Clause 8 of the Amnesty Scheme envisages only the Commissioner VAT passing such orders.

16. In response to the notice issued in these writ petitions, a reply has been filed by the Respondents where, inter alia, on this specific aspect, the stand taken is that the power in terms of Clause 8 of the Amnesty Scheme has been exercised by Additional Commissioners who are officers authorised to act on behalf of the Commissioner in terms of Sections 66 and 68 of the DVAT Act read with Rule 48 of the Delhi Value Added Tax Rules, 2005 ('DVAT Rules').

17. Section 66(1) of the DVAT Act states that for the purposes of the DVAT Act, the Government shall appoint a person to be the Commissioner, VAT. Under Section 66(2)(a) of the DVAT Act, the Government may appoint Special Commissioners, Value Added Tax Officers ('VATOs') and such other persons with such designation as the Government thinks appropriate, to assist the Commissioner in the administration of the DVAT Act.

18. Under Section 66(2)(b) of the DVAT Act, the Commissioner may with the previous sanction of the Government, engage and procure the engagement of other persons to assist him in the performance of his duties.

19. Section 68 of the DVAT Act deals with delegation of the Commissioner's powers. Under Section 68(1), the Commissioner may delegate any of his powers under the DVAT Act to any of the VAT authority subject to such restrictions and conditions as may be prescribed.

20. In exercise of the powers under Section 66(2) and 68(1) of the DVAT Act, orders have been issued by the Commissioner from time to time delegating the powers of the Commissioner to various other officers subordinate to the Commissioner. One such recent order is an order dated 12th November 2013 issued under Section 68 of the DVAT Act by the

Commissioner. The order contains four columns where Column 1 gives the serial number, Column 2 gives the Section of the DVAT Act, Column 3 gives the description of powers and Column 4 gives the description of the officer to whom the power is delegated. In other words, section-wise there is a specific delegation of powers to various officers by designation. What is significant, as far as this order is concerned, is that in the column which gives the section of the DVAT Act, Section 107 is not included. The Respondents have not placed before the Court any other order issued either earlier or later to the above order by which the Commissioner, VAT has delegated any of his powers under the Amnesty Scheme including, most importantly, the powers under Clause 8 thereof to any other subordinate officer or to even a Designated Authority.

21. As already noticed earlier, the order-instruction issued on 30th April 2014 merely declares several Additional Commissioners as Designated Authority for the purposes of disposal of applications received under the Amnesty Scheme. Such Designated Authorities would exercise powers as mentioned in Clauses 4 and 5 of the Amnesty Scheme. Clause 8 of the Amnesty Scheme does not envisage the power therein to be exercised by a Designated Authority but only by the Commissioner. Unless there is a specific order issued by the Commissioner under Section 68(1) of the DVAT Act delegating his powers under Clause 8 of the Amnesty Scheme to any other subordinate officer, it cannot be presumed that an Additional Commissioner, who has been declared as a Designated Authority, can ipso facto exercise the powers of the Commissioner under Clause 8 of the Amnesty Scheme.

22. The Court's attention has been drawn to a judgment dated 15th December 2015 passed by this Court in Writ Petition (C) No. 6340/2013 (Yongnam Engineering & Construction (Private) Limited v. Commissioner, Delhi Value Added Tax) where the question arose whether the power under Section 36A(8) of the DVAT Act could be exercised by an officer other than the Commissioner, particularly when that provision envisages the powers being exercised only by the Commissioner. Just as in the present case, there the Respondents were unable to produce before the Court an order issued by the Commissioner delegating his powers under Section 36A(8) of the DVAT Act to any other subordinate officer. In the circumstances, the Court negatived the plea that the Commissioner could have authorised a VATO to exercise such powers without issuing a specific order of delegation of such power.

23. Consequently, as far as the present cases are concerned, the Court is satisfied that the impugned orders rejecting Petitioners' applications could not have been passed by an Additional Commissioner who has been

declared as Designated Authority in exercise of the powers under Clause 8 of the Amnesty Scheme, which power only could have been exercised by the Commissioner, VAT and particularly in the absence of any order issued by the Commissioner under Section 68 (1) of the DVAT Act delegating such power to any other VAT officer.

24. Mr. S. Ganesh, learned Senior counsel for the Petitioners was candid that in response to the SCNs none of the Petitioners raised a specific objection to the power and jurisdiction of the Additional Commissioner to either issue the SCN or to adjudicate it. However, as rightly pointed out by him, since this goes to the very root of the matter and involves a pure question of law, the Petitioners cannot be precluded from urging it before this Court.

25. The Court also notes that under Clause 8(3) of the Amnesty Scheme, the SCN under Clause 8(1) would have to be issued within one year from the date of filing of the declarations by the applicants. Admittedly, that period of one year in all these cases has elapsed. Therefore, it is not possible for the Court to place the said applications before the Commissioner for a fresh decision.

26. For the aforementioned reasons, the impugned orders issued by the Additional Commissioners rejecting the applications of each of the Petitioners in exercise of the power under Clause 8 of the Amnesty Scheme are hereby quashed. All other actions taken or orders passed by the Respondents pursuant to the said impugned orders are also accordingly declared to be invalid.

27. The writ petitions and the applications are accordingly disposed of in the above terms.

[2015] 53 DSTC 60 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

W.P. (C) 974/2010

Kumagai Skanska HCC ITOCHU Group ... Petitioner

Versus

The Commissioner of Value Added Tax & Anr ... Respondents

Date of Order : April 26, 2016

JURISDICTION – DELHI SALES TAX ACT, 1975 – POWER OF REVISION – REDESIGNATION OF AUTHORITY – POWER TO ISSUE NOTICE U/S 46 OF THE ACT

WAS DELEGATED TO ASSISTANT COMMISSIONER – ASSISTANT COMMISSIONER REDESIGNATED AS DEPUTY COMMISSIONER – NOTICE ISSUED BY DEPUTY COMMISSIONER – WHETHER WITHOUT JURISDICTION?

JURISDICTION – TERRITORIAL JURISDICTION – ASSESSING AUTHORITY WARD 72 FRAMED ASSESSMENT – JURISDICTION TRANSFERRED TO SPECIAL ZONE – WHO HAS JURISDICTION TO ISSUE NOTICE FOR SUO MOTO REVISION? POINT OF TERRITORIAL JURISDICTION NOT REVISED IN WRIT PETITION – EFFECT OFF!

REVISION – POWER TO SUO MOTO REVISE AN ORDER? – SENIOR OFFICER DIRECTED TO INITIATE SUO MOTO REVISION – SEVERAL DAYS AFTER THE DIRECTION DEPUTY COMMISSIONER RECORDED REASONS FOR INITIATING SUO MOTO REVISIONAL PROCEEDING – REASONS SUPPLIED FOR INVOKING THE POWER WERE NEITHER ERRONEOUS NOR PREJUDICIAL TO THE INTEREST OF REVENUE – WHETHER JUSTIFIED; HELD NO.

Facts of the Case

The Petitioner was a joint venture registered as such under the Income Tax Act, 1961. It was also a dealer registered under the Delhi Sales Tax on Works Contract Act, 1999 ("DSTWC Act") (now repealed with effect from 1st April 2005) within the jurisdiction of the Sales Tax Officer (STO), Ward-72.

For the Assessment Year ("AY") 2003-04, the assessment was completed by the Assessing Authority of Ward – 72 by an order dated 24th February 2005 and a refund of Rs. 1, 78, 58,291 was created. The Petitioner stated that at the time of assessment, all the books of accounts were duly produced along with copies of the Joint Venture Agreement, Contract Agreement, Audited Balance Sheets and details of TDS certificate covering the amount of tax deducted and deposited by Delhi Metro Rail Corporation ("DMRC").

On the basis of the above order, the Petitioner filed an application for refund on 2nd March 2005 in form ST-21 in accordance with Rule 29 of the Delhi Sales Tax Rules, 1975 ("DST Rules") read with Section 30 (1) of the Delhi Sales Tax Act, 1975 ("DST Act") as was made applicable to the DSTWC Act.

The Petitioner stated that it kept following up on its refund application through several letters addressed to the Assessing Authority between 24th June 2005 and 29th May 2007. It also sent reminders to the Commissioner. It was stated that on 12th January 2007, the Inspector of the Sales Tax Department verified the TDS challans and also submitted his report.

However, the Assessing Authority issued a notice for re-assessment in form ST-15 (WC) under Section 24 of the DST Act on 5th July 2007. The said notice stated that deductions had been claimed wrongly by the Petitioner and hence the turnover escaped assessment to tax under Rule 5 of the Delhi Sales Tax Act on Works Contract Rules, 1999 ("DSTWC Rules"). It was stated that for some reason the said notice was not proceeded with and no reassessment order was passed.

Writ Petition 8526 of 2008

Meanwhile, aggrieved by the inaction of the Department as far as the issue of refund was concerned and instead initiating reassessment proceedings under Section 24 of the DST Act, the Petitioner filed Writ Petition (Civil) No. 8526 of 2008 in the Court.

It may be noticed that in the meanwhile, with effect from 1st April 2005 the DST Act stood repealed by the Delhi Value Added Tax Act, 2004 ("DVAT Act").

In the writ petition, with the Respondent not filing any counter-affidavit, the Court on 15th November 2008 directed the Respondent to deposit the entire sum of Rs. 1, 78, 58,291 in the Court and further ordered it to be kept by the Registrar in a fixed deposit. This order was complied with.

By an order dated 25th November 2009, Writ Petition (Civil) No. 8526 of 2008 was disposed of by the Court. The Court inter alia noted that the Respondent did not dispute that the reassessment order had not been passed till that date. It was contended by the Department that the limitation period would be six years from the date of the final order of assessment in question and not four years as was contended by the Petitioner. The Court after analysing Section 24 of the DST Act noted that the extended limitation period of six years for reopening the assessment would apply only where the dealer had "concealed, omitted or failed to disclose fully the particulars of such turnover." After going through reasons recorded on 14th March 2007 for reopening of the assessment, the Court concluded that the reopening was not done on the basis that "there was any concealment or omission or failure on the part of the Assessee to disclose fully the particulars of such turnover." It was noticed that "the reasons themselves demonstrate that the entire turnover as disclosed by the Petitioner was taken into account and the reasons given were that claims of deduction made by the Petitioner was not permissible under Rule 5 of the Works Contracts Rules, 1999. Thus it was not the case of the Petitioner (sic Respondent) that the Petitioner had not disclosed full particulars. In these circumstances, the limitation has prescribed under Section 24 (1) (b), i.e., four years from the date of final order of assessment would apply."

The Court further held that since the assessment itself has become time barred it would not be permissible for the Assessing Officer ("AO") to now proceed on the basis of the notice dated 5th July 2007 and pass reassessment orders. It was, therefore, not necessary to examine the other issues that were raised in the writ petition. The sum of Rs. 1,78,58,291 which had become refundable as a result of the original assessment and which had already been deposited by the Respondent in the Court was asked to be released to the Petitioner along with interest accrued thereon. The Petitioner was directed to make a claim of interest for the past period with the Sales Tax Authorities.

With no appeal being filed against the above order by the Respondent, the above order had become final. Pursuant to the above order, the said sum of Rs. 1, 78, 58,291 together with interest accrued thereon was refunded to the Petitioner by the Respondent.

The petitioner filed writ petition against the proceeding initiated for revision u/s74A. The Revenue show cause notice on 2-02-2010.

Held That

It was evident in the instant case that in exercise of the power under Section 46 of the DST Act, the Deputy Commissioner did not bear in mind the previous history of the case where the Court had quashed the notice dated 5th July 2007 which sought to reopen the assessment for AY 2003-04 on the same ground viz., that the deductions had wrongly been allowed to the Petitioner. The Court was, therefore, satisfied that in the present case the invoking of the revisional power by the Deputy Commissioner under Section 46 of the DST Act was unjustified and unwarranted. The impugned SCN dated 2nd February 2010 required to be quashed on this ground alone.

Revenue sought review petition before the court on the basis of section 106(4) of DVAT Act.

Power and jurisdiction of the officer issuing the SCN

The other major point urged in the writ petition concerned the authority of the jurisdiction of the Deputy Commissioner to issue the impugned SCN.

In this regard the Court had been showed an order dated 20th August 2008 issued by the Commissioner (VAT), delegating her powers to Joint Commissioners/Deputy Commissioners appointed under Section 66 of the DVAT Act. This includes the power of revision under Section 74A in respect

of the orders passed by VATOs/AVATOs working under their respective jurisdictions.

It was pointed out by an order dated 12th September 1994 that the Commissioner had delegated its revisional powers under Section 46 of the DST Act to the Assistant Commissioner where the order sought to be revised was passed by an assessing authority below the rank of Assistant Commissioner. The delegation of the power was made to the Deputy Commissioner where the order to be revised was passed by the Assistant Commissioner in the capacity of an Assessing Authority. After the enactment of the DVAT Act, there had been re-designation of the authorities. A sample order dated 22nd September 2006 had been placed on record. The Assistant Commissioner who was earlier exercising powers as such under the DST Act has been re-designated as Deputy Commissioner.

Therefore, on a combined reading of order dated 12th September 1994 issued by the Commissioner under Section 10 of the DST Act read with order dated 20th August 2008 issued under Section 68 of the DVAT Act, 2004 and further read with Rule 48 of the DVAT Rules, 2005 and in light of the order dated 22nd September 2006 issued by the Commissioner, the Court was satisfied that the Deputy Commissioner in the present case had the necessary power to issue the impugned SCN.

The case of the Petitioner was originally assessed by the Assessing Officer Ward 72. By the time the revisional jurisdiction came to be exercised, his case had been transferred to the jurisdiction of the Special Zone. It was urged that no specific order transferring the case to the Special Zone had been produced and that in any event no such order could have been passed without prior intimation to the Petitioner.

The Court found that this point had not been raised in this writ petition. There was, therefore, no opportunity to the Respondent to reply to such a plea. Consequently, the Court cannot permit the Petitioner to raise such a plea at this stage.

For the aforementioned reasons, the Court negatived the plea of the Petitioner that the Deputy Commissioner lacked the power and jurisdiction to issue the impugned SCN dated 2nd February 2010.

However, for the reasons already explained, that the Court was of the view that the power of revision was not validly exercised by the Deputy Commissioner in the instant case. Accordingly, the impugned SCN dated 2nd February 2010 was hereby quashed.

The writ petition was allowed.

Cases Referred to:

- *International Metro Civil Contractors v. CST/VAT (2008) 16 VST 329 (Del)*
- *Dharam Pal Satya Pal Limited v. The Commissioner, Value Added Tax*
- *Santalal Mehendi Ratta (HUF) v. Commissioner of Taxes 2006 (143) STC 511*
- *Orient Paper Mills v. Union of India 1978 (2) ELT 345 (SC)*
- *Sita Juneja & Associates v. Commissioner of Sales Tax 38 DSTC J- 60 (Del)*
- *Mahadayal Premchandra v. CTO, Calcutta AIR 1958 SC 667*
- *Collector of Central Excise, Bombay v. Kores (India) Limited 1997 (89) ELT 441 (SC)*
- *State of Madhya Pradesh v. G.S. Dall and Flours Mills (1991) 187 ITR 478 (SC),*
- *Bengal Iron Corporation v. CTO 1993 (66) ELT 13 (SC)*

Present for Petitioner : Mr. Rajesh Jain with Mr. Raj K. Batra and Mr. Virag Tiwari, Advocates.

Present for Respondet : Mr. Satyakam, Additional Standing Counsel, GNCTD.

Dr. S. Muralidhar, J.:

Background facts

1. The Petitioner, Kumagai Skanska HCC Itochu Group, is a joint venture registered as such under the Income Tax Act, 1961. It and was also a dealer registered under the Delhi Sales Tax on Works Contract Act, 1999 ('DSTWC Act') (now repealed with effect from 1st April 2005) within the jurisdiction of the Sales Tax Officer (STO), Ward-72.

2. For the Assessment Year ('AY') 2003-04, the assessment was completed by the Assessing Authority of Ward – 72 by an order dated 24th February 2005 and a refund of Rs. 1,78,58,291 was created. The Petitioner stated that at the time of assessment, all the books of accounts were duly produced along with copies of the Joint Venture Agreement, Contract Agreement, Audited Balance Sheets and details of TDS certificate covering the amount of tax deducted and deposited by Delhi Metro Rail Corporation ('DMRC').

3. On the basis of the above order, the Petitioner filed an application for refund on 2nd March 2005 in form ST-21 in accordance with Rule 29 of the Delhi Sales Tax Rules, 1975 ('DST Rules') read with Section 30 (1) of the Delhi Sales Tax Act, 1975 ('DST Act') as was made applicable to the DSTWC Act.

4. The Petitioner states that it kept following up on its refund application through several letters addressed to the Assessing Authority between 24th June 2005 and 29th May 2007. It also sent reminders to the Commissioner. It is stated that on 12th January 2007, the Inspector of the Sales Tax Department verified the TDS challans and also submitted his report.

5. However, the Assessing Authority issued a notice for re-assessment in form ST-15 (WC) under Section 24 of the DST Act on 5th July 2007. The said notice stated that deductions had been claimed wrongly by the Petitioner and hence the turnover escaped assessment to tax under Rule 5 of the Delhi Sales Tax Act on Works Contract Rules, 1999 ('DSTWC Rules'). It is stated that for some reason the said notice was not proceeded with and no reassessment order was passed.

Writ Petition 8526 of 2008

6. Meanwhile, aggrieved by the inaction of the Department as far as the issue of refund was concerned and instead initiating reassessment proceedings under Section 24 of the DST Act, the Petitioner filed Writ Petition (Civil) No. 8526 of 2008 in this Court.

7. It may be noticed that in the meanwhile, with effect from 1st April 2005 the DST Act stood repealed by the Delhi Value Added Tax Act, 2004 ('DVAT Act').

8. In the writ petition, with the Respondent not filing any counter-affidavit, this Court on 15th November 2008 directed the Respondent to deposit the entire sum of Rs. 1,78,58,291 in this Court and further ordered it to be kept by the Registrar in a fixed deposit. This order was complied with.

9. By an order dated 25th November 2009, Writ Petition (Civil) No. 8526 of 2008 was disposed of by this Court. In the said order, the Court inter alia noted that the Respondent did not dispute that the reassessment order had not been passed till that date. It was contended by the Department that the limitation period would be six years from the date of the final order of assessment in question and not four years as was contended by the Petitioner. The Court after analysing Section 24 of the DST Act noted that the extended limitation period of six years for reopening the assessment would apply only where the dealer has "concealed, omitted or failed to disclose fully the particulars of such turnover." After going through reasons recorded on 14th March 2007 for reopening of the assessment, the Court concluded that the reopening was not done on the basis that "there was

any concealment or omission or failure on the part of the Assessee to disclose fully the particulars of such turnover." It was noticed that "the reasons themselves demonstrate that the entire turnover as disclosed by the Petitioner is taken into account and the reasons given is that claims of deduction made by the Petitioner was not permissible under Rule 5 of the Works Contracts Rules, 1999. Thus it is not the case of the Petitioner (sic Respondent) that the Petitioner had not disclosed full particulars. In these circumstances, the limitation has prescribed under Section 24 (1) (b), i.e., four years from the date of final order of assessment would apply."

10. The Court further held that since the assessment itself has become time barred it would not be permissible for the Assessing Officer ('AO') to now proceed on the basis of the notice dated 5th July 2007 and pass reassessment orders. It was, therefore, not necessary to examine the other issues that were raised in the writ petition. The sum of Rs. 1,78,58,291 which had become refundable as a result of the original assessment and which had already been deposited by the Respondent in this Court was asked to be released to the Petitioner along with interest accrued thereon. The Petitioner was directed to make a claim of interest for the past period with the Sales Tax Authorities.

11. With no appeal being filed against the above order by the Respondent, the above order has become final. Pursuant to the above order, the said sum of Rs. 1,78,58,291 together with interest accrued thereon was refunded to the Petitioner by the Respondent.

Revisional power under the DVAT Act

12. Section 74A of the DVAT Act provides for powers of revision of the Commissioner. Section 74A (1) of DVAT Act states that the Commissioner may, of his own motion or upon information received by him, call for the record of any order or assessment passed under this Act by any officer or person subordinate to him and examine whether (a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate or has been incorrectly classified or any claims incorrectly granted or that liability to tax is understated or (b) in any case, the order is erroneous, insofar as it is prejudicial to the interest of Revenue and after examination, the Commissioner may pass an order to the best of his judgment, where necessary.

13. By way of Amendment to the DVAT Act, by the Delhi Value Added Tax (Amendment) Act, 2009 notified on 6th January 2010, sub-Section 5 was inserted in Section 74A of the DVAT Act which stated that notwithstanding anything contained in any judgment, decree or order of

any Court, “the provisions of this Section shall be deemed to have come into effect with effect from the 1st April 2005.” In other words, the power of the Commissioner to revise the order of the subordinate officer in terms of Section 74A of DVAT Act was made effective from 1st April 2005. Section 74A itself was inserted and notified with effect from 16th November 2005. Therefore, during the period from 1st April 2005 to 16th November 2005 there was no provision under the DVAT Act which was similar to Section 46 of the DST Act which granted to the Commissioner the suo motu power of revision.

The decision in International Metro Civil Contractors

14. In *International Metro Civil Contractors v. CST/VAT (2008) 16 VST 329 (Del)* this Court held that Section 74A “did not resuscitate or resurrect the long-dead revisionary power conferred on the Commissioner under Section 46 of the DST Act. It had no retrospective effect.” The said Special Leave Petition (‘SLP’) filed by the Department against the aforesaid judgment was disposed of by the Supreme Court by its order dated 31st March 2008 with the observation that “the larger issue regarding the applicability of the Delhi Value Added Tax Act, 2004 as also question of repeal of the Delhi Sales Tax Act and related issues discussed in the impugned judgment of the High Court are kept open.”

15. It may be also noticed at this stage that with retrospective effect from 1st April 2005 sub-section (4) in Section 106 of the DVAT Act was introduced. Section 106 was the ‘repeal and savings’ provision. Section 106 (4) stated that notwithstanding anything contained in the DVAT Act, for the purpose of levy, assessment, deemed assessment, reassessment, appeal, revision, review etc. which relates to any period ending before 1st April 2005 “the repealed Act, and all rules, regulations, orders, notifications, forms and notices issued thereunder and in force immediately before 1st day of April 2005 shall continue to have effect as if this Act has not been passed.”

Impugned show cause notice

16. On 2nd February 2010 a show-cause notice (‘SCN’) was issued to the Petitioner by the Deputy Commissioner (Special Zone) in exercise of the powers under Section 16 of the DSTWC Act read with Section 46 of the DST Act and Notification No. F. 8(28)/93-PPR/13368-384 dated 12th September 1994 delegating the power of revision read with Section 106 (2) of the DVAT Act requiring the Petitioner to appear before the said officer with the books of accounts and other relevant record and to show cause as to why the said assessment order dated 24th February 2005 be not

revised under Section 16 of the DSTWC Act read with Section 46 of the DST Act.

17. *Inter alia* it was stated in para 5 of the said notice that "whereas it has come to the notice of the undersigned that in the assessment order for the year 2003-04 deductions have been wrongly allowed hence said order is erroneous and prejudicial to the interest of revenue."

Earlier decision of this Court

18. In this very writ petition it was decided in the first instance by a Division Bench of this Court by its judgment dated 22nd May 2012 that the impugned show cause notice was invalid as it was barred by limitation. In the said judgment, the Court took note of the detailed observations in the judgment dated 2nd September 2011 of the Full Bench of this Court in Writ Petition (Civil) No. 274 of 2010 (*Dharam Pal Satya Pal Limited v. The Commissioner, Value Added Tax*) where it was held that the Commissioner under the DVAT Act can exercise suo motu powers of revision under Section 74A of the DVAT Act in respect of assessments completed under the DST Act "provided the power is invoked and exercised during the period of limitation as stipulated under Section 74A and subject to the other conditions precedent stipulated therein." The Division Bench also took note of one of the conclusions of the Full Bench that "the order of assessment framed under the DST Act is deemed to be an order framed under the DVAT Act and on reading of Section 106 (2) and 106 (3) in a conjoint manner, it is not correct to state that once the order of assessment has been passed, the transaction is closed and therefore, the assessment/ order is not revisable under Section 74A of the DVAT Act."

19. The Division Bench also took note of one other specific conclusion of the FB that the proceedings initiated under the DST Act were saved by the DVAT Act and further that the proceedings could be initiated under Section 74A of the DVAT Act "during the period of limitation as stipulated under Section 74A subject to the conditions precedent stipulated therein."

20. The Division Bench took note of Section 74A (2) (b) which stated that no order under the said provision can be passed after the expiry of four years from the end of the year in which the order passed by the subordinate officer has been served on the dealer. In the present case, the original order of assessment determining the refund was passed on 24th February 2005 and therefore, service of the assessment order should be taken to have been effected on the Petitioner on or before 2nd March 2005. Therefore, the revisional order could have been passed within four years of 31st March 2005, i.e., upto 31st March 2009. Since the SCN has been issued only on 2nd February 2010, it was held to be barred by limitation.

21. In response to the plea that the entire Section 46 of the DST Act which provided that the final order that may be passed in exercise of the power of revision has to be passed within five years of the date of the order sought to be revised, the Court held that Section 46 of DST Act has been replaced by Section 74A of the DVAT Act qua the power of the revision and further that it is Section 74A which should be held to apply. Accordingly, the SCN dated 2nd February 2010 was quashed as being time barred.

Review petition of the Department

22. Soon thereafter the Department filed Review Petition No. 420 of 2012 drawing the attention of the Court to Section 106 (4) of the DVAT Act which had been inserted with effect from 1st April 2005 and was not noticed by the Court in the above decision.

23. On 2nd May 2014 the Division Bench of this Court allowed the review petition after noticing Section 106 (4) of the DVAT Act and held that "It is absolutely clear that the entire provision of revision as contemplated under Section 46 of the 1975 Act including the period of limitation prescribed therein would be applicable to such revisions notwithstanding the repeal of the said Act by the DVAT Act, 2004." Accordingly, the order dated 22nd May 2012 is recalled and the matter was again placed for hearing on the other grounds taken by the Petitioner.

Submissions of the Petitioner on merits of the impugned SCN

24. There are two broad submissions made by Mr. Rajesh Jain, learned counsel for the Petitioner to assail the impugned SCN dated 2nd February 2010. The first concerns the power of jurisdiction of the officer concerned to issue the said impugned SCN. The second concerns the legality of the said notice in terms of Section 46 of the DST Act.

25. As far as the second submission is concerned, the contention of the Petitioner can be stated as under:

(a) The impugned SCN has been issued on identical grounds taken in the reassessment notice issued to the Petitioner under Section 24 of the DST Act on 5th July 2007 viz., that the deductions had been wrongly claimed by the Petitioner under Rule (5) of DSTWC Rules and therefore, the turnover has escaped assessment.

(b) The said assessment proceedings had lapsed on account of the fact that no reassessment order was passed. This Court in its judgment dated 25th November 2009 held that no further order

could be passed pursuant to the said notice. The *suo motu* power under Section 46 of the DST Act cannot be invoked on the same ground. Reliance is placed on the decision of the Gauhati High Court in *Santalal Mehendi Ratta (HUF) v. Commissioner of Taxes 2006 (143) STC 511*.

(c) In the case of *International Metro Civil Contractors v. CST/VAT* (*supra*) the said Petitioners were also doing the job of work contract for DMRC and they were denied refund by the Department. Instead reassessment proceedings were sought to be initiated. This was challenged before this Court in Writ Petition (Civil) No. 869 of 2004 and a judgment was passed on 20th July 2004 by this Court holding that once the assessment has become final, then it was not open to the Assessing Authority while considering the refund application, to question the correctness of assessment. The Court accordingly directed the authorities to pass appropriate orders on the refund application within a period of 15 days. Soon after, the SCN under Section 46 of the DST Act was issued to International Metro Civil Contractors. This was challenged in the Writ Petition (Civil) No. 5828 of 2007 which came to be allowed by the aforementioned judgment in *International Metro Civil Contractors* (*supra*) and the said SCN was quashed. The SLP against the said order was disposed of by the Supreme Court on 31st March 2008 observing that the Commissioner "ought not to have interfered with the assessment order under Section 46 of the Delhi Sales Tax Act, 1975, particularly when the requirements of that section do not stand complied with."

(d) Respondent No. 2, the Deputy Commissioner, had issued the impugned SCN without satisfying herself whether the requirements for issuing the SCN stand complied with. The SCN did not specify (a) which deductions have been wrongly allowed, (b) to what extent, (c) what are the relied upon documents to support the stand taken in the SCN and (d) which sub-rule of Rule 5 of DSTWC Rules has been violated etc. In other words, in the absence of any specific finding given and without adducing any document to support such finding, Respondent No. 2 cannot purport to exercise *suo motu* power seeking to revisit the original assessment order dated 24th February 2005.

(e) The impugned SCN has been issued by Respondent No. 2 on the instruction of the higher authority. In other words, Respondent No. 2 has not applied her mind on her own and without satisfying

herself whether the conditions to invoke the powers under Section 46 of DST Act exist. Reliance was placed on the decision of the Supreme Court in *Orient Paper Mills v. Union of India 1978 (2) ELT 345 (SC)* and this court in *Sita Juneja & Associates v. Commissioner of Sales Tax 38 DSTC J- 60 (Del)*.

(f) The reasons supplied on the request by the Petitioner for invoking the powers under Section 46 of the DST Act had revealed that the original assessment order was neither stated to be erroneous nor prejudicial to the interests of the Revenue. The reasons are not sustainable in law since they failed to point out how the deductions had been wrongly allowed.

26. It is further pointed out by Mr. Rajesh Jain that for the preceding AYs 2001-02, 2002-03 as well as for the subsequent AY 2004-05 refund has been granted to the Assessee on the very same basis as claimed by the Assessee for the AY in question, i.e., AY 2003-04.

Submissions of the Respondent

27. In the counter-affidavit filed in response to the present writ petition, it is contended that the original assessment order was erroneous and was prejudicial to the interest of the Revenue since the deduction had wrongly been allowed to the Petitioner contrary to Rule 5 (1) of the DSTWC Rules. It is simply stated that “the Petitioner has not approached this Court with any arguments to the effect that he was entitled to the deductions allowed in the assessment order. All through these legal proceedings, the Petitioner has taken advantage of technical reasons to avoid a revision whereas huge public money is involved in the case.”

28. It is further contended that on the earlier occasions when the notice dated 5th July 2007 had been quashed by the Court by its judgment dated 24th November 2009 there was no occasion for the Court to go into the merits of the case. The case was decided only on the ground of limitation. Thus, the revision power under Section 46 of the DST Act was validly invoked in the present case.

Merits of the impugned SCN

29. The above submissions on the merits of the impugned SCN dated 2nd February 2010 has been considered. As already noticed in the SCN itself, the only reason for invoking the revisional powers under Section 46 of the DST Act is contained in para 5 which simply states: “whereas it has come to the notice of the undersigned that in the assessment order for the

year 2003-04 deductions have been wrongly allowed hence said order is erroneous and prejudicial to the interest of revenue." In other words, the language of Section 46 of the DST Act has been reproduced. The reasons fail to specify how the original assessment order is erroneous or prejudicial to the interests of the Revenue and in what manner deductions had been wrongly claimed and allowed to the Petitioner.

30. It is sought to be contended by Mr. Satyakam, learned Additional Standing counsel for the Respondent that the SCN does not itself have to set out all the grounds on which the revisional power has been exercised and that in any event the detailed reasons are available in the note prepared by the officer, a copy of which has been made available to the Petitioner. Consequently, it is submitted that the Petitioner could reply to the SCN and in the proceedings pursuant to the SCN the case of the Petitioner would be considered and an appropriate order passed exercising the revisional power under Section 46 of the DST Act.

31. It must be remembered at this stage that the grounds on which the revisional power sought to be exercised is identical to the ground on which the power under Section 24 of the DST Act to reopen the assessment was invoked by issuing the notice dated 5th July 2007. In other words it is the very same reason viz., alleged wrong claim of deductions under the DSTWC Act, that prompted the reopening of the assessment for AY 2003-04. This attempt was negatived by the Court by its judgment dated 25th November 2009.

32. Secondly, it must be recalled that reassessment was done at the stage where the refund order was due to be issued to the Petitioner and the Petitioner had been making repeated representations in that regard. Thirdly, in its judgment dated 25th November 2009 the Court had directed release of the refund amount to the Petitioner making it clear that no further order could be passed pursuant to the notice dated 5th July 2007 issued under Section 24 of the DST Act.

33. While it is true that in its judgment the Court concluded that no assessment order could be passed on account of limitation, the fact remains that there had to be strong reasons even *prima facie* for the Deputy Commissioner to invoke revisional powers under Section 46 of the DST Act in light of the above background of the case.

34. Keeping the above facts in mind, the Court proceeds to examine the background note and the reasons for invoking the power under Section 46 of the DST Act.

The Background note and reasons for re-opening

35. It is seen that pursuant to the judgment dated 25th November 2009 a note was drawn up by the Deputy Commissioner seeking legal advice on the aspect whether the Department should file an SLP against the said judgment "relating to refund of Rs. 1,78,58,291 for the year 2003-04."

36. After narrating the above background of the case, the note referred to the fact that learned counsel for the Department gave an opinion that "it will not be worthwhile or a suitable case to file any SLP in Supreme Court." The note then stated that "it is further submitted that under the present circumstances there is one remedy available before the Department that is revision of orders prejudicial to revenue under Section 46 of the DST Act, 1975 ....." It was noted that "the instant case had been reopened vide notice dt. 5/07/07 under Section 24 of the Act for reassessment proceedings. The case could not be concluded because of Writ Petition No. 8526/2008." This is factually erroneous since it was pointed out by the Petitioner there was no stay order passed in Writ Petition No. 8526 of 2008 and therefore, nothing prevented the Department from passing the reassessment order. Nevertheless it was noted that the power of revision under Section 46 would have to be exercised by 23rd February 2010. The note concluded seeking advice whether an SLP should be filed or a revision of the assessment order dated 24th February 2005 under Section 46 of the DST Act be undertaken.

37. The above note was prepared by the Deputy Commissioner (Special Zone) on 6th January 2010. The photocopy of the said note together with further endorsement thereunder had been placed on record. The above note was marked to the Joint Commissioner (Law & Justice) who recorded in his own handwriting: "revision proceedings to safeguard the interest of Revenue may be initiated immediately. The said proceedings may be completed within the limitation period." (emphasis in original)

38. The note was further marked to the Commissioner (VAT) who approved it.

39. The note reveals that it was straightway presumed that the assessment order dated 24th February 2005 was prejudicial to the Revenue since a refund had been ordered. Further, the note makes it clear that the Deputy Commissioner was seeking instructions from her superior officers to file either an SLP or undertake a revision. The Joint Commissioner (L&J) directed that it should be done immediately, and it was pursuant to the said direction that the Deputy Commissioner proceeded to issue the SCN to the Petitioner.

Acting under dictation

40. The fact remains that there was no subjective satisfaction of the Deputy Commissioner for initiation of the revisional proceedings by applying objective criteria. This is evident from the fact that nearly three weeks after the above note, on 29th January 2010 the Deputy Commissioner actually penned a note setting out the reasons for invoking Section 46 of the DST Act. This note contains the reason that the Petitioner had been allowed deductions in violation of Rule 5 of the DSTWC Rules. Thus the decision to invoke the revisional power under Section 46 of the DST Act was not made independently by the Deputy Commissioner. She was acting on the directions of her superior officers. Consequently, the plea of Mr. Satyakam that the reasons prepared by the Deputy Commissioner in the note dated 29th January 2010 should be read as the reasons for deciding to invoke the power of revision under Section 46 of the DST Act, which is decision appears to have been taken on 7th/9th January 2010 itself, cannot be accepted.

41. It is well settled legal position that a quasi judicial authority should discharge the statutory discretionary powers independently and not under the dictation of superior officers. In *Sita Juneja & Associates v. CIT* (*supra*) this Court noticed the judgment of the Supreme Court in *Mahadayal Premchandra v. CTO, Calcutta AIR 1958 SC 667, Collector of Central Excise, Bombay v. Kores (India) Limited 1997 (89) ELT 441 (SC), State of Madhya Pradesh v. G.S. Dall and Flours Mills (1991) 187 ITR 478 (SC)*, *Bengal Iron Corporation v. CTO 1993 (66) ELT 13 (SC)* to conclude that where the Assessing Officer acts on the basis of the instructions of the superior authority the entire proceedings would stand vitiated.

42. Reference was made by this Court in *Sita Juneja & Associates v. CIT (supra)* to the observations in *Orient Paper Mills v. Union of India (supra)* where the Supreme Court held that the assessing authorities as well as the appellate authorities are called upon to decide disputes "independently and impartially." They cannot be said to act independently if their judgment is controlled by the directions given by the others. "Then it is a misnomer to call their orders as their judgments, they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party."

43. It is evident in the instant case that in exercise of the power under Section 46 of the DST Act, the Deputy Commissioner did not bear in mind the previous history of the case where the Court had quashed the notice dated 5th July 2007 which sought to reopen the assessment for AY 2003-04 on the same ground viz., that the deductions had wrongly been allowed

to the Petitioner. The Court is, therefore, satisfied that in the present case the invoking of the revisional power by the Deputy Commissioner under Section 46 of the DST Act was unjustified and unwarranted. The impugned SCN dated 2nd February 2010 requires to be quashed on this ground alone. Power and jurisdiction of the officer issuing the SCN

44. The other major point urged in the writ petition concerns the authority of the jurisdiction of the Deputy Commissioner to issue the impugned SCN.

45. In this regard the Court has been shown an order dated 20th August 2008 issued by the Commissioner (VAT), delegating her powers to Joint Commissioners/Deputy Commissioners appointed under Section 66 of the DVAT Act. This includes the power of revision under Section 74A in respect of the orders passed by VATOs/AVATOs working under their respective jurisdictions.

46. It is pointed out by an order dated 12th September 1994 that the Commissioner had delegated its revisional powers under Section 46 of the DST Act to the Assistant Commissioner where the order sought to be revised was passed by an assessing authority below the rank of Assistant Commissioner. The delegation of the power was made to the Deputy Commissioner where the order to be revised was passed by the Assistant Commissioner in the capacity of an Assessing Authority. After the enactment of the DVAT Act, there has been re-designation of the authorities. A sample order dated 22nd September 2006 has been placed on record. The Assistant Commissioner who was earlier exercising powers as such under the DST Act has been re-designated as Deputy Commissioner.

47. Therefore, on a combined reading of order dated 12th September 1994 issued by the Commissioner under Section 10 of the DST Act read with order dated 20th August 2008 issued under Section 68 of the DVAT Act, 2004 and further read with Rule 48 of the DVAT Rules, 2005 and in light of the order dated 22nd September 2006 issued by the Commissioner, the Court is satisfied that the Deputy Commissioner in the present case had the necessary power to issue the impugned SCN.

48. It was sought to be urged by Mr Jain, learned counsel for the Petitioner, that the case of the Petitioner was originally assessed by the Assessing Officer Ward 72. By the time the revisional jurisdiction came to be exercised, his case had been transferred to the jurisdiction of the Special Zone. It was urged that no specific order transferring the case to the Special Zone had been produced and that in any event no such order could have been passed without prior intimation to the Petitioner.

49. The Court finds that this point has not been raised in this writ petition. There was, therefore, no opportunity to the Respondent to reply to

such a plea. Consequently, this Court cannot permit the Petitioner to raise such a plea at this stage.

50. For the aforementioned reasons, this Court negatives the plea of the Petitioner that the Deputy Commissioner lacked the power and jurisdiction to issue the impugned SCN dated 2nd February 2010.

Conclusion

51. However, for the reasons already explained, that the Court is of the view that the power of revision was not validly exercised by the Deputy Commissioner in the instant case. Accordingly, the impugned SCN dated 2nd February 2010 is hereby quashed.

52. The writ petition is allowed in the above terms but, in the facts and circumstances, with no orders as to costs.

[2015] 53 DSTC 77 – (Chandigarh)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
[Hon'ble Mr. Justice Ajay Kumar Mittal & Hon'ble Mrs. Justice Raj Rahul Garg]

VATAP No.2 of 2016 (O&M)

Conell Bros. Co. (India) Pvt. Limited ... Appellant

Versus

State of Punjab ... Respondent

Date of decision: 19.2.2016

LIMITATION – CONDONATION OF DELAY- DEATH OF THE REPRESENTATIVE OF THE COMPANY – APPROPRIATE EXPLANATION AND REASONABLE CAUSE – DELAY OF 124 DAYS IN FILING THE APPEAL BEFORE TRIBUNAL CONDONED – PUNJAB VALUE TAX ACT, 2005, SECTION 64 – LIMITATION ACT, 1963, SECTION 5.

Facts of the Case

The appellant sold frozen lemon concentrate to M/s Epicu Agro Products Pvt. Limited, Village, Mohra, Ambala vide invoice dated 28.4.2009. The goods were transported through M/s MP Bombay Transport Careers, Mumbai. As per instructions of the buyer, the goods were consigned to M/s Snowman Frozen Foods Limited, Village Ganna Pind, Phillaur with whom

the buyer had agreement. The transaction was against Form C and 2% CST was charged. The goods were detained at ICC on the ground that neither M/s Epicu Agro Products Pvt. Limited nor M/s Snowman Frozen Foods Limited was registered in Punjab. Ultimately, penalty of 12,19,335/- was imposed under Section 51(7) (b) of the PVAT Act vide order dated 22.5.2009, Annexure A.2. Aggrieved by the order, the assessee filed appeal before the Deputy Excise and Taxation Commissioner (Appeals) [DETC(A)]. Vide order dated 4.6.2013, Annexure A.3, the DETC(A) dismissed the appeal. The said order was received on 14.8.2013 by Vinod Kumar Grover, representative of the company who was dealing with the matter. Before the appeal could be filed in the Tribunal, Mr. Grover expired on 8.10.2013. Mr. Rajesh Chhabra took over the charge on the demise of Mr. Grover. In this way, there was delay in filing the appeal.

Held That

After perusing the averments made in the grounds of appeal, the impugned order dated 13.8.2015, Annexure A.6, passed by the Tribunal and hearing the parties, the Court found that the appeal before the Tribunal against the order of DETC (A) could not be filed in time due to the death of the representative of the company dealing with the matter. When the charge was taken over by another person, immediately thereafter, steps for filing of appeal before the Tribunal were taken. There was no malafide intention on the part of the appellant-assessee. The explanation tendered by the appellant-assessee appeared to be plausible. Thus, the delay of 124 days in filing the appeal before the Tribunal was condoned. The impugned order dated 13.8.2015, Annexure A.6 passed by the Tribunal was set aside. Consequently, the matter was remanded to the Tribunal to hear the appeal after hearing the parties in accordance with law.

Present for Appellant : Mr. Avneesh Jhingan, Advocate
Mr. Jagmohan Bansal, Addl.A.G.Punjab
with Ms. Sudeepti Sharma,
DAG, Punjab.

ORDER

Ajay Kumar Mittal, J.

CM No.973 CII of 2016

1. This is an application under Section 5 of the Limitation Act, 1963 for condonation of delay of 45 days in filing the appeal.

2. Notice of the application was given to the respondent. For the reasons stated in the application and after hearing learned counsel for the parties, the delay of 45 days in filing the appeal is condoned. CM stands disposed of.

3. This appeal has been preferred by the assessee under Section 68 of the Punjab Value Added Tax Act, 2005 (in short, "the PVAT Act") against the order dated 13.8.2015, Annexure A.6 in STA No.25 of 2014, claiming following substantial questions of law:

"i) Whether in the facts and circumstances of the case, the delay in filing the appeal ought to have been condoned by the Tribunal?

ii) Whether in the facts and circumstances of the case, the reasonable cause should have been liberally construed by the Tribunal while dealing the application for condonation of delay?

iii) Whether in the facts and circumstances of the case, the delay of 124 days should have been condoned as the same occurred because of the death of the representative of the company?

iv) Whether in the facts and circumstances of the case, the order Annexure A.6 is contradictory and perverse?"

4. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant sold frozen lemon concentrate to M/s Epicu Agro Products Pvt. Limited, Village, Mohra, Ambala vide invoice dated 28.4.2009. The goods were transported through M/s MP Bombay Transport Careers, Mumbai. As per instructions of the buyer, the goods were consigned to M/s Snowman Frozen Foods Limited, Village Ganna Pind, Phillaur with whom the buyer had agreement. The transaction was against Form C and 2% CST was charged. The said goods were detained at ICC on the ground that neither M/s Epicu Agro Products Pvt. Limited nor M/s Snowman Frozen Foods Limited was registered in Punjab. Ultimately, penalty of ` 12,19,335/- was imposed under Section 51(7) (b) of the PVAT Act vide order dated 22.5.2009, Annexure A.2. Aggrieved by the order, the assessee filed appeal before the Deputy Excise and Taxation Commissioner (Appeals) [DETC(A)]. Vide order dated 4.6.2013, Annexure A.3, the DETC(A) dismissed the appeal. The said order was received on 14.8.2013 by Vinod Kumar Grover, representative of the company who was dealing with the matter. Before the appeal could be filed in the Tribunal, Mr. Grover expired on 8.10.2013. Mr. Rajesh Chhabra took over the charge on

the demise of Mr. Grover. In this way, there was delay in filing the appeal. Ultimately, the appeal was filed alongwith an application for condonation of delay of 124 days before the Tribunal. Vide order dated 13.8.2015, Annexure A.6, the Tribunal dismissed the appeal on the ground of delay. Hence the instant appeal by the assessee.

5. We have heard learned counsel for the parties.

6. After perusing the averments made in the grounds of appeal, the impugned order dated 13.8.2015, Annexure A.6, passed by the Tribunal and hearing learned counsel for the parties, we find that the appeal before the Tribunal against the order of DETC(A) could not be filed in time due to the death of the representative of the company dealing with the matter. When the charge was taken over by another person, immediately thereafter, steps for filing of appeal before the Tribunal were taken. There was no malafide intention on the part of the appellant-assessee. The explanation tendered by the appellant-assessee appears to be plausible. Thus, the delay of 124 days in filing the appeal before the Tribunal is condoned. The impugned order dated 13.8.2015, Annexure A.6 passed by the Tribunal is set aside. Consequently, the matter is remanded to the Tribunal to hear the appeal after hearing learned counsel for the parties in accordance with law. The appeal stands disposed of accordingly.

[2015] 53 DSTC 80 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

Reserved on : March 16,2016
Decision on : March 30, 2016

ITD-ITD CEM JV ... Petitioner

Versus

Commissioner of Trade And Taxes …Respondent

WRIT PETITION – CHALLENGE TO RE-ASSESSMENT PROCEEDINGS – DIRECTION TO REVENUE TO PRODUCE RECORDS SHOWING RECORDING OF REASONS TO BELIEVE THAT TURNOVER HAS ESCAPED ASSESSMENT – REVENUE CLAIMED THAT TURNOVER SHOULD HAVE BEEN HIGHER THAN DECLARED – WORKED ON THE BASIS OF DEDUCTION FOR LABOUR, SERVICES AND OTHER LIKE CHARGES CLAIMED BY THE DEALER UNDER RULE 3(1) & (2) BUT TREATING BY THE REVENUE AS IF THE SAME ARE NOT ASCERTAINABLE FROM THE REQUISITE DOCUMENTATION PRODUCED –

WHETHER FRESH REASONS TO BELIEVE CAN BE ACCEPTED AS ORIGINALLY IT WAS CLAIMED BY REVENUE THAT TURNOVER HAS ESCAPED – BUT IN HEARING SAYING EXCESS DEDUCTION HAS BEEN CLAIMED – WHETHER THE MATERIAL GATHERED BY DT&T IF ANY, OUGHT TO HAVE A LIVE NEXUS TO THE FORMATION OF BELIEF THAT THERE IS ESCAPEMENT OF TURNOVER FROM ASSESSMENT.

POWER AND JURISDICTION OF AC (VAT AUDIT) - SECTION 67(2) OF DVAT ACT – NO POWER OF DELEGATION AS SUCH BUT POWER IS TO ISSUE ORDERS FOR THE DUE AND PROPER ADMINISTRATION OF THE DVAT ACT. – SPECIAL COMMISSIONER COULD NOT HAVE DELEGATED POWER IN TERMS OF SECTION 67(2) AND IN PARTICULAR POWER OF REOPENING OF RE-ASSESSMENT TO AC(VAT AUDIT).

ASSESSING AUTHORITY TO ACT INDEPENDENTLY U/S 34 OF DVAT ACT 2004 TO REOPEN AN ASSESSMENT AND NOT UNDER THE DICTATES OF SENIOR OFFICERS – AA PREPARED NOTE PROPOSING TO RE-OPEN THE ASSESSMENT FOLLOWED BY APPROVAL BY SEVERAL SUPERIOR OFFICERS UP TO THE LEVEL OF COMMISSIONER VAT – WHETHER JUSTIFIED.

Facts of the Case

The dealer is engaged in the business of executing indivisible Works contract.

Assessment framed u/s 32 and 33 of the DVAT Act, 2004 after 4 years from the end of assessment year without mentioning any reference to concealment, omission or failure by petitioner in furnishing any material particular. Dealer challenged the same in writ petition. High Court quashed the order being barred by limitation with a direction that revenue may, take recourse to such other action as may be permissible in law.

Revenue, thereafter, issued notice for special Audit to the petitioner for the reason that he has concealed substantial part of his turnover arrived on the basis of deduction claimed by him under Rule 3 of DVAT Rules — Petitioner raised objection that notice was without jurisdiction - VATO (Audit) disagreed — Dealer again challenged by way of writ petition against re- initiation of Audit proceedings – Department withdrew the notice for audit and writ petition disposed without any cost.

Notice again issued by revenue by AC (VAT Audit) to do the re-assessment u/s 32 & 33 as he has reason to believe that there has been suppression of gross turnover by the dealer in DVAT return filed by him by invoking section 34 of the DVAT Act by taking approval from Senior Officers including Commissioner VAT — Petitioner filed detailed objection claiming that no re-assessment can be done -AC (VAT Audit) directed

the Petitioner to submit additional information for re-assessment. Petitioner again challenged the re-assessment proceedings by way of writ petition.

Held

The law is well settled that the reasons for reopening the re-assessment by invoking the extended period of limitation under Section 34 of the DVAT Act have to be recorded in the file and was explained by this Court in H.M. Industries v. Commissioner of Value Added Tax (2015) 78 VST 382(Del)

It is not legally permissible for the DT & T at this stage to supply fresh reasons to believe, other than what is recorded in file. While the reasons recorded in the file speak of the concealment by the Petitioner of "substantial part of his turnover", the reason as transpired during the course of hearing is regarding excessive claim of exemption made by Petitioner.

There was, therefore, certainly no failure/omission on the part of the Petitioner to furnish material particulars which formed the basis of re-assessment in terms of the proviso to the section 34 of the DVAT Act. The proviso is very clear that there has to be "concealment, omission or failure to disclose fully material particulars" by the Petitioner. In relation to the claim for exemption there was nothing in the "reasons to believe" as recorded by the Respondent to show that there was any concealment or omission or failure by the Petitioner to disclose material particulars. As already noted, the reasons to believe talk of "suppression of gross turnover". The materials gathered by the DT & T, if any, ought to have a live nexus to the formation of the belief that there is escapement of turnover from assessment The reasons to believe as recorded make no reference to any such material. In fact, a tabular chart prepared by the DT&T placed before the Court refers to the very figures of gross turnover, works contract and sale of capital goods, as disclosed by the Petitioner in the return filed.

Revenue referred to the Audit report and urged that the said report should form the basis for the reasons to believe that exemption far in excess of what was permissible and supported by the disclosed documents had been claimed by the Petitioner. He further urged that since the note on the file referred to the audit report, it cannot be said that the reasons to believe as recorded were not based on such audit report.

There were several difficulties in accepting the above submission. As already noticed, the reasons to believe as recorded are about "suppression of gross turnover "and not about claim of excess exemption. Secondly, the audit report formed the basis of the Previous round of litigation. It will be recalled that the notice of default assessment of tax dated 9th July, 2014 was based on the said audit report and the said notice was quashed by this Court by the order dated 14th May 2015 in W. P.(C)5231/2014 on the

ground that it was time barred. Merely because the Court in the said order reserved the right of the DT&T" to make recourse to such other action as may be permissible in the law" did not permit it to initiate one more round of litigation on the very same material. That would be an abuse of the process of law. Such other action would have to be based on some fresh material. Thirdly, the Court cannot possibly read into the reasons as recorded in the file, all of the above fresh reasons being put forth by the DT&T to justify what is a legally indefensible course of action.

There was yet another issue that has been raised by the Petitioner which concerns the power and jurisdiction of the Assistant Commissioner (VAT Audit). It was seen that the assignment to Assistant Commissioner (VAT Audit) to undertake the task of issuance of notice of reopening the reassessment was made by the order dated 23rd December 2015 of the Special Commissioner (Special Zone)under Section 67(2) of the DVAT Act. Under Section 67(2) of DVAT Act there is no power of delegation as such but the power to issue orders "for the due and proper administration" of the DVAT Act and ''all such persons engaged in the administration of this Act shall observe and follow such orders, instructions and directions of the Commissioners." It is not understood how the Special Commissioner (Special Zone) could have delegated powers in terms of Section 67(2) of DVAT Act and in particular, the power of reopening the reassessment to the Assistant Commissioner (VAT Audit). Interestingly, the impugned notice is issued by the Assistant Commissioner (VAT Audit) and not the Assessing Officer who has been duly empowered to issue it.

A further issue that arised was that in re-opening an assessment in exercise of the powers under section 34 of the DVAT Act, the VATO concerned was expected to act independently and not under the dictates of any superior officer. Here, as the file notings showed, the Additional Commissioner VAT Audit prepared a note proposing the re-opening of assessment which was approved by several of the superior officers up to the level of the Commissioner, VAT.

For all the aforementioned reasons, the Court held the impugned notice dated 9th February 2016 issued under section 59(2) of the DVAT Act along with the letter dated 24th February 2016 issued by the Assistant Commissioner (VAT Audit) to be unsustainable in law and quashed. The writ petition was allowed.

Cases Referred to:

- *H.M. Industries v. Commissioner of Value Added Tax (2015) 78 VST 382 (Del)*

Present for Petitioner	:	Mr. Rajesh Jain with Mr. Virag, Mr.K.J. Bhat and Mr V.K. Jain, Advocates.
Present for Respondent	:	Mr. Gautam Narayan, Additional Standing Counsel with Mr. R.A. Iyer, Advocate and Mr Pradeep Verma, Assistant Commissioner (Audit)/ Special Zone.

JUDGMENT

Dr. S. Muralidhar, J:

1. The challenge in this writ petition by the Petitioner, ITD-ITD CEM, a joint venture group, which is engaged in executing the works contract for Delhi Metro Rail Corporation ('DMRC') and has been registered with Ward No. 107 (Special Zone) with the Department of Trade & Taxes ('DT&T'), Government of National Capital Territory of Delhi ('GNCTD'), is to the notice dated 9th February 2016 issued under Section 59 (2) of the Delhi Value Added Tax Act, 2004 ('DVAT Act') along with the letter dated 24th February 2016 issued by the Assistant Commissioner (VAT Audit).

2. The Petitioner states that it has been filing its returns regularly with the DT&T and also making other statutory compliances in terms of the provisions of the DVAT Act and Delhi Value Added Tax Rules 2005 ('DVAT Rules'). It is stated that during the year 2009-10, the Petitioner filed monthly returns in form DVAT 16, which returns were taken to be notice of assessment under Section 31 of the DVAT Act.

3. On 2nd August 2013, a notice for audit of the business affairs was issued to the Petitioner by the Value Added Tax Officer ('VATO') under Section 58 of the DVAT Act in form DVAT-37 asking it to produce documents indicated in the notice. In response to the above notice, the Petitioner appeared on several dates before the VATO and produced documents including records, books of accounts, invoices, details of purchases (DVAT-30 & 31) apart from the audit report including the balances sheet and chart showing the method of claiming deductions towards various expenses claimed in the return.

4. The limitation of four years for making the default assessment for the period 2009-10 expired on 31st March 2014. Till that time, no assessment

notice under Section 32 of the DVAT Act was framed as the proceedings continued thereafter. It is stated that the audit proceedings which were initiated on 2nd August 2013 concluded on 23rd June 2014. The audit report, prepared on 4th July 2014, inter alia covered the period from 1st April 2009 to 31st March 2010. It was a month-by-month analysis of the returns filed. It calculated month-wise, the gross turnover. At the end of audit report, a demand of Rs.14,43,95,186 towards tax, Rs.10,61,40,115 towards interest, Rs.36,84,90,564 towards penalty (a total sum of Rs. 61,90,25,865) was proposed.

5. The VATO issued default notices of tax, interest and penalty under Sections 32 and 33 of the DVAT Act on 4th/9th July 2014. However, in these default notices, no mention was made of any concealment, omission or failure by the Petitioner in furnishing any material particulars although the audit report adverted to these aspects.

6. The Petitioner filed Writ Petition (Civil) No. 5231 of 2014 in this Court challenging the aforementioned default notices, essentially on the ground of limitation. The point urged before this Court was that in terms of Section 34 (1) (a) of the DVAT Act, no assessment or reassessment under Section 32 of the DVAT Act could be carried out by the Commissioner after the expiry of four years from the end of the year for which the person furnished a return under Section 26 or 28 of the DVAT Act. With the four year limitation calculated from the end of the year 2009-10 having expired on 31st March 2014, the default notices under Sections 32 and 33 of the DVAT were time barred.

7. At this juncture, it requires to be noticed that the proviso to Section 34 (1) extends the period of limitation up to six years where the Commissioner “has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars”.

8. During the course of hearing of the above Writ Petition (Civil) No. 5231 of 2014, the learned Additional Solicitor General of India appeared on behalf of DT&T and urged that although the default notices had not expressly invoked the proviso to Section 34(1) of the DVAT Act, they impliedly did so if one were to examine in detail the ingredients of the said notices. The Petitioner had repeatedly been taking time to furnish the details and did not do so.

9. The Court by its final order dated 14th May 2015 held that the default notices under Sections 32 and 33 of the DVAT Act dated 9th July 2014 were barred by limitation. In paras 7 and 8 of the judgment dated 14 th May 2015 it was observed as under:

“7. Apart from the fact that the proviso to section 34 (1) of the said Act has not been invoked and the ‘reasons to believe’ have not been recorded in writing, what is shocking is the document which has been placed at page 18 of the rejoinder affidavit filed by the petitioner which is a certified copy of the file noting dated 09.03.2014 of the Assistant Commissioner (HQ). The said noting is reproduced in its entirety herein below:-

“Sub: Request for Extension of time to conduct Audit of Cases pertaining to CWG.

May kindly see the list of cases allotted to this branch for audit of business affairs, for the year 2009-10 & 2010-11. These cases have been recommended for audit by the CVC as these firms were engaged in Common Wealth Games related projects.

It is pertinent to mention here, that all the officers of the Branch are currently engaged in Enforcement duties in accordance with the order of the Competent Authority. Besides, the ensuing Election duties are sure to keep these officer occupied up to mid May, 2014. Since, the cases for the year 2009-10 are due to get time-barred by 31.03.2014, it is important to seek extension of time limit for these cases for the year 2009-10.

If, agree, we may request the Competent Authority to kindly consider for extension of time-limit as per provision of the Act & Rules (u/s 34 of DVAT).

Sd/- 9-3-14

Asst. Commissioner (HQ)

Addl. Commissioner. (VAT Audit) Sd/ 10-3-14”

(underlining added)

From the above extract it is evident that the reasons for extending the time for completing the re-assessment proceedings were not the reasons indicated in the proviso to Section 34(1) but other purported reasons of pendency of cases, election duty etc. etc. Those purported reasons did not permit the Respondent to invoke the extended period of limitation given in the proviso to section 34(1) of the said Act.

8. We, therefore, hold that the default assessment notice dated 9th July 2014 is time barred and is quashed. The revenue may, however, take recourse to such other action as may be permissible in law.”

10. On 23rd December 2015 the Special Commissioner (Special Zone) passed an order under Section 67 (2) of the DVAT Act assigning the Petitioner's case to Mr. Praveen Verma, Assistant Commissioner to take recourse to such other action in light of the judgment dated 14 th May 2015 passed by this Court in Writ Petition (Civil) No. 5231 of 2014.

11. Pursuant to the above order passed by the Special Commissioner (Special Zone), a note was prepared by the DT&T on 26th November 2015 regarding coercive action available to it. The note referred to opinion of an advocate that if the facts so justified, the DT&T can avail of the extended period of limitation of six years. The matter was then assigned to Mr. Brijesh Sharma, AC (Audit) for further necessary action. Thereafter the Commissioner, DT&T assigned the matter to Mr. Praveen Verma, Assistant Commissioner (VAT Audit). On 1st January 2016 Mr. Praveen Verma prepared a detailed note for the consideration of the Additional Commissioner (VAT Audit) in which he noted that the six years' period was to expire on 31st March 2016. In the note, it was inter alia observed as under:

> "In the case of M/s. ITD ITD CEM JV, while scrutinizing DVAT-16 (returns filed by the dealer for the year 2011-12) it has been observed that the dealer has claimed exemption/deduction towards labour, services and like charges more than the permissible limit as specified under Rule 3 of DVAT Rules, 2005. In the financial year 2009-10, the dealer has shown his taxable turnover as Rs. 88,89,16,555 whereas he has claimed deductions to the tune of Rs. 274,20,36,059. Under normal circumstances, if a dealer deductions of Rs. 274,20,36,059 then his gross turnover should be 1096,81,44,236. It appears that the dealer has concealed a substantial part of his turnover, thereby, apparently avoiding/under-calculating his tax liabilities. It is the reason to believe that due tax has not been paid by the dealer and there is every likelihood of concealment, omission or failure to disclose full material particulars on the part of the dealer."

12. The note therefore proposes that the Commissioner, VAT is to allow extension of time for assessment for the period 2011-12 up to six years in terms of the proviso to Section 34 of the DVAT Act and the above extension is required "for the purpose of verifying concealment etc. after scrutiny of records of the dealer for the year 2009-10."

13. When the above note was placed before the Additional Commissioner (Audit) who made, in his handwriting, an endorsement

referring to "as the Assessing Authority has clearly indicated high possibility of concealment, omission or failure to disclose full material particulars on the part of the dealer resulting in lower gross turnover and tax liability."

14. With the Commissioner, VAT having approved the above note, a notice under DVAT-37 was duly issued to the Petitioner on 7 th January 2016 proposing a special audit be conducted for the year 2009-10. The Petitioner replied on 12th January 2016 objecting to the above notice on the ground that it was without jurisdiction. When the VATO disagreed with the objection, Writ Petition (Civil) No. 713 of 2016 was filed by the Petitioner challenging the re-initiation of the audit proceedings.

15. When the writ petition was finally disposed of on 1 st February 2016, Mr. Gautam Narayan, learned panel counsel for the DT&T produced a letter dated 30th January 2016 written by the Assistant Commissioner (VAT Audit Branch) in which it was stated that DT&T did not want to insist on fresh audit proceedings under Section 58 of the DVAT Act. The Court then passed the following order:

> "1. Aggrieved by the issuance of an Audit Notice dated 7 th January 2016 by the Commissioner of Trade and Taxes in Form DVAT-37 in exercise of the powers under Section 58 of the Delhi Value Added Tax Act, 2004 read with Rule 46 of the Delhi Value Added Tax Rules, 2005, the Petitioner ITD-ITD CEM JV has filed this writ petition.
>
> 2. Earlier, a notice of Audit dated 2nd August, 2013 had been issued to the Petitioner by the Commissioner, Department of Trade and Taxes, Government of NCT of Delhi (GNCTD) and pursuant thereto an Audit Report dated 4 th July, 2014 was prepared after scrutinizing the books of account of the Petitioner. This led to a notice of default assessment of tax being issued under Section 32 of the Act on 9th July, 2014. Additionally, a notice of penalty of the same date was issued under Section 33 of the Act. Both these were challenged by the Petitioner in this Court by filing W.P.(C) 5231/2014. The challenge was on the ground that given the relevant assessment period was 1st April, 2009 to 31st March, 2010, the default assessment and penalty notices under Sections 32 and 33 of the Act issued on 9th July, 2014 were time barred.
>
> 3. By a judgment dated 14th May, 2015, this Court quashed the default assessment notices as being time barred. Para 8 of the said order reads as under:

"8. We, therefore, hold that the default assessment notice dated 09.07.2014 is time barred and is quashed. The revenue may, however, take recourse to such other action as may be permissible in law."

4. It is, thereafter, that the impugned Audit Notice dated 7 th January, 2016 was issued stating that an audit is required to be undertaken for the very same period, i.e., 1st April, 2009 to 31st March, 2010.

5. On the previous date, i.e., 27th January, 2016, this Court had, while directing notice to be issued to the Respondent, ordered that the Value Added Tax Officer (VATO) would not pass any order in respect of the impugned notice. Learned counsel for the Respondent had stated that he would take instructions in the matter.

6. Today, Mr Gautam Narayan, learned Additional Standing Counsel for the Respondent, has produced before the Court a letter dated 30th January, 2016 addressed to him by the Assistant Commissioner, VAT Audit Branch of the Department of Trade and Taxes, GNCTD which, inter alia, states that in light of the observations of this Court on the previous date, the Department of Trade and Taxes, GNCTD "does not want to insist on fresh audit proceedings under Section 58 of the DVAT Act, 2004 and the Audit Notice issued for the same shall be withdrawn with the permission of the Hon'ble High Court". The letter proceeds to state that the Department intends to initiate fresh assessment proceedings under Sections 32 and 33 of the DVAT Act on the basis of the records available with it and other material facts/documents submitted by the dealer during the audit proceedings concluded earlier.

7. While, Mr Rajesh Jain, learned counsel appearing for the Petitioner, submits that no further proceedings are warranted, the contention of Mr Narayan is that the right of the Department to initiate further proceedings in accordance with law has already been reserved by this Court in para 8 of its order dated 14th May 2015 and, therefore, the Department is within its right to proceed further in accordance with law.

8. In light of the instructions given to Mr Narayan in the letter dated 30th January 2016 addressed to him, the prayer in the present petition does not survive. The said letter states that the Respondent does not wish to proceed with the Audit proceedings

> and is withdrawing the Audit Notice dated 7 th January, 2016. The said statement is taken on record and the impugned notice dated 7th January 2016 is treated as having been withdrawn by the Respondent.
>
> 9. As far as further action that the Respondent states it intends to take is concerned, this Court does not consider it necessary to express any opinion whatsoever on the legality of such action as that would be a hypothetical exercise at this stage. The Court also does not consider it necessary to add anything to what has been already stated by it in the order dated 14th May, 2015 as far as the permissible course of action for the Department to take is concerned.
>
> 10. The writ petition is disposed of in the above with no order as to costs."

16. After the above order of the Court, the impugned notice dated 9 th February 2016 was issued by the Assistant Commissioner (VAT Audit) to the Petitioner, which reads as under:

> "Assessment of tax liabilities of M/s. ITD ITD CEM JV is required to be done under Section 32 and 33 of DVAT Act for the year 2009-10 as there are reasons to believe that there has been suppression of gross turnover as shown by the dealer in DVAT returns filed by the dealer for the period concerned. Accordingly, Section 34 of DVAT Act is being invoked with the approval of Competent Authority. The assessment under Section 32 and 33 of DVAT Act read with Section 34 of DVAT Act shall be done on the basis of dealer's records, and findings thereon, available with this department.
>
> An opportunity is hereby given to the dealer to submit any additional information other than what has already been submitted by the dealer, concerning assessment of tax liabilities for the year 2009-10, which he may find relevant to be submitted, before assessment is framed. It is, therefore, directed that the same may be submitted to the undersigned on or before 16th February 2016."

17. The Petitioner then filed a detailed objection, by its letter dated 15th February 2016 wherein various grounds were taken why re-assessment proceedings under Sections 32 and 33 of the DVAT Act could not be initiated.

18. On 24th February 2016 the Assistant Commissioner (Special Zone VAT) responded to the above letter dated 15th February 2016 in which the Petitioner was asked to furnish additional information before 2 nd March 2016.

19. Aggrieved by the above order, the Petitioner filed the present writ petition. At the first hearing, i.e., on 2nd March 2016 while accepting notice, Mr. Gautam Narayan, learned Additional Standing counsel for the DT&T, stated that he would produce the file in which the reasons to believe that the turnover of the Petitioner/dealer has escaped assessment for the period in question, have been recorded. Mr. Narayan also stated that "till the next date, no order will be passed pursuant to the impugned notice issued to the Petitioner under Section 59 (2) of the DVAT Act, 2004."

20. Thereafter, the petition was finally heard on 16 th March 2016. Mr. Narayan produced the original file and also prepared a compilation of the relevant documents filed by the Petitioner.

21. The file contains the notings, already referred to hereinabove. At the outset it requires to be noticed that on a perusal of the records produced before the Court, it is seen that in the chart prepared by the DT&T for the period April 2009 to March 2010, the Petitioner disclosed gross turnover of Rs. 424,34,40,248 in relation to which it claimed exemption in the sum of Rs. 274,20,36,059. In making the fresh proposal on 29th January 2016 for invoking the extended period of limitation, the approach of the Assistant Commissioner (VAT Audit) was to infer from the figure of deduction of Rs. 274,20,36,059 filed by the Petitioner in its returns, that it should have been Rs. 1096,81,44,236. The emphasis was inter alia, on what ought to have been the gross turnover. The basis for this estimation was the permissible standard deduction of 25% of the total value of the contract towards labour, services and other like charges, where the actual expenses on these heads is not ascertainable and an Assessee is unable to provide the requisite documentation as proof of the expenses incurred. In this context, Rules 3 (1) and (2) of the DVAT Rules are relevant.

22. There is a basic misconception in this approach inasmuch as there was absolutely no material for the Assistant Commissioner (VAT Audit) to have "reasons to believe" that the Petitioner had concealed "a substantial portion of its turnover". The gross turnover was being taken as Rs. 424,34,40,248 whereas the claim of deduction was in the sum of Rs. 274,20,36,059. As it was urged in the course of hearing by Mr. Narayan, the case of the DT&T is that there is no material produced by the Petitioner to justify the claim of the above entry, i.e., far above the permissible limit of 25% in terms of Rule 3 (2) of DVAT Rules. Mr. Narayan repeatedly urged before this Court that this rule must be read as forming part of the "reasons to believe" recorded by the Assistant Commissioner (VAT Audit) in the noting dated 29th January 2016 of the file and this formed the basis of issuance of the notice to the Petitioner. Mr. Narayan further submitted that

since it was only a notice and not an assessment order, it would be open to the Petitioner to appear before the Assistant Commissioner (VAT Audit) and place the entire documents available to it to substantiate the claim for exemption in the sum of Rs.274,20,36,059.

23. The law is well settled that the reasons for reopening the re-assessment by invoking the extended period of limitation under Section 34 of the DVAT Act have to be recorded in the file was explained by this Court in H.M. Industries v. Commissioner of Value Added Tax (2015) 78 VST 382 (Del) :

> "The said "reasons to believe" have to be formed by the Commissioner. Secondly, the said expression "reasons to believe" must have nexus and live link with failure to pay tax because of concealment, omission or failure to disclose material particulars by the Assessee. Thus, the Commissioner is required to form an opinion in the nature of "reasons to believe" that there was failure, omission or concealment to disclose material particulars which had the effect of short- payment or non-payment of tax. The "reasons to believe" and satisfaction of any of the three stipulations are a jurisdiction precondition and a mandatory requirement which must be met to apply and seek benefit of extended period of six years."

24. Turning to the case on hand, it is not legally permissible for the DT&T at this stage to supply fresh reasons to believe, other than what is recorded in the file. While the reasons recorded in the file speak of the concealment by the Petitioner of "substantial part of his turnover", the real reason as transpired during the course of hearing is regarding excessive claim of exemption made by Petitioner.

25. There is, therefore, certainly no failure/omission on the part of the Petitioner to furnish material particulars which forms the basis of re-assessment in terms of the proviso to Section 34 of the DVAT Act. The proviso is very clear that there has to be "concealment, omission or failure to disclose fully material particulars" by the Petitioner. In relation to the claim for exemption there is nothing in the "reasons to believe" as recorded by the Respondent to show that there was any concealment or omission or failure by the Petitioner to disclose material particulars. As already noted, the reasons to believe talk of "suppression of gross turnover". The materials gathered by the DT&T, if any, ought to have a live nexus to the formation of the belief that there is escapement of turnover from assessment. The reasons to believe as recorded make no reference to any such material. In fact, a tabular chart prepared by the DT&T placed before the Court refers to the very figures of gross turnover, works contract and sale of capital goods, as disclosed by the Petitioner in the return filed.

26. Mr Narayan referred to the audit report and urged that the said report should form the basis for the reasons to believe that exemption far in excess of what was permissible and supported by the disclosed documents had been claimed by the Petitioner. He further urged that since the note on the file referred to the audit report, it cannot be said that the reasons to believe as recorded were not based on such audit report.

27. There are several difficulties in accepting the above submission. As already noticed, the reasons to believe as recorded are about "suppression of gross turnover" and not about claim of excess exemption. Secondly, the audit report formed the basis of the previous round of litigation. It will be recalled that the notice of default assessment of tax dated 9th July, 2014 was based on the said audit report and the said notice was quashed by this Court by the order dated 14th May 2015 in W.P.(C) 5231/2014 on the ground that it was time barred. Merely because the Court in the said order reserved the right of the DT&T "to take recourse to such other action as may be permissible in law" did not permit it to initiate one more round of litigation on the very same material. That would be an abuse of the process of law. Such other action would have to be based on some fresh material. Thirdly, the Court cannot possibly read into the reasons as recorded in the file, all of the above fresh reasons being put forth by the DT&T to justify what is a legally indefensible course of action.

28. There is yet another issue that has been raised by the Petitioner which concerns the power and jurisdiction of the Assistant Commissioner (VAT Audit). It is seen that the assignment to Mr. Praveen Verma, Assistant Commissioner (VAT Audit) to undertake the task of issuance of notice of reopening the reassessment was made by the order dated 23rd December 2015 of the Special Commissioner (Special Zone) under Section 67 (2) of the DVAT Act. Under Section 67 (2) of DVAT Act there is no power of delegation as such but the power to issue orders "for the due and proper administration" of the DVAT Act and "all such persons engaged in the administration of this Act shall observe and follow such orders, instructions and directions of the Commissioners." It is not understood how the Special Commissioner (Special Zone) could have delegated powers in terms of Section 67 (2) of DVAT Act and in particular, the power of reopening the reassessment to the Assistant Commissioner (VAT Audit). Interestingly, the impugned notice is issued by the Assistant Commissioner (VAT Audit) and not the Assessing Officer who has been duly empowered to issue it.

29. A further issue that arises is that in re-opening an assessment in exercise of the powers under Section 34 of the DVAT Act, the VATO concerned is expected to act independently and not under the dictates

of any superior officer. Here, as the file notings show, the Additional Commissioner (VAT Audit) prepared a note proposing the re-opening of assessment which was approved by several of the superior officers up to the level of the Commissioner, VAT.

30. For all the aforementioned reasons, the Court holds the impugned notice dated 9th February 2016 issued under Section 59 (2) of the DVAT Act along with the letter dated 24th February 2016 issued by the Assistant Commissioner (VAT Audit) to be unsustainable in law and they are hereby quashed. The writ petition is allowed in the above terms but with no order as to costs. The pending application is also disposed of.

[2015] 53 DSTC 94 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar and Justice Vibhu Bakhru]

W.P.(C) 1625/2014 & CM 3374/2014

Tim Delhi Airport Advertising Pvt. Ltd. ... Petitioner

Versus

Special Commissioner – II,
Department of Trade & Taxes and Ors. ... Respondent

Date of Judgment : May 2, 2016

TRANSFER OF RIGHT TO USE GOODS – PRE – DEPOSIT – NOTICE U/S 59(2) OF DVAT ACT- WRIT PETITION CHALLENGING THE TAXABILITY OF THE ENTIRE TURNOVER FOR USE OF THE HOARDINGS, PANELS, DISPLAY BOARDS , KIOSKS ETC BASED ON RULING MADE BY THE COMMISSIONER VAT U/S 85 OF DVAT ACT, 2004 – ORDER BY OHA DIRECTING DEPOSIT OF RS 3.14 CR BEING 20 % OF DISPUTED DEMAND OF VAT & INTEREST AND NOTICE U/S 59 TO PRODUCE THE DOCUMENTS ALSO CHALLENGED- SITES WERE BEING USED BY THE PETITIONER FOR RENDERING SERVICES AND NO RIGHT TO USE THE SITES HAD IN FACT BEEN TRANSFERRED BY THE PETITIONER- MERELY BECAUSE THE ADVERTISEMENTS OF THE ADVERTISERS WERE DISPLAYED ON THE SITES WOULD NOT NECESSARILY LEAD TO THE CONCLUSION THAT THEY HAD ACQUIRED THE RIGHT TO USE THE SITES. THE COURT HELD THAT TRANSACTIONS ENTERED INTO BY THE PETITIONER IT WILL BE DIFFICULT TO ACCEPT THE VIEW THAT THE SAME CONSTITUTED TRANSFER OF RIGHT TO USE THE SITES IN QUESTION- THE ORDER OF THE COMMISSIONER U/S 85 COULD NOT BE APPLIED IN EACH CASE WHERE ADVERTISEMENTS WERE DISPLAYED ON HOARDINGS, PANELS ETC-THE COURT MODIFIED THE ORDER AND DIRECTED THE SPECIAL COMMISSIONER TO CONSIDER THE OBJECTIONS FILED BY THE PETITIONER IN LIGHT OF THE OBSERVATIONS MADE IN THIS ORDER WITHOUT INSISTING ON PRE-DEPOSIT OF ANY

AMOUNT- MATTER REMITTED TO ASSESSING AUTHORITY WITH REGARD TO THE IMPUGNED NOTICES UNDER SECTION 59 OF THE DVAT ACT REQUIRING THE PETITIONER TO PRODUCE DOCUMENTS FOR THE PERIOD OF 2012-13, DIRECTION WAS GIVEN TO COMPLETE THE ASSESSMENT KEEPING IN VIEW THE OBSERVATIONS MADE IN THE ORDER.

Facts of the Case

The petitioner was granted the license for designing, setting up, developing, operating and maintaining sites for display of advertisements in terms of a license agreement between DIAL and the petitioner. The sites were located within or in the vicinity of the Indira Gandhi International Airport, which was a secured area, and as such, access to the sites was highly restricted. The petitioner asserted that its business model was that it entered into agreements with various persons including advertisement agencies in terms of which the advertisement content and / or advertisement material was provided by the advertiser. The petitioner then printed and mounted the advertisement at the sites and was remunerated for the same. DIAL also entered into sponsorship agreements with the petitioner granting a non-exclusive license for procuring, acquiring or installing, managing, maintaining and upgrading MATVs at designated locations at the Indira Gandhi International Airport, New Delhi. The petitioner was licensed to display brand logos on the said screens. Pursuant to this agreement, petitioner entered into an agreement with LG Electronics India (P) Ltd. for installation of MATVs at various display sites at T3 of Indira Gandhi International Airport, New Delhi. According to the petitioner, it was rendering a service which fell within the taxable services of "sale of space or time for advertisement" as defined u/s 65(105) of the Finance Act, 1994. The petitioner was also duly registered with the Service Tax Department and regularly filed its returns of service tax in respect of the aforesaid services. The Finance Act, 1994 was amended w.e.f. 1st July, 2012 and a negative list of services was introduced by virtue of section 66D of the Finance Act, 1994 specifying the services that were not eligible to service tax. It was asserted that the service pertaining to Selling of Space or Time Slots for Advertisements other than Advertisements broadcasted by Radio or Television, was covered under the said list and, according to the petitioner, the services rendered by it in respect of advertisement were thus exempt from the levy of service tax with effect from 1st July 2012. The Commissioner VAT Delhi passed an order u/s 85 of DVAT Act, 2004 holding as under:

(a) The Advertisement hoardings, panels, display boards, kiosks etc., whether attached to immovable property/earth or not, are goods as defined u/s 2(m) of the DVAT Act, 2004.

(b) The advertisers are liable to pay Value Added Tax on the revenue received on account of deemed sale due to transfer of right to use of these hoardings, panels, display boards, kiosks etc.

Thereafter, VATO issued notice u/s 59 of the DVAT Act, 2004 to submit details for 2009-2010 to 2012-2013 for assessment. The petitioner responded that his transactions were not sales but were not accepted by the VATO and levied heavy tax, interest and penalty. OHA directed the petitioner to deposit 3.14 Cr. as pre condition for hearing the objection. The petitioner apprehended that his objections would be rejected and therefore, filed the writ petition.

Held That

On a plain reading of the license granted to the petitioner, it was doubtful whether the Petitioner had any right to transfer any right to use the Sites in question. It was also important to examine the Petitioner's contention that the Sites were being used by the Petitioner for rendering services and no right to use the Sites had in fact been transferred by the Petitioner. Merely, because the advertisements of the advertisers were displayed on the Sites would not necessarily lead to the conclusion that they had acquired the right to use the Sites. It was also relevant to state that a transfer of the right to use goods also entailed delivery of the goods in question. In Bharat Sanchar Nigam Ltd. *the Supreme Court opined that "....the essence of the right was that it related to user of goods. It may be that the actual delivery of the goods was not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It was assumed, at the time of execution of any agreement to transfer the right to use, that the goods were available and deliverable. If the goods, or what was claimed to be goods by the respondents, were not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise." In this case it was not disputed that the Sites in question were located in a restricted area and none of the advertisers had an unmitigated access to those Sites; the Petitioner affirmed that possession of the Sites was retained by DIAL. In the circumstances, it would be difficult to accept the view that the transactions entered into by the Petitioner with the advertisers constituted transfer of the right to use the Sites in question.*

Insofar as the challenge to the order dated 6th April, 2011 passed by the Commissioner under Section 85 of the DVAT Act was concerned, it was obvious that the aforesaid order must be applied keeping in view the

facts of each case. The said order could not be read to mean that in every case where advertisements were displayed on hoardings, panels, display boards, kiosks, etc., the advertisers would be liable to pay VAT on the amount received for display of such advertisements. The said decision had limited application and would have been applicable only in cases where it was found as a matter of fact that there had been a transfer of right to use hoardings, panels, display boards, etc. which constituted goods. Clearly, the said decision could not be applied where the necessary concomitants of sale under Section 2(1)(zc)(vi) were absent – there had been no transfer of the right to use goods and/or the possession of the goods in question was retained by the owner and not transferred to the advertisers.The decision in the case of Selvel Advertising Pvt. Ltd. *also could not be read as an authority for the proposition that in all cases where advertisements were displayed on hoardings, the revenue earned would be chargeable to VAT. However in cases where the hoardings, display boards, etc. were found to be movable property (i.e. goods) and there was a transfer of the right to use such hoardings in favour of the advertisers, the ratio of* Selvel Advertising *would be applicable and the consideration received for the right to use hoardings could undoubtedly be bought to tax if the provisions of the relevant taxing statute contained clauses, which were similarly worded as Article 366 (29-A) of the Constitution of India. In the case of* Upasana Finance Ltd. *, the Tamil Nadu Taxation Special Tribunals had itself clarified that it would have to be found on facts "whether a person who erects the hoardings only lets on hire the hoardings for display of advertisements or whether he also undertakes the job of designing the advertisements and painting the hoardings. Even here the two transactions are clearly separable. For the hire-charges of the hoardings, the person who erects is certainly liable to be taxed under section 3-A. This will depend upon the facts of each case." The question whether a transaction entailed transfer of the right to use would have to be examined by ascertaining the true nature and intention of the parties and whether the necessary ingredients of sale were present. The Tribunal's decision, in* Upasana Finance Ltd.*, to the extent that it held that possession of the hoardings was not relevant, could not be accepted in light of the unequivocal view expressed by the Supreme Court in* Bharat Sanchar Nigam Ltd. *The court modified the order and directed the Special Commissioner to consider the objections filed by the Petitioner in light of the observations made in the order without insisting on pre-deposit of any amount. With regard to the impugned notices under Section 59 of the DVAT Act requiring the Petitioner to produce documents stated therein for the period of 2012-13, the court directed the assessment be completed keeping in view the observations made in the order. The petition was disposed of in the above terms.*

Cases Referred to:

- *Selvel Advertising Private Limited v. Commercial Tax Officers, Alipore Charge: (WBTT) (1993) 89 STC 1*
- *Tamil Nadu Taxation Special Tribunal in Upasana Finance Ltd. v. State of Tamil Nadu and Anr.: (1999) 113 STC 403*
- *Gujarat Ambuja Cements Ltd. v. Union of India: (2005) 274 ITR 194 (SC)*
- *Bharat Sanchar Nigam Ltd. v. Union of India: 2006 (3) SCC 1*
- *Union of India v. Shri Harbhajan Singh Dhillon: (1971) 2 SCC 779*
- *Governor General in Council v. Province of Madras: (1945) FCR 179 P.C.*
- *Federation of Hotel & Restaurant Association of India v. Union of India: (1989) 3 SCC 634*
- *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes &Ors.: (2008) 2 SCC 614*
- *State of Andhra Pradesh and Anr. v. Rashtriya Ispat Nigam Ltd.: (2002) 3 SCC 314*
- *Indus Towers Ltd. v. Commissioner of Income Tax & Ors.: (2014) 364 ITR 114 (Delhi)*

For the Petitioner : Mr N. Venkatraman, Senior Advocate with Mr Nand Kishore, Ms Anshul Verma and Ms Amoha Sharma.

For the Respondents : Mr Satyakam, Additional Standing Counsel for R-1 to 3.
Mr Rahul Kaushik, Senior Standing Counsel CBEC with Mr Bhavishya Sharma for R-4.

Vibhu Bakhru, J

1. The Petitioner, a company incorporated under the Companies Act, 1956, has filed the present petition under Articles 226 and 227 of the Constitution of India, inter alia, impugning separate notices of default assessment dated 5th August, 2013 whereby the Petitioner's entire turnover for the period 2010-11 and 2011-12 has been assessed to Value Added Tax (VAT) and penalty and interest has also been levied in addition to the tax assessed. The Petitioner also impugns an order dated 7th February, 2014 as rectified by an order dated 13th February, 2014 passed by the Special Commissioner (VAT) directing a deposit of Rs.3,14,00,000/- - being 20% of the disputed demand of VAT and interest for the period 2011-12 - as a pre-condition for hearing the objections filed by the Petitioner in respect of demand raised for the financial year 2011-12. In addition, the Petitioner also impugns a ruling dated 6th April, 2011 made by the Commissioner (VAT) under Section 85 of the Delhi Value Added Tax Act, 2004 (hereafter 'the DVAT Act') whereby the Commissioner has held that advertisement

hoardings, panels, display boards, kiosks etc. are 'goods' as defined under Section 2(m) of the Act and the advertisers are liable to pay VAT on the revenue received on account of deemed sale resulting from transfer of the right to use the said hoardings, panels, display boards, kiosks etc. A further challenge is also laid to the notices under Section 59 of the DVAT Act dated 8th May 2013 and 21st October 2013 requiring the Petitioner to produce the documents stated therein for the period of 2012-13.

2. The principal controversy involved in this petition is whether the Petitioner, who is a licensee in respect of certain advertisement display sites (hereafter 'the Sites'), would be liable to pay VAT on the revenue earned from display of advertisement at the Sites. According to the Petitioner, the Sites are being used by the Petitioner itself for rendering services and there is no transfer of any right to use those sites as alleged by the Revenue. The Revenue, on the other hand, contends that the Sites for display of advertisements are 'goods' and the Petitioner has transferred the right to use those goods to various advertising agencies/advertisers, who use the Sites for display of their advertisement and/or advertisements of their clients.

Factual background

3. The Delhi International Airport Ltd. (hereafter 'DIAL') had entered into Operations, Management and Development Agreement dated 4th April, 2006 (hereafter 'OMDA') with the Airport Authority of India (hereafter 'AAI') whereby AAI has granted DIAL, the exclusive right and authority to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage the Indira Gandhi International Airport. With the view to develop, setup, operate, maintain and manage various sites for display of advertisement, DIAL issued a Request For Proposal ('RFP') on 11th March, 2010 requesting interested parties to bid for participating in a joint venture company which would be: (i) licensed for establishing, setting up, developing, operating, maintaining and managing the Sites for display of advertisements; and (ii) granted rights to procure install and maintain Master Antenna Television Screens (MATV) and wall clocks at certain locations and display of brand logos in terms of the Sponsorship Agreement. The Petitioner successfully participated in the bidding process and was granted the licence for designing, setting up, developing, operating and maintaining the Sites for display of advertisements in terms of a licence agreement dated 17th August, 2010 (hereafter „the Licence Agreement').

4. The Sites are located within or in the vicinity of the Indira Gandhi International Airport, which is a secured area, and as such, access to the

Sites is highly restricted. The Petitioner asserts that its business model is that it enters into agreements with various persons including advertisement agencies in terms of which the advertisement content and/or advertisement material is provided by the advertiser. The Petitioner then prints and mounts the advertisement at the Sites and is remunerated for the same.

5. DIAL has also entered into a Sponsorship Agreement dated 17th August, 2010 and a supplementary agreement dated 18th August, 2011 with the Petitioner whereby, the Petitioner has been granted a nonexclusive licence for procuring, acquiring, installing, managing, maintaining and upgrading 318 nos. MATVs at designated locations at Indira Gandhi International Airport, New Delhi. The Petitioner is licensed to display brand logos on the said screens. The Petitioner states that pursuant to the aforesaid agreement, the Petitioner has entered into an agreement with M/s LG Electronics India Pvt. Ltd. (hereafter 'LG') for installation of 318 MATVs at various display sites at Terminal-3 of the Indira Gandhi International Airport at New Delhi.

6. According to the Petitioner, it is rendering a service which falls within the taxable services of "sale of space or time for advertisement" as defined under Section 65(105) (zzzm) of the Finance Act, 1994. The Petitioner was also duly registered with the Service Tax Department and regularly filed its returns of service tax in respect of the aforesaid services for the period August, 2010 to June, 2012.

7. The Finance Act, 1994 was amended w.e.f. 1st July, 2012 and a negative list of services was introduced by virtue of Section 66D of the Finance Act, 1994 specifying the services that were not exigible to service tax. It is asserted that the service pertaining to selling of space or time slots for advertisements other than advertisements broadcasted by radio or television, is covered under the said list and, according to the Petitioner, the services rendered by it in respect of advertisement are thus exempt from the levy of service tax with effect from 1st July, 2012.

8. In the meantime, on 6th April, 2011, the Commissioner (Trade and Taxes) Delhi, VAT passed an order under Section 85 of the DVAT Act, inter alia, holding as under:

> "a) The advertisement hoardings, panels, display boards, kiosks etc., whether attached to immovable property/earth or not, are goods as defined under section 2(m) of the DVAT Act, 2004.
>
> b) The advertisers are liable to pay Value Added Tax on the revenue received on account of deemed sale due to transfer of right to use of these hoarding, panels, display, kiosks etc."

9. In the aforesaid order, the Commissioner relied on the decision of the West Bengal Tax Tribunal in the case of *Selvel Advertising Private Limited v. Commercial Tax Officers, Alipore Charge: (WBTT) (1993) 89 STC 1* as well as the decision of the *Tamil Nadu Taxation Special Tribunal in Upasana Finance Ltd. v. State of Tamil Nadu and Anr.: (1999) 113 STC 403* wherein the Tribunals had held hoardings to be goods and letting of such hoardings as constituting a transfer of rights to use goods and thus, exigible to sales tax as a deemed sale.

10. Thereafter, the Value Added Tax Officer (hereafter 'VATO') issued a notice dated 8th May 2013 under Section 59 of the DVAT Act calling upon the Petitioner to submit details in respect of financial years 2009-10, 2010-11, 2011-12 and 2012-13 for the purposes of assessment under the DVAT Act. The Petitioner responded to the aforesaid notice by asserting that it was not engaged in any transaction that would constitute a sale within the meaning of clause (zc) of Sub-section (1) of Section 2 of the DVAT Act. The contention advanced by the Petitioner was not accepted and the VATO issued separate notices of default assessment dated 5th August, 2013 in respect of the financial years 2010-11 and 2011-12 imposing VAT of Rs.6,46,29,253/- along with interest of Rs.2,20,18,213/- and a penalty of Rs.7,62,62,456/- for the year 2010-11; and VAT of Rs.13,21,99,660/- along with interest of Rs.2,51,54,154/- and a penalty of Rs.8,72,51,736/- for the year 2011-12.

11. The Petitioner filed its objections against the aforementioned notices for default assessment before the Special Commissioner (VAT) on 7th October, 2013. The Petitioner also filed an application seeking complete waiver of pre-deposit for hearing the objections. Whilst, the matter relating to the financial years 2010-11 and 2011-12 was pending, the VATO issued another notice under Section 59 of the DVAT Act on 21st October, 2013 calling upon the Petitioner to submit the details for the financial year 2012-13. The Petitioner filed its detailed response to the aforesaid notice on 18th November, 2013 and was also afforded a hearing on 16th December, 2013. We have been informed that the matter relating to the year 2012-13 is still pending before the VATO.

12. Thereafter, on 7th February, 2014, the Special Commissioner (VAT) took up the objections and passed an order directing the Petitioner to deposit a sum of Rs.3,14,00,000/- as a pre condition for hearing the objections. The order erroneously indicated that the said condition of pre-deposit of the amount was agreed to by the Petitioner. Therefore, the Petitioner was constrained to file an application for rectification of the order dated 7th February, 2014 which was allowed by the Special Commissioner

(VAT) by an order dated 13th February, 2014. Thereafter on 26th February, 2014, the objections filed by the Petitioner for waiver of pre-deposit was taken up for hearing and was adjourned.

13. The Petitioner apprehends that its objections would be rejected and, therefore, has filed the present petition.

14. At the outset, we must state that the question whether the levy of service tax and VAT/Sales Tax are mutually exclusive, is no longer *res integra*.

15. The legislative competence of the Parliament to tax Services is traced to entry 97 of list I of the Seventh Schedule to the Constitution of India while the power of a State to levy Sales Tax or VAT is traced to entry 54 of List II of the Seventh Schedule to the Constitution of India. Undisputedly, States have the power to levy sales tax/VAT but the same is subject to the transaction falling within the parameters of a 'sale'. Taxing a transaction of rendering service would fall outside the legislative competence of a State legislature and thus, even by a device of legal fiction, such transactions cannot be subjected to levy of Sales Tax or VAT.

16. In *Gujarat Ambuja Cements Ltd. v. Union of India: (2005) 274 ITR 194 (SC)*, the Supreme Court had held that "This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field."

17. Following the aforesaid decision, the Supreme Court in *Bharat Sanchar Nigam Ltd. v. Union of India: 2006 (3) SCC 1*, held that: "No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales Tax."

18. Insofar as the legislative competence of Parliament or State to make a particular legislation is concerned, the same has to be considered

in the context of the subject of the legislation. In *Union of India v. Shri Harbhajan Singh Dhillon: (1971) 2 SCC 779*, a Constitution Bench of the Supreme Court applied the doctrine of pith and substance in order to examine whether imposition of wealth tax on agricultural lands, by virtue of an amendment to the definition of 'net wealth' under the Wealth Tax Act brought about by the Finance Act, 1969 fell within the legislative competence of the Parliament or the States. The Supreme Court has also in several cases explained the difference between the incidence of tax and the measure of tax. In several cases, it is seen that the subject and the pith and substance of two or more taxing statutes are different but the measure of such taxes is similar or overlapping.

19. In *Governor General in Council v. Province of Madras: (1945) FCR 179 P.C.,* the Court explained the distinction between the subject of tax and measure of tax in the context of duties of excise and sales tax in the following words:

> "...The two taxes, the one levied upon a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time upon the occasion of its sale....."

20. In *Federation of Hotel & Restaurant Association of India v. Union of India: (1989) 3 SCC 634*, the Supreme Court referred to the Aspect doctrine and explained that "the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspect."

21. However, in *Bharat Sanchar Nigam Limited (supra)*, the Supreme Court explained that the Aspect doctrine only dealt with the issue of legislative competence. In a later decision in *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes &Ors.: (2008) 2 SCC 614*, the Supreme Court unequivocally held that the levy of service tax and VAT were mutually exclusive and even in cases of composite contracts, sales tax would not be payable on the value of the entire contract irrespective of the element of service provided.

22. In cases where the contracts are indivisible - other than those contracts which are by legal fiction deemed to be divisible under Article

366 (29-A) of the Constitution of India - the intention of the parties to the transaction would be material. While, considering the issue whether providing SIM (Subscribers" Identification Module) Cards would be chargeable to sales tax, the Supreme Court, in *Bharat Sanchar Nigam Limited (supra)* held that: "if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon."

23. In view of the above, if a transaction has been held to be one of providing services then the same would not be chargeable to VAT. The dominant object of the transaction (other than those deemed to be divisible under Article 366 (29-A) of the Constitution of India) would be determinative of the nature of the transaction and consequently, dispositive of the question whether the same could be assessed as a 'sale' within the meaning of Section 2(1)(zc) of the DVAT Act.

24. The question whether a transaction would fall within the parameters of a deemed sale or a service is essentially a question of fact and would have to be determined in appropriate proceedings. The fact that the Assessee has filed its returns for service tax and also paid service tax may not be determinative of the true nature of the transaction and certainly, the authorities under the DVAT cannot be precluded from independently examining the transactions in question.

25. The objections filed by the Petitioner against notices of default assessment are pending consideration before the Objection Hearing Authority and, therefore, we do not consider it apposite to determine the question whether the transaction entered into by the Petitioner or the revenue earned by it would be assessable to VAT as a deemed sale by virtue of clause (vi) of Section 2(1)(zc) of the DVAT Act, that is, whether there is any transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. However, we feel that it is necessary to reiterate certain established principles. In Bharat Sanchar Nigam Ltd. (supra) the Supreme Court had explained that to constitute a transaction of transfer of a right to use goods, the transaction must have the following attributes:

"(a) There must be goods available for delivery;

(b) There must be a consensus ad idem as to the identity of the goods;

(c) The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

(d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute - viz. a “transfer of the right to use” and not merely a licence to use the goods;

(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.”

26. It is relevant to state that Article 366 was amended by the 46th Amendment to include Sub-Article 29-A which reads as under:-

“4. Amendment of article 366. - In article 366 of the Constitution, after clause (29), the following clause shall be inserted, namely:- (29A) “tax on the sale or purchase of goods” includes-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash,

> deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;'."

27. Clause (vi) of Section 2(1)(zc) of the DVAT Act is identically worded as clause (d) of Article 366 (29-A) of the Constitution of India. It is important to note that under the expanded scope of 'tax on the sale or purchase of goods', tax on transfer of the right to use goods has been included; this is not the same as a tax on the use of goods and the two expressions cannot be read synonymously. Therefore, for a transaction to fall within the meaning of Section 2(1)(zc)(vi) of the DVAT Act, it is necessary that there should be a transfer of the right to use.

28. In the *State of Andhra Pradesh and Anr. v. Rashtriya Ispat Nigam Ltd.: (2002) 3 SCC 314*, the Supreme Court rejected the contention of the State of Andhra Pradesh that higher charges collected by Rashtriya Ispat Nigam Ltd. (Respondent therein) for sophisticated machinery provided to the contractors was liable to be assessed to tax under Section 5-E of the Andhra Pradesh General Sales Tax Act, 1957. In that case, the Respondent, Rashtriya Ispat Nigam, had contracted certain works to contractors and had also undertaken to supply sophisticated machinery for the purposes of executing the contracted works in consideration for certain charges. The Supreme Court upheld the decision of the High Court that the hire charges collected were not taxable under Section 5-E of the Andhra Pradesh General Sales Tax Act as the transaction did not involve the transfer of the right to use the machinery in favour of the contractors. On analysis of the various clauses of the concerned agreements, the Court was of the view that although the sophisticated machinery was made available to the contractors for a charge, they were not free to make use of the machinery for other works. Even though, the machinery was placed in the custody of the contractors and they had the effective control of the machinery in question, the same did not result in the transfer of the right to use that machinery.

29. In the facts of the present case, it would be necessary for the authorities to examine the transactions entered into by the Petitioner from the stand point whether there has been any transfer of the right to use the Sites under the agreement entered into by the Petitioner with the advertisers.

30. *Prima facie*, on a plain reading of the Licence Agreement dated 17th August, 2010 entered into between DIAL and the Petitioner, it is difficult to

accept that the Petitioner acquired any right to transfer any right to use the Sites in question. The licence granted to the Petitioner is defined in the Licence Agreement, as under:

> "License" shall mean the license for designing, setting up, developing, managing, operating and maintaining the Sites for display of the Advertisements there at pursuant to the execution of the License Agreement awarded to the Selected Bidder for the License Term."

31. On a plain reading of the aforementioned definition, it is doubtful whether the Petitioner would have any right to transfer any right to use the Sites in question. It is also important to examine the Petitioner's contention that the Sites were being used by the Petitioner for rendering services and no right to use the Sites had in fact been transferred by the Petitioner. Merely, because the advertisements of the advertisers were displayed on the Sites would not necessarily lead to the conclusion that they had acquired the right to use the Sites.

32. In *Indus Towers Ltd. v. Commissioner of Income Tax & Ors.: (2014) 364 ITR 114 (Delhi),* a co-ordinate bench of this Court considered the question whether agreement entered into by a Telecom Tower owning company to provide passive infrastructure on a sharing basis to other telecom operators (referred to as 'Sharing Telecom Operators') could be understood as transferring the right to use such infrastructure. In that case, the Petitioner – Indus Towers Ltd. entered into arrangements to provide passive infrastructure facilities to Sharing Telecom Operators to the extent permitted within the regulatory framework. In terms of the arrangements, Indus Towers Ltd. argued to put up shelters at their towers in which Sharing Telecom Operators were permitted to keep and maintain their base terminal stations, associated antenna, back-haul connectivity to the network of the Sharing Telecom Operator and associated civil and electrical works required to provide telecom services. Indus Towers Ltd. also provided other facilities such as diesel generator sets, air conditioners, electrical and civil works, DC power system, battery bank etc. The Commissioner (VAT) held that the consideration received by Indus Towers Ltd. from the Sharing Telecom Operators was chargeable to VAT as it constituted consideration for 'sale' as defined in Section 2 (1)(zc)(vi) of the DVAT Act. This view was rejected by this Court as it was held that there was no intention on the part of Indus Towers Ltd. to part with the possession of its passive infrastructure. The Master Service Agreement entered into by Indus Towers with Sharing Telecom Operators merely permitted access to the passive infrastructure and the Sharing Telecom Operators did not acquire any right, title or interest over the site or the passive infrastructure.

33. It is also relevant to state that a transfer of the right to use goods also entails delivery of the goods in question. In *Bharat Sanchar Nigam Ltd. (supra)* the Supreme Court opined that "....the essence of the right under Article 366(29-A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise." In the present case, it is not disputed that the Sites in question are located in a restricted area and none of the advertisers have an unmitigated access to those Sites; the Petitioner affirms that possession of the Sites is retained by DIAL. In the circumstances, it would be difficult to accept the view that the transactions entered into by the Petitioner with the advertisers constituted transfer of the right to use the Sites in question.

34. Insofar as the challenge to the order dated 6th April, 2011 passed by the Commissioner under Section 85 of the DVAT Act is concerned, it is obvious that the aforesaid order must be applied keeping in view the facts of each case. The said order cannot be read to mean that in every case where advertisements are displayed on hoardings, panels, display boards, kiosks, etc., the advertisers would be liable to pay VAT on the amount received for display of such advertisements. The said decision has limited application and would be applicable only in cases where it is found as a matter of fact that there has been a transfer of right to use hoardings, panels, display boards, etc. which constitute goods. Clearly, the said decision cannot be applied where the necessary concomitants of sale under Section 2(1)(zc)(vi) are absent – there has been no transfer of the right to use 'goods' and/or the possession of the goods in question is retained by the owner and not transferred to the advertisers.

35. The decision in the case of Selvel Advertising Pvt. Ltd. (supra) also cannot be read as an authority for the proposition that in all cases where advertisements are displayed on hoardings, the revenue earned would be chargeable to VAT. However in cases where the hoardings, display boards, etc. are found to be movable property (i.e. goods) and there is a transfer of the right to use such hoardings in favour of the advertisers, the ratio decidendi of Selvel Advertising (supra) would be applicable and the consideration received for the right to use hoardings could undoubtedly be bought to tax if the provisions of the relevant taxing statute contain clauses, which are similarly worded as Article 366 (29-A) of the Constitution of India.

36. In the case of *Upasana Finance Ltd. (supra)*, the Tamil Nadu Taxation Special Tribunals had itself clarified that it would have to be found on facts “whether a person who erects the hoardings only lets on hire the hoardings for display of advertisements or whether he also undertakes the job of designing the advertisements and painting the hoardings. Even here the two transactions are clearly separable. For the hire-charges of the hoardings, the person who erects is certainly liable to be taxed under section 3-A. This will depend upon the facts of each case.” Clearly, the question whether a transaction entails transfer of the right to use would have to be examined by ascertaining the true nature and intention of the parties and whether the necessary ingredients of sale are present.

37. The Tribunal’s decision, in *Upasana Finance Ltd. (supra),* to the extent that it holds that possession of the hoardings is not relevant, cannot be accepted in light of the unequivocal view expressed by the Supreme Court in *Bharat Sanchar Nigam Ltd. (supra)*.

38. In the given facts of this case, we modify the order dated 7th February, 2014 (as rectified by the order dated 13th February, 2014) and direct the Special Commissioner to consider the objections filed by the Petitioner in light of the observations made in this order without insisting on pre-deposit of any amount.

39. With regard to the impugned notices under Section 59 of the DVAT Act dated 8th May 2013 and 21st October 2013 requiring the Petitioner to produce documents stated therein for the period of 2012-13, the court directs the assessment be completed keeping in view the observations made in this order.

40. The petition is disposed of in the above terms. The pending application also stands disposed of. The parties are left to bear their own costs.

[2015] 53 DSTC 110 – (Bombay)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
[Justice S.C. Dharmadhikari & Justice G.S.Patel, JJ.]

Judgement Reserved On : 1st February 2016
Judgement Pronounced On : 22nd February 2016

The Principal Commissioner of Central Excise
& Customs, Daman Commissionerate ... Appellant

versus

Omnitex Industriex (India) Limited ... Respondents

LIMITATION – TERRITORIAL JURISDICTION – DELAY OF 2192 DAYS IN FILING – CONDONATION OF – APPELLANTS WERE PURSUING THEIR REMEDY IN A COURT – APPEAL BEFORE GUJARAT HIGH COURT WAS FILED IN TIME – ENTIRE PERIOD, FROM THE TIME OF FILING OF APPEAL IN THE GUJARAT HIGH COURT TILL ITS DISPOSAL BY THAT COURT MUST BE EXCLUDED FOR THE PURPOSES OF LIMITATION- IF THAT IS NOT DONE, GREAT INJUSTICE AND UNFAIRNESS WILL RESULT- THE COURT DIRECTED THAT PAPERS IN EACH OF APPEALS BE RETURNED TO THE RESPECTIVE APPELLANT/ THEIR COURTS FOR PRESENTATION TO THE COMPETENT APPELLATE COURT, WHICH WAS BOMBAY HIGH COURT IN THIS CASE- THUS ENTIRE PERIOD FROM THE DATE OF FILING OF APPEALS IN THE GUJARAT HIGH COURT TO THE DATE OF ITS DISPOSAL BY HIGH COURT WAS TO BE EXCLUDED – SECTION 35G OF CENTRAL EXCISE ACT, 1944.

Facts of the Case

The present Appeal arised from an order dated 2nd January 2009 passed by the Customs, Excise & Service Tax Appellate Tribunal (“CESTAT”), West Zonal Bench, Ahmedabad and the CESTAT’s subsequent order dated 29th May 2009 in a rectification of mistake application by the Appellants. Copies of the two CESTAT appellate orders were received by the present Appellants on 28th January 2009 and 19th June 2009 respectively. The present Appellants preferred an Appeal under Section 35-G of the Central Excise Act, 1944 before the Gujarat High Court. That Appeal was lodged within 180 days, the period prescribed under Section 35-G(2)(a) of the Central Excise Act, 1944. On 28th April 2011, the Gujarat High Court admitted the Appeal. It then remained pending there till 12th January 2015, when the Gujarat High Court held that since the manufacturing unit in question was located within the Union Territory of Daman, in view of Section 36(b) of the Central Excise Act, 1944, the Gujarat High Court did not have the necessary territorial jurisdiction. The

Gujarat High Court therefore dismissed the Appeal, but gave liberty to the Appellants to pursue their remedies in a court of competent jurisdiction. It was pursuant to this order that the present Appeal was lodged in the Court on 29th July 2015. The Appellant then filed the Notice of Motion seeking that a delay computed at 2192 days be condoned. Section 35-G(2-A) conferred on the High Court before whom an Appeal is filed the discretion to admit an Appeal even after expiry of a period of 180 days, if it was satisfied that there was sufficient cause for not filing the Appeal within the prescribed period. This provision was in consonance with the provisions of Section 5 of the Limitation Act, 1963. However, Section 14 of the Limitation Act, 1963 was more apposite. In terms, this Section said that in computing the period of limitation for any Suit, the time during which the Plaintiff had been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or appeal or revision, against the defendant shall be excluded, where the proceeding related to the same matter in issue and was prosecuted in good faith in a Court which, from defect of jurisdiction or similar cause, was unable to entertain it. This Section and its application to various statutes, including in particular taxing statutes, had been interpreted in several authorities. A Division Bench of this Court in Union of India v Epcos India Private Limited held in the context of the Central Excise Act, 1944 that the period spent in prosecuting the Appeal bona fide before the CESTAT, later found to lack jurisdiction, was liable to be excluded under Section 14. In Ketan V. Parekh v Special Director, Directorate of Enforcement, the Supreme Court, in the context of Foreign Exchange Management Act, 1999 and its corresponding Rules as also the Central Excise Act, 1944, held that in an appropriate case Section 14 can be invoked to exclude the time an Appellant had spent prosecuting diligently his remedy before an incorrect forum. This was a consistent view of various courts. While considering this question, decision of the Supreme Court in M.P. Steel Corporation v. Commissioner of Central Excise could be referred. In that case, one of the questions was whether the Limitation Act, 1963 applied only to Courts and not to Tribunals, for the appeal in question in that case was before the tribunal. The Supreme Court noted the decision of the Supreme Court in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and in particular the five conditions that were set out in that decision for the correct invocation and application of Section 14 of the Limitation Act. These five conditions were by now well settled. Both the prior and subsequent proceedings must be civil proceedings prosecuted by same party; the prior proceeding should have been prosecuted with due diligence and in good faith; the failure of the prior proceeding must had been due to a jurisdictional defect or similar cause; both proceedings

must relate to the same matter in issue; and both proceedings must be in a Court. In its decision in M.P. Steel Corporation, the Supreme Court in terms held that the period spent in pursuing a remedy before another appellate forum ought to be excluded. The Supreme Court also said that Section 14 must be liberally construed to advance the cause of justice. In its decision in M.P. Steel Corporation, the Supreme Court said that the plain language of Section 14, construed in light of its statutory purpose, lends itself to just such a liberal interpretation. The statutory object was to ensure that, subject to conditions being met, a plaintiff or applicant or appellant was put in the same position as he would have been when he first commenced the proceeding in a court of competent jurisdiction; i.e., that the time taken diligently pursuing the same remedy in a court without jurisdiction should be excluded. In such a case, all that was necessary was the absence of negligence or inaction. As long as the party bona fide pursued a legal remedy, one that later turns down to be abortive, the time taken in that jurisdictionally deficient proceeding was to be excluded. If this were not so, the results would be anomalous. There was no doubt that the Appellants were pursuing their remedy in a "Court". The only question was one of lack of territorial jurisdiction. There was also no dispute that the Appeal before the Gujarat High Court was in fact filed in time. The entire period, therefore, from the time of filing of the Appeal in the Gujarat High Court till its disposal as above by that Court must, be fairly excluded for the purposes of limitation. If that was not done, great injustice and unfairness will result. The direction of High Court, with respect, was that the papers in each of these Appeals be returned to the respective Appellants / their Advocates for presentation to the Competent Appellate Court.

Held That

Held computing the delay to be condoned, if any, it was to be taken first the two dates that lie at the extremities, viz., the date of receipt of the order appealed against and the date of filing of the Appeal in the present Court. From this period, the entire period from the date of filing of the Appeal in the Gujarat High Court to the date of its disposal by that High Court was to be excluded. If the remaining period was found to be 180 days or less, then there was no question of any application being necessary to condone the delay and the Appeal was in time. It was only if this remaining period exceeded 180 days that the Appellant would be required to file a application seeking condonation of delay and setting out the reasons or cause which in the Appellant's opinion was sufficient. The court found that having regard to the circumstances, there was sufficient reason to condone the delay. The explanation given in the Affidavit in Support was adequate. The time

spent in prosecuting the Appeal before the Gujarat High Court was to be excluded. The Notice of Motion was allowed.

Cases Referred to:

- *Court in Union of India v Epcos India Private Limited*
- *M.P. Steel Corporation v. Commissioner of Central Excise*
- *2012 (275) ELT 3 (SC) Badlu & Anr. v Shiv Charan & Ors, (1980) 4 SCC 401*
- *Rajkumar Shivhare v Union of India, 2011 (273) E.L.T. 75 (Bom)*
- *Flemingo (Duty Free Shop) P. Ltd. v Commissioner of Customs (Appeals) Mumbai-I, 2015 (315) E.L.T. 321 (Bom)*
- *Steel Authority of India Ltd. v Collector of Central Excise, 1996 (82) E.L.T. 172 (S.C.)*
- *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department*

Present for the Appellants : Mr. Pradeep S. Jetly

Present for the Respondents : Mr. Prakash Shah, i/b PDS Legal.

Judgment

1. This is one of a several Notices of Motion seeking that a quite substantial delay in the filing of these Appeals be condoned. As the facts in all these cases are broadly similar, we have dealt with the present Notice of Motion as the main case for this judgment; the others will follow suit.

2. The present Appeal arises from an order dated 2nd January 2009 passed by the Customs, Excise & Service Tax Appellate Tribunal ("CESTAT"), West Zonal Bench, Ahmedabad and the CESTAT's subsequent order dated 29th May 2009 in a rectification of mistake application by the present Appellants. We are not in this Notice of Motion examining the merits of the present Appeal. We only note that the CESTAT order-in-appeal was passed in a proceeding that emanated from an Order-in-Original dated 10th January 2008 passed by the Joint Commissioner, Central Excise and Customs, Daman and a subsequent order dated 30th July 2008 passed by the Commissioner (Appeals), Central Excise & Customs, Daman.

3. Copies of the two CESTAT appellate orders were received by the present Appellants on 28th January 2009 and 19th June 2009 respectively. The present Appellants preferred an Appeal under Section 35-G of the Central Excise Act, 1944 before the Gujarat High Court. That Appeal was lodged within 180 days, the period prescribed under Section 35-G(2)(a) of the Central Excise Act, 1944. On 28th April 2011, the Gujarat High Court

admitted the Appeal. It then remained pending there till 12th January 2015, when the Gujarat High Court held that since the manufacturing unit in question was located within the Union Territory of Daman, in view of Section 36(b) of the Central Excise Act, 1944, the Gujarat High Court did not have the necessary territorial jurisdiction. The Gujarat High Court therefore dismissed the Appeal, but gave liberty to the Appellants to pursue their remedies in a court of competent jurisdiction. It is pursuant to this order that the present Appeal was lodged in this Court on 29th July 2015. The Appellant then filed the present Notice of Motion seeking that a delay computed at 2192 days be condoned.

4. We have heard Mr. Jetly for the Appellants and Mr. Shah for the Respondents. Mr. Shah has, with his usual fairness, placed before us a compilation or compendium of several authorities on the subject. Before we advert to this, it is necessary to note that Section 35-G(2-A) confers on the High Court before whom an Appeal is filed the discretion to admit an Appeal even after expiry of a period of 180 days, if it is satisfied that there is sufficient cause for not filing the Appeal within the prescribed period. This provision is in consonance with the provisions of Section 5 of the Limitation Act, 1963. However, for our purposes, Section 14 of the Limitation Act, 1963 is more apposite. In terms, this Section says that in computing the period of limitation for any Suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or similar cause, is unable to entertain it.

5. This Section and its application to various statutes, including in particular taxing statutes, have been interpreted in several authorities. A Division Bench of this *Court in Union of India v Epcos India Private Limited* held in the context of the Central Excise Act, 1944 that the period spent in prosecuting the Appeal bona fide before the CESTAT, later found to lack jurisdiction, was liable to be excluded under Section 14. In Ketan V. Parekh v Special Director, Directorate of Enforcement, the Supreme Court, in the context of Foreign Exchange Management Act, 1999 and its corresponding Rules as also the Central Excise Act, 1944, held that in an appropriate case Section 14 can be invoked to exclude the time an Appellant has spent prosecuting diligently his remedy before an incorrect forum. This is a consistent view of various courts.

6. While considering this question, we may profitably make reference to the decision of the Supreme Court in *M.P. Steel Corporation v. Commissioner of Central Excise*. In that case, one of the questions was whether the Limitation Act, 1963 applied only to Courts and not to Tribunals,

for the appeal in question in that case was before the tribunal. The Supreme Court noted the decision of the Supreme Court in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and in particular the five conditions that are set out in paragraph 21 of that decision for the correct invocation and application of Section 14 of the Limitation Act. These five conditions are by now well settled. Both the prior and subsequent proceedings must be civil proceedings prosecuted by same party; the prior proceeding should have been prosecuted with due diligence and in good faith; the failure of the prior proceeding must have been due to a jurisdictional defect or similar cause; both proceedings must relate to the same matter in issue; and both proceedings must be in a Court. In paragraph 7 of its decision in M.P. Steel Corporation, the Supreme Court in terms held that the period spent in pursuing a remedy before another appellate forum ought to be excluded. The Supreme Court also said that Section 14 must be liberally construed to advance the cause of justice. In paragraph 41 of its decision in M.P. Steel Corporation, the Supreme Court said that the plain language of Section 14, construed in light of its statutory purpose, lends itself to just such a liberal interpretation. The statutory object is to ensure that, subject to conditions being met, a plaintiff or applicant or appellant is put in the same position as he would have been when he first commenced the proceeding in a court of competent jurisdiction; i.e., that the time taken diligently pursuing the same remedy in a court without jurisdiction should be excluded. In such a case, all that is necessary is the absence of negligence or inaction. As long as the party bona fide pursues a legal remedy, one that later turns down to be abortive, the time taken in that jurisdictionally deficient proceeding is to be excluded. If this were not so, the results would be anomalous.

7. In the present case, there is no doubt that the Appellants were pursuing their remedy in a “Court”. The only question was one of lack of territorial jurisdiction. There is also no dispute that the Appeal before the Gujarat High Court was in fact filed in time. The entire period, therefore, from the time of filing of the Appeal in the Gujarat High Court till its disposal as above by that Court must, in our view, be fairly excluded for the purposes of limitation. If that is not done, great injustice and unfairness will result. The direction of that High Court, with respect, is that the papers in each of these Appeals be returned to the respective Appellants / their Advocates for presentation to the Competent Appellate Court, which is this Court.

8. For the purposes, therefore, of computing the delay to be condoned, if any, we must take first the two dates that lie at the extremities, viz., the date of receipt of the order appealed against and the date of filing of the Appeal in the present Court. From this period, the entire period from the date of filing of the Appeal in the Gujarat High Court to the date of its

disposal by that High Court is to be excluded. If the remaining period is found to be 180 days or less, then there is no question of any application being necessary to condone the delay and the Appeal is in time. It is only if this remaining period exceeds 180 days that the Appellant will be required to file a application seeking condonation of delay and setting out the reasons or cause which in the Appellant's opinion is sufficient.

9. We find that having regard to the circumstances, there is sufficient reason to condone the delay. The explanation given in the Affidavit in Support is adequate. The time spent in prosecuting the Appeal before the Gujarat High Court is to be excluded. The Notice of Motion is allowed in terms of prayer clause (a). No costs.

[2015] 53 DSTC 117 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[Diwan Chand, Member (A) and M. S. Wadhwa, Member (J)]

Appeal No.1423/ATVAT/12-13

Director General Supplies & Disposals,
Jeevan Tara Building, Parliament Street,
New Delhi-110 001. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : January 1, 2016

VERIFICATION AND CREDIT OF SALE TAX PAYMENT UNDER DELHI SALE TAX ACT, 1975 – BURDEN OF PROOF – PRODUCTION OF PHOTOSTAT COPY OF TAX CHALLAN – RECORDS NOT AVAILABLE WITH REVENUE – BANKER SHOWED ITS INABILITY TO ISSUE CERTIFICATE FOR ENCASHMENT – WHETHER IN THE PECULIAR CIRCUMSTANCES THE EVIDENCE WHICH HAD BEEN FILED BY THE APPELLANT BEING A CENTRAL GOVERNMENT DEPARTMENT WAS ADMISSIBLE? – APPELLANT FILED QUARTERLY RETURNS ALONG WITH REQUISITE TAX CHALLAN "C" PART WHICH WAS NOT DENIED BY THE REVENUE – ASSESSMENT FRAMED AND DEMAND CREATED DUE TO NON VERIFICATION OF PAYMENT CHALLAN FOR NON AVAILABILITY OF RECORDS – THE APPELLANT REQUESTED TO BANKER FOR ISSUANCE OF CERTIFICATE BEING OLD MATTER BANK RECORDS HAD BEEN DESTROYED – REVENUE ARGUED BEFORE THE TRIBUNAL THAT BURDEN LAID DOWN ON APPELLANT TO PROVE – APPELLANT DISCHARGED ITS BURDEN BY FILING THE PHOTOSTAT COPIES OF "C" PARTS OF THE CHALLAN WHICH WAS DEPOSITED IN RBI - THE APPELLANT REFERRED VARIOUS JUDGEMENT RELATING TO THE ADMISSION OF PHOTOCOPY IN ABSENCE OF ORIGINAL ONE AND SUBSTANTIATED THE ARGUMENT THAT PART "C" OF THE CHALLAN BE ADMITTED UNLESS IT WAS PROVED THAT IT WAS NOT GENUINE – APPEAL ALLOWED.

Facts of the Case

The appellant was a Department of Government of India functioning under the aegis of Ministry of Supply, Government of India, New Delhi. The appellant was entrusted with the disposal of unserviceable and obsolete stores of the Ministry of Defence, Government of India. It was registered as a dealer under the Delhi Sales Tax Act, 1975.The assessment of the appellant under the Act, 1975 for the year 1985-86 was originally completed by the Assessing Authority vide its order dated 02.03.1990. This order was assailed by the appellant by way of appeal u/s 43 (1) of the Act of 1975 and this appeal was disposed off by the Appellate Authority vide its order dated 22.10.2002, inter-alia, with the direction that the payment of

Rs.44,90,272/- as claimed by the appellant needed to be verified and credit must be given if the amount had been paid. The remanded proceedings were completed by the Appropriate Assessing Authority vide its order dated 10.08.2004 whereby a demand of Rs.36,02,138/- had been made. The appellant had not been afforded credit of Rs.35,92,359/-. The actual position of deposits made by the appellant during the year 1985-86 was that along with the returns filed for the first, second and third quarters, the appellant deposited amounts of Rs.20,76,433.85, Rs.20,61,750.60 and Rs.8,74,200.70 respectively. Therefore, at the time of entertainment of first appeal filed by the appellant against the assessment order, the appellant had deposited Rs.10,000/- as condition precedent for entertainment of appeal. Out of these amounts, the appellant was duly in possession of received copies of challans in form 'C' for Rs.20,76,433.85, Rs.20,54,402.10 and Rs.8,74,200.70 for the first, second and third quarter respectively i.e. Rs.50,005,036.65 and Rs.10,000/-. The appellant also vide its letter dated 06.02.1992 approached the Manager, Accounts Section, Reserve Bank of India, New Delhi requesting them to issue an encashment certificate for the amounts deposited as mentioned above but the RBI, vide its letter dated 03.03.1992, showed inability to do. The appeal had been filed against the impugned order dated 17.10.2012 passed by the Special Commissioner-I, who vide this order concurred with the findings of the Assessing Authority and upheld his order dated 10.08.2004.

Held That

The Tribunals view was that appellant, prima facie, had discharged its burden by filing the photocopies of C part of the challan deposited in the Reserve Bank of India, New Delhi. Now the burden shifted to Revenue as B and C copies of the challan were in possession of the department. Revenue had not said in unambiguous terms that they had not received these challans from the bank or that returns purported to be filed by the appellant along with C part of the challan had not been filed by the appellant in the department. Appellate authority in its order had mentioned that appellant filed returns for the relevant period. Appellant during the course of arguments also submitted that a Demand and Collection Register was maintained by the Revenue department in which challan receipts from the banks were entered and then they were sent back to the concerned ward. Revenue side had neither produced this Register nor denied that any such Register was maintained by the department. In the peculiar facts and circumstances of the case, best evidence available had been filed by the appellant. Appellant took shelter of certain decision of Hon'ble Supreme Court and High Courts and the first case which was referred during the course of arguments was M. Veerabadra Konar Vs. State of

Madras (1962) 13 STC 556 (Madras) and submitted that in the above case the Hon'ble Madras High Court observed that there was normal presumption that official acts are properly done. The second case in this regard, which was referred by the appellant was Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. P.P. Varkey & Company to submit that presumption was that the official records reflect true and correct detail. These two cases were referred for the purpose that photocopies of C challan may be admitted because these were official records. In support of the arguments, another case, which was referred by appellant was Hari Chand Ramesh Kumar, Vs. State of Haryana. The question in this case was whether on refund of tax amount to the assessee, Government was liable to pay interest also. The Hon'ble Punjab & Haryana High Court said that the assessee and the State cannot be said to be in equal situation and refused to give interest to the assessee on the refund of the tax extra deposited by the assessee. The ratio of the case could not be applied to the present case because though appellant was a Government department, but so far as imposition of Sales Tax was concerned, on sale of any item by the appellant, he was placed in the same position as any other dealer.Appellant also referred to the case of Union of India Vs. Ex. Major Sudershan Gupta (2009) 6 SCC 298 in support of the arguments that Revenue was supposed to maintain the relevant records and on this ground adverse inference may be drawn against the Revenue. Revenue had nowhere said that relevant record had been destroyed by them. Revenue insisted on the fact that burden lied on the appellant to prove that he had deposited the tax. The ratio of this case was also not applicable to the case in hand because initial burden laid down on the appellant as per section 78 which it had sufficiently discharged. Appellant also referred to the case of Commissioner of Income Tax, West Bengal Vs. Durga Prasad More to substantiate the argument that an apparent statement must be considered real until it was shown that there were reasons to believe that the apparent was not the real to prove that photocopy of part C challan be admitted unless it was proved that it was not genuine. Appeal allowed.

Cases Referred to

- *M. Veerabadra Konar Vs. State of Madras (1962) 13 STC 556 (Madras)*
- *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. P.P. Varkey & Company*
- *Hari Chand Ramesh Kumar, Vs. State of Haryana*
- *Union of India Vs. Ex. Major Sudershan Gupta (2009) 6 SCC 298*
- *Commissioner of Income Tax, West Bengal Vs. Durga Prasad More*

Present for the Appellant : Shri H.L. Taneja, Advocate

Present for the Respondent : Shri Pradeep Tara, Advocate/Govt. Counsel

ORDER

1. The present appeal has been filed against the impugned order dated 17.10.2012 passed by the Ld. Special Commissioner-I, who vide this order concurred with the findings of the Ld. Assessing Authority and upheld his order dated 10.08.2004.

2. Brief facts giving rise to the present appeal are that the appellant Director General Supplies & Disposals is a Department of Government of India functioning under the aegis of Ministry of Supply, Government of India, New Delhi. The appellant is entrusted with the disposal of unserviceable and obsolete stores of the Ministry of Defence, Government of India. The appellant was registered as a dealer under the Delhi Sales Tax Act, 1975.

3. The assessment of the appellant under the Act, 1975 for the year 1985-86 was originally completed by the Ld. Assessing Authority vide its order dated 02.03.1990. This order was assailed by the appellant by way of appeal u/s 43 (1) of the Act of 1975 and this appeal was disposed off by the Ld. Appellate Authority vide its order dated 22.10.2002, inter-alia, with the direction that the payment of Rs.44,90,272/- as claimed by the appellant needed to be verified and credit must be given if the amount had been paid.

4. The remanded proceedings were completed by the Ld. Appropriate Assessing Authority vide its order dated 10.08.2004 whereby a demand of Rs.36,02,138/- had been made. The appellant had not been afforded credit of Rs.35,92,359/-. The actual position of deposits made by the appellant during the year 1985-86 is that along with the returns filed for the first, second and third quarters, the appellant deposited amounts of Rs.20,76,433.85, Rs.20,61,750.60 and Rs.8,74,200.70 respectively. Therefore, at the time of entertainment of first appeal filed by the appellant against the assessment order, the appellant had deposited Rs.10,000/- as condition precedent for entertainment of appeal. Out of these amounts, the appellant is duly in possession of receipted copies of challans in form 'C' for Rs.20,76,433.85, Rs.20,54,402.10 and Rs.8,74,200.70 for the first, second and third quarter respectively i.e. Rs.50,005,036.65 and Rs.10,000/-.

5. The appellant also vide its letter dated 06.02.1992 approached the Manager, Accounts Section, Reserve Bank of India, New Delhi requesting them to issue an encashment certificate for the amounts deposited as

mentioned above but the RBI, vide its letter dated 03.03.1992, showed inability to do so because relevant records for the year 1985-86 had been destroyed.

6. As mentioned in the impugned order vide para–10, the appellant submitted before the Ld. Special Commissioner that the challan of payment had four parts. After payment in the authorized bank, part A of the challan is kept by the payee bank, part B of the challan is remitted to the department and it is this part of the challan that is relied upon by the assessing authority while making assessment, part C of the challan is given to the dealer who attach the same with the return to be filed by him with the department and part D of the challan is also given to the dealer for his record.

7. The Ld. First Appellate Authority, when it remanded the assessment case back to the assessing authority vide its order dated 22.10.2002, also, vide para 9, gave clear direction that the assessing authority had not given credit of Rs.44,90,272/- and this amount needed to be verified and after due verification, the credit must be given if the amount had been paid. But the Ld. Assessing Authority, in compliance with the direction of the appellate authority, observed as under in the remanded assessment order:

> "As regards giving credit to the payment of tax of Rs.44,90,272/-, I find that the verification of the payment is still wanting, the facts on the basis of credit was not allowed in the original assessment order still prevails because RBI has not verified the payment, therefore, I do not find myself in a position to accept the contention of the dealer and no credit is given for the alleged payment of tax."

8. It will be appreciated from the above that compliance by the assessing authority is hardly satisfactory because it is silent about the B portions of the challans received directly from the authorized bank and C portions of the challans attached with the returns for the first, second and third quarters filed by the appellant. In other words, when the original record is with the department and the appellant cannot do anything more than producing duplicate copies of the returns with C forms, the appellant cannot be fastened with the liability to pay the tax again.

9. The appellant has challenged the impugned order dated 17.10.2012 passed by the Ld. OHA on the following, among other grounds :

(i) That the impugned order dated 17.10.2012 is not sustainable in law because the original records i.e. B portions of the challans remitted by the authorized bank and C portions of the challans

submitted by the appellant are already with the department and the appellant cannot be expected to produce more than what it has done i.e. copies of the returns filed and copies of C portions of challan.

(ii) That the law is well settled that nobody can be asked to do an impossible thing i.e. except D portions of the challans as the appellant has no other record of payment, which had been produced in the form of duplicate copies of the returns filed.

(iii) That the appellant being a Government of India department, it will be well nigh impossible to obtain sanction of the Government of India for double payment as demanded by the department for their own fault.

(iv) That the judgment cited before the Ld. Special Commissioner, (1962) 13 STC 556 (Madras) fully support the case of the appellant which the Ld. Special Commissioner had not followed.

10. Heard to appellant Ld. Counsel Shri H.L. Taneja and Shri Pradeep Tara on behalf of Revenue and perused the file. Both sides have also filed written arguments. As per order of the Hon'ble Delhi High Court dated 22.07.2014, the appeal was heard on merits without pre deposit of any amount.

11. As is clear from the facts that this appeal relates to the year 1985-86 and assessment of the appellant was made under the provisions of the Delhi Sales Tax Act, 1975. The original assessment was made on 02.03.1990. Against this assessment order, an appeal was filed u/s 43 (1) of the DST Act, which was disposed off vide order dated 22.10.2002. It was directed by the appellate authority that payment of Rs.44,90,272/- as claimed by the appellant be verified and credit must be given if the amount had been paid by the appellant. In remanded proceedings, assessing authority, vide its order dated 10.08.2004, created fresh demand of Rs.36,02,138/- and appellant was denied credit of Rs.35,92,359/-. This assessment order was again challenged before the assessing authority, who vide impugned order dated 17.10.2012, reaffirmed the findings of the assessing authority and denied the credit of Rs.36,02,138/-

12. Appellant has challenged the impugned order dated 17.10.2012 before us. In this appeal the appellant is a Government department functioning under the aegis of Ministry of Supply, Government of India. The appellant is entrusted with the disposal of unserviceable and obsolete stores of the Government of India and it was registered under the Delhi Sales Tax Act as a dealer. For the assessment year 1985-86, according to appellant,

he deposited tax to the tune of Rs.20,76,433.85, Rs. 20,61,750.60 and Rs.8,74,200.70 for the first, second and third quarters of this financial year. According to appellant, he deposited this amount in the Reserve Bank of India. Normal practice is that challan has four parts A, B, C and D. After payment in the authorized bank, part A of the same is kept by the payee bank, part B is remitted to the concerned department for which tax has been deposited and part C and D of the challan are given to the dealer. Part C of the challan is attached with the return filed by the dealer with the department.

13. In the present case the sole controversy with which we are seized with is whether in the absence of B and C original copy of challan, can Photostat copy of C challan and returns filed by appellant be admitted to give credit to the appellant? In the present case assessment of the appellant was completed by the Ld. Assessing Authority vide order dated 02.03.1990 against which appeal was filed and appellate authority vide its order dated 22.10.2002 directed while remanding back to the assessing authority that due credit of Rs.44,90,272/- be given to the appellant after due verification, which was again refused vide remanded assessment order dated 10.08.2004 on the ground that verification of the payment is still wanting and since original assessment factual position has not changed. So the credit of Rs.44,90,272/- was denied and as per fresh assessment order, Rs.36,02,138/- were assessed as tax liability, which order was affirmed by the impugned order dated 17.10.2012.

14. Now the question arises whether in the peculiar circumstances of the present case, the evidence, which has been filed by the appellant, is admissible? The appellant, which is a Central Government department, is running from pillar to post to get justice in the old case of year 1985-86 and also must be realizing the position of a common man in such type of circumstances. According to appellant he sent a letter dated 06.02.1992 to the RBI requesting the bank to issue encashment certificate of the disputed cheques but RBI in its reply vide letter dated 03.03.1992 showed its inability to issue encashment certificate due to the reason that records pertaining to the relevant period had been destroyed. In these circumstances appellant was left with no option but to file photocopy of returns alongwith photocopy of C part of the challan on which official stamp of the RBI is fixed. Even then authorities below disregarded these papers and observed that as verification of the amount could not be made, in these circumstances credit cannot be given. According to Ld. Counsel for the Revenue, burden lies on the appellant to prove his case as per section 78 of the Delhi Value Added Tax Act. In our considered view appellant, prima facie, has discharged its burden by filing the photocopies of C part of the challan deposited in the

Reserve Bank of India, New Delhi. Now the burden shifts to Revenue as B and C copies of the challan are in possession of the department. Revenue has not said in unambiguous terms that they have not received these challans from the bank or that returns purported to be filed by the appellant alongwith C part of the challan have not been filed by the appellant in the department. Appellate authority in its order has mentioned that appellant filed returns for the relevant period. Appellant's Ld. Counsel during the course of arguments also submitted that a Demand and Collection Register is maintained by the Revenue department in which challan receipts from the banks are entered and then they are sent back to the concerned ward. Revenue side has neither produced this Register nor denied that any such Register is maintained by the department. In the peculiar facts and circumstances of the present case, best evidence available has been filed by the appellant.

15. In support of his arguments, appellant Ld. Counsel took shelter of certain decision of Hon'ble Supreme Court and High Courts and the first case which was referred during the course of arguments was M. Veerabadra Konar Vs. State of Madras (1962) 13 STC 556 (Madras) and submitted that in the above case the Hon'ble Madras High Court observed that there is normal presumption that official acts are properly done. The second case in this regard, which was referred by the appellant's Ld. Counsel was Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. P.P. Varkey & Company to submit that presumption is that the official records reflect true and correct detail. These two cases were referred for the purpose that photocopies of C part of challan may be admitted because these are official records.

16. In support of the arguments, another case, which was referred by the appellant's Ld. Counsel is Hari Chand Ramesh Kumar, Vs. State of Haryana. The question in this case was whether on refund of tax amount to the assessee, Government is liable to pay interest also. The Hon'ble Punjab & Haryana High Court said that the asessee and the State cannot be said to be in equal situation and refused to give interest to the assessee on the refund of the tax extra deposited by the assessee. In our view, the ratio of this case cannot be applied to the present case in the facts and circumstances of the present case because though appellant is a Government department, but so far as imposition of Sales Tax is concerned, on sale of any item by the appellant, he is placed in the same position as any other dealer.

17. Appellant's Ld. Counsel also referred to the case of Union of India Vs. Ex. Major Sudershan Gupta (2009) 6 SCC 298 in support of the arguments that Revenue was supposed to maintain the relevant records

and on this ground adverse inference may be drawn against the Revenue. Revenue has nowhere said that relevant record has been destroyed by them. Revenue insisted on the fact that burden lies on the appellant to prove that he has deposited the tax. So in the facts and circumstances of the present case, the ratio of this case is also not applicable to the case in hand because initial burden lies on the appellant as per section 78 which it has sufficiently discharged in the peculiar facts of the present case.

18. Lastly appellant's Ld. Counsel also referred to the case of Commissioner of Income Tax, West Bengal Vs. Durga Prasad More to substantiate the argument that an apparent statement must be considered real until it is shown that there are reasons to believe that the apparent is not the real to prove that photocopy of part C challan be admitted unless it is proved that it is not genuine

19. On the basis of aforesaid discussion, we are of the considered view that the impugned order dated 17.10.2012 passed by the Ld. Special Commissioner-I was not as per law, hence it is set aside and present appeal is allowed.

20. Order pronounced in the open court.

21. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

22. File be consigned to record room.

[2015] 53 DSTC 125 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand, Member (A) and M. S. Wadhwa, Member (J)]

Appeal no. 86-87/ATVAT/14-15
Assessment Period: 1st Quarter 2010-11
Default assessment of Tax, interest & penalty

Shree Sidhi Vinayak Traders
Shop No-14, CSC, C-Block,
Dilshad Garden, Delhi ... Appellant

Versus

Commissioner Trade & Taxes, Delhi ... Respondent

Date : October 2015

DEFAULT ASSESSMENT OF TAX & INTEREST AND NOTICE OF ASSESSMENT OF PENALTY U/S 32 & 33 READ WITH SECTION 86(12) OF THE DVAT ACT, 2004- INPUT TAX CREDIT DISALLOWED U/S 9(2)(G) ON THE BASIS OF REGISTRATION

CERTIFICATES OF THE SELLING DEALERS CANCELLED W.E.F. 13.04.2010 & 01.04.2010 – CANCELLATION WAS NOT NOTIFIED AS ENVISAGED UNDER PROVISIONS OF SECTION 22(G) OF THE DVAT ACT, 2004 – OBJECTION HEARING AUTHORITY HAD BEEN MISTAKEN ON PLACING RELIANCE ON THE PROVISIONS OF SECTION 9(1)(9) AND 9(2)(9) – NO DOCUMENTS OR EVIDENCES HAD BEEN PLACED ON RECORD TO ESTABLISH THAT THE APPELLANT HAD BEEN AWARE OF THE FACTS OF CANCELLATION OF REGISTRATION CERTIFICATES OF THE SELLING DEALERS OR WAS OTHERWISE IN COLLUSION WITH THE SELLING DEALER-DEPARTMENT WEBSITE DID NOT INDICATE WHICH DATE IT WAS PUBLISHED IN GAZETTE OR HOSTED – APPEALS ALLOWED ORDERS SET ASIDE.

Facts of the Case

The Appellant was registered with the Department of Trade & Taxes holding Tin No. 07520330568 in Ward No. 80. VAT Audit of the business of the appellant was conducted for 2010-11 under section 58 of the Act and during the tax period 1st Qtr.2010-11 it was noted that the appellant had made purchases of Rs. 82,21,295/- from M/s Jai Enterprises and Rs 90,21,706/- from M/s Shriram Enterprises involving ITC of Rs 3,91,487/- and Rs. 4,29,604/- respectively. VATO framed Default Assessment of Tax & Interest dated 30.12.2013 and disallowed the input tax credit of Rs.8,21,096/- and also imposed interest of Rs.4,22,133/-, thus creating an additional demand of Rs. 12,43,229/-for the tax period 1st Qtr. 2010-11. The input tax credit claimed by the Appellant firm from the above two firms had been disallowed for the reasons that the registration certificate of M/s Jay Enterprises and M/s Shriram Enterprises were cancelled w.e.f.13.04.2010 and 01.04.2010 respectively. Ld. VATO also framed the notice of assessment of penalty u/s 33 r/w section 86(12) of the DVAT Act and imposed a penalty of Rs.14,61,380/-.Aggrieved with the default assessment of tax, interest and penalty, the appellant filed objections before the Objection Hearing Authority who vide orders dated 19.03.2014 dismissed the objections both against the notice of default assessment of tax and interest as well as against the notice of penalty. Appellant finding certain errors in the order of Objection Hearing Authority moved an application U/s 74B of the DVAT Act for review of order by the OHA. The Objection Hearing Authority vide orders dated 20.05.2014 dismissed the application for review filed by the applicant. The appellant filed appeal before the Tribunal.

Held That

The principle of law that emerged from all the aforesaid decisions was that cancellation of the registration certificate of an appellant cannot be

effective against the other dealers engaged in business dealings with the said appellant unless the fact of cancellation was notified in the gazette. Applying the above principle to the facts of the present case, it was apparent that the appellant had entered into transactions with M/s Jai Enterprises and M/s Shriram Enterprises after the dates the registration certificates were cancelled. But the said fact of cancellation of RC of the selling dealers in the present case had not been notified as envisaged under provisions of section 22(8) of the DVAT Act. No document or evidence had been placed on record to establish that the appellant had been aware of the fact of cancellation of the registration certificate of the selling dealers or was otherwise in collusion with the selling dealers. Copy of the print of the list of cancelled dealers hosted on the website of the department placed on record by the Revenue had no indication as to on which date it was published in gazette or hosted on the website. On the other hand the appellant had produced enough evidence about the genuineness of the transactions effected by him. He had filed the copy of the ledger account of the dealers, payments had been made by cheques. Authorities below had been totally mistaken in placing reliance on the provisions of section 9(7)(a) and 9(2)(a) as the selling dealers with whom the appellant had conducted transactions were the registered dealers and not the dealers who were not registered or un-registered dealers. In view of the foregoing discussion that the Input Tax Credit in respect of the two dealers namely, M/s Jai Enterprises and M/s Shriram Enterprises had been wrongly disallowed to the appellant and the impugned orders were consequently set aside and the appellant was held entitled to the ITC claimed by him. As a result of this the imposition of interest and of the penalty was also considered illegal and set aside.

Present for the Appellant : Sh. V. Lalwani, Adv.,

Present for the Respondent : Sh. Pradeep Tara, Adv.,

Cases Referred to:

- *CST Vs. Hari Ram Oil Co., (1992) 87 STC 493*
- *Kannodia Enterprises Vs. CST, 1995-96; 35 DSTC*
- *M/s Kanudia Enterprises Vs Commissioner of sales Tax 35 DSTC J-135*
- *Meet Traders Vs State of Gujarat and another 63 VST 246 (Guj)*
- *M/s Shanti Kiran India Pvt Ltd Vs Commissioner Trade & Tax, Delhi (2012) DSTC J-429*
- *Yemmiganur Spinning Mills [1976] 3 7 STC 314*

- *Arjan Radio House's case [1973] 31 STC 49*
- *United Steel and Allied Industries Vs The State of Andhra Pradesh (1988) 70 STC 114*
- *M/s Calcutta Wax Trading Company Vs. Commissioner of Sales Tax, Delhi reported as (1992-93) 32 DSTC J-195*

ORDER

1. This order shall dispose of the above noted appeals challenging the impugned orders dated 19.03.2014 passed by Additional Commissioner (III&IV) upholding the orders of default assessment of tax and interest of Rs 12,43,229/- u/s 32 and penalty of Rs. 14,61,380/- u/s 33 r/w 86(12) of the Act.

2. Facts of the case briefly stated are that Appellant M/s Sidhi Vinayak Traders is registered with the Department of Trade & Taxes vide its Tin No. 07520330568 in Ward No. 80. VAT Audit of the business of the appellant was conducted for 2010-11 under section 58 of the Act and during the tax period 1st Qtr.2010-11 it was noted that the appellant had made purchases of Rs. 82,21,295/- from M/s Jai Enterprises and Rs 90,21,706/- from M/s Shriram Enterprises involving ITC of Rs 3,91,487/- and Rs. 4,29,604/- respectively. VATO framed Default Assessment of Tax & Interest dated 30.12.2013 and disallowed the input tax credit of Rs.8,21,096/- and also imposed interest of Rs.4,22,133/-, thus creating an additional demand of Rs. 12,43,229/-for the tax period 1st Qtr. 2010-11. The input tax credit claimed by the Appellant firm from the above two firms has been disallowed for the reasons that the registration certificate of *M/s* Jay Enterprises and *M/s* Shriram Enterprises were cancelled w.e.f. 13.04.2010 and 01.04.2010 respectively. Ld. VATO also framed the notice of assessment of penalty u/s 33 r/w section 86(12) of the DVAT Act and imposed a penalty of Rs.14,61,380/-.

3. Aggrieved with the default assessment of tax, interest and penalty, the appellant filed objections before the Objection Hearing Authority who vide orders dated 19.03.2014 dismissed the objections both against the notice of default assessment of tax and interest as well as against the notice of penalty. Appellant finding certain errors in the order of Objection Hearing Authority moved an application U/s 74B of the DVAT Act for review of order by the OHA. The Objection Hearing Authority vide orders dated 20.05.2014 dismissed the application for review filed by the applicant. Hence the present appeal before this Tribunal.

4. Appellant has assailed the impugned orders on the following grounds:-

1) That the order of VATO framing the notice of default assessment of tax and interest as well as the order of Objection Hearing Authority dismissing the objections are illegal and void.

2) That the order of VATO disallowing the Input tax credit U/s 9 (2)(g) of the DVAT Act as well as the order of Objection Hearing Authority dismissing the objections are illegal and void. The Input tax credit claimed by the Appellant firm has been illegally disallowed in view of the fact that the Appellant firm has claimed the Input Tax Credit U/s 9(1) read with Section 50 of the DVAT Act. The VATO has illegally disallowed the claim of ITC ignoring the statutory provisions contained in Section 22(8) of the DVAT Act as the Purchasing dealer has no notice of cancellation of registration certificates of the selling dealer by the Department of Trade & Taxes. The Objection Hearing Authority has also upheld the order of VATO in a most mechanical and casual manner. As regards the notice of cancellation as provided under section 22(8) of the DVAT Act the Objection Hearing Authority has not even stated a single word as to how Section 22 (8) is not applicable in the facts and circumstances of the present case. The Objection Hearing Authority has illegally dismissed the objection in view of Section 9(2) (a) and 9(7) (a) which are not at all applicable to the facts of the present case. Section 9(2) (a) & Section 9(7) (a) deal with goods purchased by a dealer from the seller who is not registered dealer/purchase of goods from unregistered dealers, whereas in the present case the appellant firm purchased the goods from dealers who were registered with the Department but for some reason not known to the appellant the registration certificate of those dealers were cancelled.

3) That the VATO has also disallowed the claim of ITC u/s 9(2) (g) of the DVAT Act without verifying the fact that even the selling dealer M/s Jay Enterprises has also filed its return of VAT for the tax period of 1st quarter 2010-11 which shows the selling dealer was also not aware of the cancellation of its registration certificate by the Department in view of the fact that there was no compliance of Section 22(8) of the DVAT Act. The Objection Hearing Authority has ignored the fact and has not correctly appreciated the relevant law and wrongly resorted to Section 9(2) (a) and Section 9(7)(a) of the DVAT Act.

4) That the VATO as well as the Objection Hearing Authority have illegally ignored the settled law on this issue laid down in the case of *CST Vs. Hari Ram Oil Co., (1992) 87 STC 493* wherein the Hon'ble High Court held that even where the registration of a dealer has been cancelled before the sales took place, but such cancellation is not notified in the Official Gazette subsequent to the date of sale, then the selling dealer cannot be deprived of the benefit of the scheme of Act. The Tribunal Sales Tax Delhi in the case of *Kannodia Enterprises Vs. CST, 1995-96; 35 DSTC* page 135 also relied upon the above judgment of Hon'ble Delhi High Court and held that deduction cannot be disallowed even for the purchases made subsequent to the cancellation of registration certificate if such cancellation is not notified. The Objection Hearing Authority was determined to dismiss the objections which shows the total non application of mind by the Objection Hearing Authority. The OHA has also dismissed the application U/s 74B by the appellant totally on a wrong application of the provisions of the DVAT Act and in a very mechanical manner which shows that the OHA was determined to dismiss the application without application of mind. The OHA has illegally not stated even a single word regarding the application of Section 22(8) of the DVAT Act and has referred only to the provisions which are not at all applicable with the facts of the present case. The OHA also illegally failed to show as to how the judgments of the Hon'ble Delhi High Court, in the case of CST Vs, Hari Ram Oil Co, as well as of this Tribunal in the case of Kannodia Enterprises Vs. CST are not applicable to the facts of the present case.

5) That the VATO has also illegally charged interest inspite of the fact that there is well settled law that in the event of disallowance of any claim bonafide made by the dealer the interest cannot be levied with the retrospective effect from the date of filing of its return. That the Objection Hearing Authority has dismissed the objection in mechanical and casual manner.

6) That the VATO illegally framed the notice of assessment of penalty in a mechanical manner and the Objection Hearing Authority also dismissed the objections with the observations that both the objections by the Objector U/s 32 and 33 read with Section 86(12) of the DVAT Act as framed by the VATO, VAT (Audit) dated 30.12.2013 are upheld.

7) That the VATO as well as the Objection Hearing Authority have failed to apply the well settled law that penalty proceedings are

different from assessment proceedings. The Objection Hearing Authority has not given any reasons whatsoever as to how the grounds of objection by the appellant firm were not relevant. The Objection Hearing Authority dismissed the objections without giving any reasons whatsoever and passed the order in a most casual, mechanical and pre-determined mind.

8) That the appellant firm reserves the right to add /amend/delete any grounds of objection during the course of hearing of appeal, if the circumstances so warrant.

5. We have heard Sh. V Lalwani, Ld Counsel for the Appellant and Sh. Pradeep Tara, Ld Counsel for the Revenue.

6. Ld Counsel for the appellant submitted that both the above dealers M/s Jay Enterprises as well as M/s Shriram Enterprises have issued tax invoices which clearly mention the TIN No. of both dealers on their invoices. Further M/s Jay Enterprises has even submitted it's VAT Return for the tax period 1st Qr. 2010-11. Also all the purchases of the objector firm from the above two dealers are supported by their tax invoices as well as payments thereof have been made through account payee cheques and duly reflected in the books of accounts of the Appellant firm. During the course of hearing of objections the appellant firm submitted copies of bank statements containing relevant entries showing the payments to the above two dealers which were all through account payee cheques which has also been admitted by the Objection Hearing Authority in its order dated 19.03.2014 also.

7. Further submitted that u/s 22(8) of the DVAT Act it is provided that the 'Commissioner shall, at intervals not exceeding three months publish in the Official Gazette, such particulars of registered dealers whose registration certificates have been cancelled. Whereas in respect of the above two dealers there was no such gazette notification publishing the fact of cancellation of registration certificate of the above two dealers.

8. Further submission made that the conduct of the selling dealer as alleged by the Revenue fell within the ambit of section 86(6) and 86(7) which provided as under:

86(6): If a registered dealer-

(a) fails to comply with the provisions of sub-section (2) of section 22 of this Act; or

(b) fails to surrender his certificate of registration as provided in sub-section(7) of section 22 of this Act

the registered dealer shall be liable to pay, by way of penalty, a sum equal to one hundred rupees for every day of default subject to a maximum of five thousand rupees.

86(7): If any person falsely represents that he is registered as a dealer under this Act, he shall be liable to a penalty equal to the amount of tax wrongly collected or one lakh rupees , whichever is the greater.

However, the Revenue instead of taking any action against the selling dealer for the alleged mischief has denied the ITC to the appellant in respect of transactions conducted in good faith acting on the representation made by the selling dealer and that the appellant could not be punished for the fraud or misrepresentation made by the selling dealer.

9. Appellant in support of his contentions has placed reliance on the decisions in the case of *Commissioner Sales Tax, New Delhi Vs Hari ram Oil Co. (1992) 83 STC 493; M/s Kanudia Enterprises Vs Commissioner of sales Tax 35 DSTC J-135, Meet Traders Vs State of Gujarat and another 63 VST 246 (Guj); M/s Shanti Kiran India Pvt Ltd Vs Commissioner Trade & Tax, Delhi (2012) DSTC J-429*.

10. Ld Counsel for the Revenue supporting the impugned orders argued that there was no illegality or infirmity in the impugned orders and that once the Registration Certificate of the Selling dealers was cancelled the authorities below have rightly refused the ITC to the Appellant in terms of provisions of Section 9(2)(a) and 9(7)(a) of the DVAT Act. He also placed on record a downloaded print of a list of cancelled dealers giving details of TIN Number, Dealer's Name and Dealer's address. Name of M/s Jai Enterprises in list of ward 84 is at Sl. No. 2406 and name of M/s Sri Ram Enterprises in list of ward 47 is at sl. No. 824.

11. We have carefully considered the rival submissions, impugned orders, grounds of appeal and the record of the case.

12. It is not disputed that M/s Jay Enterprises and M/s Shriram Enterprises had been registered under the Act and their Registration Certificates were cancelled w.e.f. 13.04.2010 and 01.04.2010 respectively and the transactions for which the ITC has been denied have been entered

into by the Appellant after the dates of cancellation of the RCS. Contention of the appellant is that the fact of cancellation of the Registration Certificates of the Selling dealers had not been published in the gazette as required by the provisions of section 22(8) of the Act and that he not being aware of the fact of cancellation of RC and the transactions having been entered by him even though after the date of cancellation of the RC are genuine and payments have been made by account payee cheques and relevant entries appear in his books of accounts and hence the benefit of the ITC cannot be denied to him. The appellant being unaware of the status of the cancellation of their registration certificates made purchases, paid tax and received the tax invoice.

13. Section 22(8) of the DVAT provides as under:

" The Commissioner shall, at intervals not exceeding three months , publish in the official Gazette such particulars as may be prescribed, of registered dealers whose registration has been cancelled."

Rule 17: Publication of particulars of cancelled certificates of registration

For the purposes of sub-section (8) of section 22 the Commissioner shall publish the particulars of dealers whose registration has been cancelled in the following form:

(1)	(2)	(3)	(4)
Name and address of the Dealer	Name of the Proprietor/ Manager /Partner/ Directors	Registration Number	Date of effect of cancellation of registration

14. There is enough judicial guidance on the subject so far as the publication of the gazette notification of the cancellation of the RC and its effect is concerned.

15. In Commissioner of Sales Tax, New Delhi v. Hari Ram Oil Co. 087 STC 0493, where the claim to exemption in respect of sales made by the respondent to registered dealers on the strength of declarations furnished by the purchasing dealers was rejected on the ground that the registration of those purchasing dealers had been cancelled before the sales took place, the Tribunal found that the cancellation was published only after the sales in question had taken place and that therefore the respondent could not be denied the exemption, on a reference, the Hon'ble High Court held:

"From the facts enumerated above it is clear that the factum of the cancellation of registration certificates of the two purchasers was notified only after the assessment year was over and the sales had been made. As on the date when sales were effected by the dealer, in the present case, the cancellation of registration certificates had not been notified. The dealer, therefore, could not possibly have any knowledge about the cancellation. The dealer acted in good faith and obtained the declarations before making the sales.

According to rule 12 of the Delhi Sales Tax Rules, 1951, when the registration certificate is cancelled the order of cancellation shall as soon as possible after the same has been made be published in the official gazette. It has been held by a Division Bench of the Andhra Pradesh High Court in the case of *Yemmiganur Spinning Mills [1976] 37 STC 314*, that the notification of cancellation of registration would be effective and enforceable only w.e.f. the date of its publication in the gazette. Similarly a single Bench of the Punjab and Haryana High Court in *Arjan Radio House's case [1973] 31 STC 49* came to the conclusion that if the selling dealer is not aware of the cancellation of the registration certificate because of the non-publication about the same in the official gazette then he cannot be deprived of the benefit of the declarations received by him.

It appears to us that the intention of the Legislature in promulgating rule 12 clearly was that the factum of cancellation of registration must be made known to the whole world. It is only for this reason that the rule requires publication about the cancellation in the official gazette. Such publication is always regarded as information to the world at large. Once the factum about the cancellation of the registration is published thereafter no dealer can plead that it was ignorant about the cancellation having been effected. It is no doubt true that the purchasing dealers may have been aware that their registration certificates had been cancelled and they may have wrongly issued the declarations but as far as the selling dealer is concerned if he obtains a declaration certificate and it is not known to him that the registration certificate of the purchaser had been cancelled and that cancellation is not notified in the official gazette then the selling dealer is entitled to the benefit under the Act. He cannot be penalised for the inaction of the department in non-publication or late publication in the official gazette. The selling dealer, in the present case, has acted in good faith and as far as he is concerned he had obtained valid declaration certificates at

the time of making the sales. The Tribunal was, therefore, right in coming to the conclusion that the benefit claimed by the dealer could not be denied to him."

16. In *Arjan Radio Vs Assessing Authority (1973)31 STC 49* Punjab & Haryana High Court, held inter alia, "that a busy dealer is not supposed to know whether the registration certificate of a purchasing dealer has been cancelled or not unless he can be fixed with the knowledge of this fact. As soon as the particulars regarding the cancellation of a registration certificate of a purchasing dealer are published in the official gazette, the selling dealer cannot be allowed to say that he has no knowledge about such cancellation. Where the revenue is itself negligent and does not perform its statutory duties of publishing the requisite information in the official gazette , it cannot turn round and demand tax from the selling dealer on the ground that the certificates produced for getting exemption under section 5(2)(a)(ii) of the Act were signed by the un-genuine dealers.

17. In *United Steel and Allied Industries Vs The State of Andhra Pradesh (1988) 70 STC 114*, Andhra Pradesh High Court held that that it was one thing to say that the purchasing dealer certificate of registration was cancelled and quite another to say that such certificate had been surrendered and the petitioner had entered into Sale transactions with dealers who did not physically possess the certificate of registration.

18. Appellate Tribunal Sales Tax, Delhi in the case of *M/s Calcutta Wax Trading Company Vs. Commissioner of Sales Tax, Delhi reported as (1992-93) 32 DSTC J-195* held as under:

"That the selling dealer cannot be penalized for inaction or neglect or even fraud of a registered purchasing dealer unless it is established by evidence that the selling dealer too was a party to such fraud, deception and mis-representation. Under the provisions of Delhi Sales Tax Act, 1975 and the Delhi Sales Tax Rules, 1975 nowhere a duty is cast on the selling dealer to see that the purchasing dealer is properly functioning after the sales were made and as to whether he furnished the correct account of ST-1 forms utilized by him or even he had neglected in his duty. The duty to observe the functioning of the purchasing dealer, submission of ST-2 accounts is on the concerned Assessing Authority of the purchasing dealer and by no stretch of imagination the selling dealer can be made liable for the lapse on the part of the purchasing dealer or on the part of his Assessing Authority. Further, if the purchasing dealer has wrongly informed his Assessing authority or even has not informed

> about the use of ST-1 forms it is no ground to doubt the sales or not to allow the deduction to the selling dealer. Besides this, in case the purchasing dealer is found to commit fraud in any manner, he is subjected to action under the provisions of Delhi Sales Tax Act and Rules therein. But the selling dealer cannot be penalized for the same."

19. The principle of law that emerges from all the aforesaid decisions is that cancellation of the registration certificate of a dealer cannot be effective against the other dealers engaged in business dealings with the said dealer unless the fact of cancellation is notified in the gazette.

20. Applying the above principle to the facts of the present case, it is apparent that the appellant had entered into transactions with M/s Jai Enterprises and M/s Shriram Enterprises after the dates the registration certificates were cancelled. But the said fact of cancellation of RC of the selling dealers in the present case had not been notified as envisaged under provisions of section 22(8) of the DVAT Act. No document or evidence has been placed on record to establish that the appellant has been aware of the fact of cancellation of the registration certificate of the selling dealers or is otherwise in collusion with the selling dealers. Copy of the print of the list of cancelled dealers hosted on the website of the department placed on record by the Revenue has no indication as to on which date it is published in gazette or hosted on the website. On the other hand the appellant has produced enough evidence about the genuineness of the transactions effected by him. He has filed the copy of the ledger account of the dealers, payments have been made by cheques. Authorities below have been totally mistaken in placing reliance on the provisions of section 9(7)(a) and 9(2)(a) as the selling dealers with whom the appellant has conducted transactions were the registered dealers and not the dealers who were not registered or un-registered dealers.

21. In view of the foregoing discussion we are of the considered view that the Input Tax Credit in respect of the two dealers namely, M/s Jai Enterprises and M/s Shriram Enterprises has been wrongly disallowed to the appellant and the impugned orders are consequently set aside and the appellant is held entitled to the ITC claimed by him. As a result of this the imposition of interest and of the penalty is also illegal and set aside. Ordered accordingly.

22. Order pronounced in the open court.

23. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 137 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S.Muralidhar and Justice Vibhu Bakhru]

W.P.(C) 134/2014 & 135/2014
CM Nos. 6108/2016 & 6109/2016

Lotus Impex ... Petitioner

versus

The Commissioner, Department Of Trade & Taxes,
New Delhi & Anr. ... Respondents

Order : February 19, 2016

WRIT UNDER CONSTITUTION- DELHI VALUE ADDED TAX ACT, 2004 – REFUND- TIME LIMITATION FOR FRAMING ASSESSMENT OR REASSESSMENT UNDER SECTION 32, 33 &34- APPLICABILITY OF SECTION 9(2)(g) – NOTICE U/S 59(2) ISSUED AGAIN, DURING THE PENDENCY OF WRIT – WHETHER JUSTIFIED, HELD – NO.

REFUND CLAIMED IN THE RETURNS DISALLOWED- INPUT TAX CREDIT ALSO DISALLOWED ALLEGING GOODS WERE PURCHASED FROM CANCELLED DEALERS/BOGUS DEALERS- VATO CARRIED OUT DEFAULT ASSESSMENT OF TAX AND INTEREST AND IMPOSED PENALTY – OBJECTION HEARING AUTHORITY SET –ASIDE THE ORDER AND REFERRED THE CASE TO VATO TO RECORD THE REASONS FOR DISALLOWANCE OF ITC AND TO PASS FRESH ORDERS.- NO ORDERS PASSED BY VATO WITHIN PRESCRIBED TIME- WRIT PETITION FILED SEEKING DIRECTION TO GRANT REFUND- NOTICE U/S 59(2) ISSUED TO FRAME FRESH DEFAULT ASSESSMENT BY INVOKING THE PROVISIONS OF SEC 34(1) OF THE ACT- THE ORDERS WERE PASSED DEMAND CREATED AND REFUND DISALLOWED – THE PETITIONER ALSO CHALLENGED THE FRESH ORDERS BY AMENDING WRIT PETITION- THE COURT HELD THAT PROCEEDING SOUGHT TO BE INITIATED FRESH BY ISSUANCE OF NOTICE U/S 59(2) AND PASSING ORDERS WERE AN ABUSE OF LAW AND HEREBY QUASHED - DIRECTIONS WERE ISSUED TO REVENUE TO GRANT REFUND WITH INTEREST.

Facts of the Case

The Petitioner was a partnership firm registered with the Department of Trade and Taxes (DTT) under the Delhi Value Added Tax Act 2004 (DVAT Act). It was engaged in the business of export of motor vehicles and tractors in Delhi. The Petitioner filed monthly returns of sales and purchases in Form DVAT 16 under Section 26 of the DVAT Act for the period 1st August, 2008 to 31st August, 2008 on 29th September, 2008 claiming refund of Rs.12,07,225/- under Section 38 read with Rule 34 of

DVAT Acts and Rules. The Petitioner filed the monthly return for the period 1st October, 2008 to 31st October, 2008 on 28th November, 2008 claiming refund of Rs. 30,42,693. It was stated that under Section 38 (3) (a) (i) of the DVAT Act, the Petitioner was entitled to refund of the aforementioned claims within two months of making them. In other words, in respect of the refund claimed for the period August 1st to 31st 2008, the refund was due by 29th November, 2008 and for the refund claimed for the period 1st to 31st October, 2008 it was due by 28th January, 2009.Two separate assessment orders dated 6th October, 2009 (for the periods 1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) the Value Added Tax Officer (VATO) disallowed the input tax credit (ITC) claimed on certain purchases. For the period 1st to 31st August 2008 refund to the extent of Rs. 87, 124 was allowed and the balance Rs. 11,20,101 was disallowed. For the period 1st October, 2008 to 31st October, 2008, refund to the extent of Rs. 5,12,169 was allowed and the balance Rs. 25,30,534 was disallowed. The default assessment orders aforementioned set out the reasons for the disallowance of refund as under: "The tax credit for the purchases was not genuine but artificially created since the selling dealers namely M/s Yash Traders, Sachdeva Sons, M/s Standard Motor Cycle House found to be bogus by the Enforcement Survey of these dealers. Consequently the purchases from these dealers were bogus. The report of the VAT (Audit) revealed that purchases of these three dealers were neither verified from the records of selling dealers nor from their bank records. Since these dealers did not purchase goods, they could not sell the same. In view of the above, the transactions with these dealers were on paper only and the benefit of input tax credit was disallowed." Aggrieved by the aforementioned orders, the petitioner filed objections before the Objection Hearing Authority (OHA) under Section 74 of the DVAT Act. By two separate orders dated 11th August 2010 and 21st October 2010, the OHA set aside the aforementioned orders of the VATO and remanded the matters to be heard afresh after giving the objector a reasonable opportunity of being heard. The above orders of the OHA were not complied with by the VATO and no fresh orders were passed. The period for passing an order of default assessment in terms of Section 34 of the DVAT Act expired on 31st March 2013. In the absence of any pending proceedings against the Petitioner, the DTT was liable to refund the entire amount of refund as claimed in the return in terms of Section 38 of the DVAT Act. Instead of processing the claims for refund in terms of Section 38 of the DVAT Act, the VATO proceeded to pass two fresh default assessment orders under Section 32 of the DVAT Act for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) on 20th August 2014. Writ petition filed.

Held

Held that Section 9 (2) (g) of the DVAT Act inserted with effect from 1st April 2010 provided that unless the tax paid by the purchasing dealers had been actually deposited by the selling dealer with the Government or had been lawfully adjusted against output tax liability and reflected in the return filed for the respective tax period, no tax credit would be allowed to the dealers or class of dealers. Since the provision was prospective it did not apply to the purchases made by the petitioner in the months of August and October, 2008.As far as Section 9 (2) (a) of the DVAT Act was concerned it stated that no tax credit shall be allowed in the case of goods purchased from a person who was not registered dealer. This would have apply, if at all, only where it was able to be shown that the petitioner was aware at the time of purchase that the selling dealer was in fact not a registered dealer or was a bogus dealer or had not deposited the tax in question. None of these conditions were fulfilled as far as this case was concerned. There was an even more fundamental problem with the entire exercise of the respondent passing orders of default assessment of tax and penalty against the petitioner. Given the history of this litigation, where the petitioner had to approach the Court for refund due to it in terms of Section 38 of the DVAT Act, the move of the DTT to raise fresh demands of tax and penalty after the petitioner had succeeded before this Court, appeared to be an abuse of the process of law. With the Respondent plainly failing to abide by the discipline of law and pass a fresh assessment order within the stipulated time, the petitioner was entitled to the refund as claimed. It was only with a view to avoiding the legal consequences that the Respondent had resorted to the issuance of a fresh notice under Section 59 of the DVAT Act. What the DTT did by that process was to give itself a second opportunity of assessing the petitioner to tax for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) long after the limitation for doing so expired and only, it seemed ,to deny somehow the refund due to the petitioner. Therefore, as far as the Court was concerned, the proceedings sought to be initiated by notice under Section 59 (2) were an abuse of process of law and the consequential orders dated 28th August 2014 of default assessment of tax and penalty for the above mentioned two periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) were quashed. While, in the normal course, the Court may have relegated the petitioner to the statutory remedy, given that the proceedings initiated afresh by issuance of the notice under Section 59 (2) of the DVAT Act were wholly without legal basis, the Court was of the view that it would not be efficacious or otherwise subject the petitioner to further rounds of

litigation. For the DTT having failed to comply with the earlier order of the Court and pass a fresh order, the refund claimed by the petitioner for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) was allowed. The legal position in this regard had been explained by this Court by the order dated 3rd June, 2010 in the case of Swarn Darshan Impex (P) Ltd v. Commissioner, Value Added Tax. This Court reiterated the law as explained in Commissioner Sales Tax v. Behl Construction (2009) 21 VST 261. It was held that in terms of Section 38 (3) (a) (i) of the DVAT Act, refund had to be made to the petitioner within two months from the date the return was furnished to the DTT. Consequently, the Court directed the Respondent to refund to the petitioner the entire amount of refund as claimed in its returns. In view of the notification in file no F (3) 58 fin of 05-06/903 dated 30th November, 2015, The petitioner was entitled to simple interest @ 6% p.a. from the date the refund was due till the actual date of payment. The writ petitions were allowed.

Cases Referred to:

- *Swarn Darshan Impex (P) Ltd v. Commissioner, Value Added Tax, 48 DSTC 317*
- *Commissioner Sales Tax v. Behl Construction (2009) 21 VST 261*

Present for Petitioner	:	Mr. Vinod Srivastava and Mr. Ravi Choudhari, Advocates
Present for Respondent	:	Mr.Satyakam, Additional Standing Counsel

ORDER

Dr. S. Muralidhar, J:

CM Nos. 6108/2016 & 6109/2016

1. For the reasons stated therein, the applications are allowed. The amended writ petition is taken on record.

WP (C) Nos.134/2014 & 135/2014

1. With the consent of the parties, the writ petitions are taken up for final hearing.

2. The Petitioner is a partnership firm registered with the Department of Trade and Taxes (DTT) under the Delhi Value Added Tax Act 2004 (DVAT Act). It is engaged in the business of export of motor vehicles and tractors

in Delhi. The Petitioner filed monthly returns of sales and purchase in Form DVAT 16 under Section 26 of the DVAT Act for the period 1st August, 2008 to 31st August, 2008 on 29th September, 2008 claiming refund of Rs.12,07,225/- under Section 38 read with Rule 34 of DVAT Acts and Rules.

3. The Petitioner filed the monthly return for the period 1st October, 2008 to 31st October, 2008 on 28th November, 2008 claiming refund of Rs. 30,42,693.

4. It is stated that under Section 38 (3) (a) (i) of the DVAT Act, the Petitioner was entitled to refund of the aforementioned claims within two months of making them. In other words, in respect of the refund claimed for the period August 1st to 31st 2008, the refund was due by 29th November, 2008 and for the refund claimed for the period 1st to 31st October, 2008 it was due by 28th January, 2009.

5. It is stated that by two separate assessment orders dated 6th October, 2009 (for the periods 1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) the Value Added Tax Officer (VATO) disallowed the input tax credit (ITC) claimed on certain purchases. For the period 1st to 31st August 2008 refund to the extent of Rs. 87, 124 was allowed and the balance Rs. 11,20,101 was disallowed. For the period 1st October, 2008 to 31st October, 2008, refund to the extent of Rs. 5,12,169 was allowed and the balance Rs. 25,30,534 was disallowed.

6. The default assessment orders aforementioned set out the reasons for the disallowance of refund as under:

> "The tax credit for the purchases is not genuine but artificially created since the selling dealers namely M/s Yash Traders, Sachdeva Sons, M/s Standard Motor Cycle House found to be bogus by the Enforcement Survey of these dealers. Consequently the purchases from these dealers are bogus. The report of the VAT (Audit) revealed that purchases of these three dealers were neither verified from the records of selling dealers nor from their bank records. Since these dealers did not purchase goods, they could not sell the same. In view of the above, the transactions with these dealers are on paper only and the benefit of input tax credit is disallowed."

7. Aggrieved by the aforementioned orders, the petitioner filed objections before the Objection Hearing Authority (OHA) under Section 74

of the DVAT Act. By two separate orders dated 11th August 2010 and 21st October 2010, the OHA set aside the aforementioned orders of the VATO and remanded the matters to be heard afresh after giving the objector a reasonable opportunity of being heard. Inter alia, it was observed by the OHA in the order dated 11th August 2010 as under:

> "5. Input tax credit is governed by Section 9 of the DVAT Act, 2004, and if the same has to be disallowed, it has to be under provisions of the said Section. A plain reading of this Section would reveal that except Section 9 (g), no other sub-section disallows input tax credit on the basis of irregularities committed by the selling dealer. Section 9 (g) has been incorporated in the Act with effect from 1.4.2010 and cannot be implemented for the period of audit with retrospective effect. Orders passed by Assessing Authorities should conform to the provisions of the law, and if the Assessing Authority had intended to disallow ITC claimed by the Objector, he should have specifically quoted the relevant provisions, which have been violated by the Objector. Hence, orders passed by the Assessing Authority are not as per the then prevailing provisions of law and cannot be upheld.
>
> 6. In result, the impugned orders are set aside. However the VATO concerned is directed to assess the case afresh on the above said lines after giving the Objector a reasonable and proper opportunity of being heard."

8. It is stated that the above orders of the OHA was not complied with by the VATO and no fresh orders were passed. The period for passing an order of default assessment in terms of Section 34 of the DVAT Act expired on 31st March 2013. In the absence of any pending proceedings against the Petitioner, the DTT was liable to refund the entire amount of refund as claimed in the return in terms of Section 38 of the DVAT Act.

9. In response to the notice issued in the present writ petitions, a counter affidavit has been filed by the Respondent in each of the petitions on 6th October, 2009. As far as the refund claimed in respect of the period 1st to 31st August 2008, it is stated that the claim for refund in the sum of Rs. 11,20,101 was rejected on the basis of a report given by the Enforcement branch in respect of the selling dealers M/s Yash Traders, M/s Sachdeva Sons and M/s Standards Motor Cycle House. It was stated that neither the books of accounts were provided by the said dealers nor any stock or godown was found at the premises. Accordingly, their respective registrations were cancelled. The claim by the Petitioner in respect of the

purchases made from the said dealers for this period was disallowed. Likewise, the refund claimed to extent of Rs. 25,30,534/- for the period 1st to 31st October 2008 was also disallowed for the same reason.

10. It is further stated that pursuant to the orders dated 11th and 21st August 2010 of the OHA, a notice dated 28th July, 2011 was issued to the Petitioner who appeared before the VATO on 8th August, 2011 but not thereafter.

11. A further short affidavit has been filed on 8th September, 2015 by Mr.D.K. Mishra, Special Commissioner, DTT in which it was stated that the dealer failed to appear on 9th August, 2011 before the VATO. It is further stated that "due to transfer of the said officer somehow the matter could not be attended to. It was subsequently discovered and action was initiated on the same."

12. It is stated that thereafter the dealer was issued a notice under Section 59 (2) of the DVAT Act on 11th July, 2014 to the Petitioner for producing documents as stated therein. The Petitioner appeared before the VATO on 17th July 2014, 25th July 2014 and 31st July 2014 and 8th August 2014. Explaining the reason for initiating the above proceedings, the Respondent has enclosed with the short affidavit, the notes in the files of the DTT. These make reference to the pendency of the present writ petitions and seek approval from the Additional Commissioner (Zone 6) to pursue the matter of the assessee and issue notice by invoking Section 34 of the DVAT Act. In the note sheet the Deputy Commissioner has recorded an endorsement in the following terms: "... I am satisfied that this is a clear case where the dealer has not paid taxes and assessment is necessary to assess the tax due."

The note suggests that counsel for the DTT had advised that default assessment should be done for the period 2008-09 in the first instance.

13. What is evident from the short affidavit is that a feeble attempt has been made to justify the initiation of fresh proceedings under Section 59 of the DVAT Act, while offering no satisfactory explanation for allowing the time period for completion of the original default assessment proceedings under Section 32 of the DVAT Act to lapse. The averment in the short affidavit to the effect that "somehow the matter could not be attended to" and that this lapse was "subsequently discovered" belies the fact that but for notice being issued in these writ petitions, the DTT would not have bothered to notice that the refunds claimed by the Petitioner in the returns originally filed were long overdue.

14. Instead of processing the claims for refund in terms of Section 38 of the DVAT Act, the VATO proceeded to pass two fresh default assessment orders under Section 32 of the DVAT Act for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) on 20th August 2014. For the period 1st to 31st August 2008 the Petitioner's refund claim was disallowed and a fresh tax demand in the sum of Rs. 2,66,349 (including tax, additional tax and interest) was raised. By a separate order of the same date of default assessment of penalty under Section 33 of the DVAT Act for the same period in the sum of Rs. 1,41,130 was passed. For the period 1st to 31st October 2008, the Petitioner's refund claim was disallowed and a fresh tax demand in the sum of Rs. 5,89,041 (including tax, additional tax and interest) was raised. By a separate order of the same date of default assessment of penalty under Section 33 of the DVAT Act for the same period in the sum of Rs. 3,16,316 was passed.

15. It is in the above circumstances that the Petitioner has challenged the above fresh orders of default assessment of tax and penalty by amendments to the present petitions.

16. At the outset, it requires to be noticed that in the fresh orders of default assessment of tax passed on 28th August 2014, the VATO makes no reference to the orders passed by the OHA on 11th August and 21st October 2010 setting aside the original assessment orders dated 6th October, 2009 and remanding the matters to the VATO for deciding afresh. Curiously, in the orders dated 28th August 2014, the VATO states that "I am reviewing the assessment order bearing reference no.....dated 6.10.2009 suo moto in exercise of the power conferred by virtue ofsection 74 B (5)" of the DVAT Act.

17. Apart from the obvious error committed by the VATO in purporting to review a non-existent order, even the requirements of Section 74 B of the DVAT Act were not satisfied and therefore the powers thereunder could not have been invoked. Section 74 B (1) of the DVAT Act states that the Commissioner may at any time within four years from the end of the year in which any order passed by him has been served, on his own motion, rectify any mistake apparent on record and shall within the said period or thereafter rectify any such mistake apparent on the record. When the original assessment orders dated 6th October 2009 of the VATO had been already set aside by the OHA by orders dated 11th August and 21st October 2010, there was simply no question of the Commissioner, and much less the VATO exercising powers under Section 74 B of the DVAT Act to rectify or review such orders.

18. A second problem with the orders dated 28th August 2014 is that although they purport to have been issued under Section 32 of the DVAT Act, in the body of the order it is stated that they have been made under Section 34 of the DVAT Act, on the basis of the permission granted by the Commissioner on 11th July 2014. In order to invoke the extended period of limitation under Section 34 of the DVAT Act, the Commissioner would, in terms of the proviso to Section 34 (1) of the DVAT Act, have to record reasons for the belief that tax was not paid "by reason of concealment, omission or failure to disclose fully material particulars" on the part of the Assessee. In the present case, there is no such reason to believe recorded by the Commissioner in the above terms and therefore, the jurisdictional requirement for invoking the extended period of limitation under Section 34 of the DVAT Act is not satisfied.

19. This Court has in H M Industries v. Commissioner of Value Added Tax 215 (2014) DLT 671 (DB) made it clear that the proviso to Section 34 (1) of the DVAT Act providing for an extended period of limitation would apply only when the following two conditions are met:

(i) that the Commissioner record reasons to believe that the tax has not been paid;

(ii) the reason for non-payment of tax would be concealment, omission or failure to disclose full material particulars on the part of the assessee.

20. As already noted herein before neither the above two conditions are satisfied in the present case. As far as the Petitioner was concerned, on the date of the aforementioned purchases, the registration of the selling dealers were not cancelled, as pointed out by the OHA in the order dated 11th August 2010.

21. Section 9 (2) (g) of the DVAT Act inserted with effect from 1 st April 2010 provides that unless the tax paid by the purchasing dealers has been actually deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and reflected in the return filed for the respective tax period, no tax credit shall been allowed to the dealers or class of dealers. Since the provision is prospective it does not apply to the purchases made by the Petitioner in the months of August and October, 2008.

22. As far as Section 9 (2) (a) of the DVAT Act is concerned it states that no tax credit shall be allowed in the case of goods purchased from a

person who is not registered dealer. This would apply, if at all, only where it is able to be shown that the Petitioner was aware at the time of purchase that the selling dealer was in fact not a registered dealer or was a bogus dealer or had not deposited the tax in question. None of these conditions are fulfilled as far as the present case is concerned.

23. There is an even more fundamental problem with the entire exercise of the Respondent passing orders of default assessment of tax and penalty against the Petitioner. Given the history of this litigation, where the Petitioner had to approach this Court for refund due to it in terms of Section 38 of the DVAT Act, the move of the DTT to raise fresh demands of tax and penalty after the Petitioner had succeeded before this Court, appears to be an abuse of the process of law. With the Respondent plainly failing to abide by the discipline of law and pass a fresh assessment order within the stipulated time, the Petitioner was entitled to the refund as claimed. It is only with a view to avoiding the legal consequences that the Respondent has resorted to the issuance of a fresh notice under Section 59 of the DVAT Act. What the DTT did by that process was to give itself a second opportunity of assessing the Petitioner to tax for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) long after the limitation for doing so expired and only, it seems, to deny somehow the refund due to the Petitioner.

24. Therefore, as far as this Court is concerned, the proceedings sought to be initiated by notice under Section 59 (2) were an abuse of process of law and the consequential orders dated 28th August 2014 of default assessment of tax and penalty for the abovementioned two periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) are hereby quashed.

25. While, in the normal course, the Court may have relegated the Petitioner to the statutory remedy, given that the proceedings initiated afresh by issuance of the notice under Section 59 (2) of the DVAT Act are wholly without legal basis, the Court is of the view that it would not be efficacious or otherwise subject the Petitioner to further rounds of litigation. For the DTT having failed to comply with the earlier order of his Court and pass a fresh order, the refund claimed by the Petitioner for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) is hereby allowed.

26. The legal position in this regard has been explained by this Court by the order dated 3rd June, 2010 in the case of Swarn Darshan Impex (P) Ltd v. Commissioner, Value Added Tax. This Court reiterated the law

as explained in Commissioner Sales Tax v. Behl Construction (2009) 21 VST 261. It was held that in terms of Section 38 (3) (a) (i) of the DVAT Act, refund has to be made to the Petitioner within two months from the date the return is furnished to the DTT.

27. Consequently, this Court directs the Respondent to refund to the Petitioner the entire amount of refund as claimed in its returns. In view of the notification in file no F (3) 58 fin of 05-06/903 dated 30th November, 2015, The Petitioner is entitled to simple interest @ 6% p.a. from the date the refund was due till the actual date of payment. The writ petitions are allowed in the above terms, with no orders as to costs.

[2015] 53 DSTC 147 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S.Muralidhar and Justice Vibhu Bakhru]

Reserved on: May 25, 2016
Decided on: June 03, 2016
W.P. (C) 5192/2015 & CM No. 9417/2015

Mega Cabs Pvt. Ltd. ... Petitioner

Versus

Union of India & Ors. ... Respondents

Date of Judgment : June 03, 2016

RULE 5A(2) OF THE SERVICE TAX RULES,1994 – CIRCULAR NO.181/7/2014-ST DATED 10TH DECEMBER, 2014 CLARIFYING FOR STATUTORY BACKING OF CONDUCTING AUDIT U/S 92(4)(k) BY DEPARTMENTAL OFFICERS – CAG OR DEPARTMENT TEAM CANNOT UNDERTAKE AN AUDIT OF THE RECORDS OF SERVICE TAX ASSESSEE – THE WORD 'VERIFY' CANNOT BE CONSTRUED AS POWER TO AUDIT - CIRCULAR NO. 181/7/2014-ST HELD TO BE ULTRA VIRES THE ACT – COURT DECLARED CBEC CIRCULAR NO. 995/2/2015-CX AND SERVICE TAX AUDIT MANUAL 2015 AS ULTRA VIRES THE ACT.

Facts of the Case

The Petitioner was in the business of running a radio taxi service and was also engaged in selling advertisement space. The Petitioner got registered with the Service Tax Department in Delhi on 27th December 2004. Since then it was regularly paying service tax and also filing its service tax returns. The Petitioner changed its name from Mega Cabs Ltd. to Mega Cabs Pvt. Ltd. with effect from 27th October 2014.

By a Notification dated 28th December 2007, the Central Government in the Ministry of Finance, Department of Revenue inserted Rule 5A in the ST Rules. Consequent thereto, the CBEC also issued an instruction on 1st January 2008 explaining the scope of the powers of the various officers of the Department to carry out audit or scrutiny of the records of service taxpayers.

Rule 5A as inserted by the aforementioned Notification dated 28th December 2007 reads as under: —

*"**Rule 5A. Access to a registered premises***

(1) An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

(2) Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be, -

(i) the records as mentioned in sub-rule (2) of Rule 5;

(ii) trial balance or its equivalent; and

(iii) the income-tax audit report, if any, under Section 44AB of the Income-tax Act, 1961 (43of 1961), for the scrutiny of the officer or audit party, as the case may be.

Both the Notification dated 28th December 2007 inserting Rule 5A as well as the CBEC Instruction dated 1st January 2008 were challenged before this Court in a writ petition by Travelite (India). The challenge in the said petition was also to a letter issued by the Commissioner of Service Tax dated 7th November 2012 seeking the records of the said Petitioner Travelite (India) for the years 2007-08 till 2011-12 to be made available for scrutiny by an audit party.

Held That

The Court declared Rule 5A (2) as amended in terms of Notification No. 23/2014-Service Tax dated 5th December 2014 of the Central Government, to the extent that it authorised the officers of the Service Tax Department, the audit party deputed by a Commissioner or the CAG to seek production

of the documents mentioned therein on demand was ultra vires the Finance Act and, therefore, strike it down to that extent.

The Court helds that the expression verified 'in Section 94 (2) (k) of the Finance Act could not be construed as audit of the accounts of an Assessee and, therefore, Rule 5A (2) could not sustained with reference to Section 94(2) (k) of the Finance Act.

The Court declared the Circular No. 181/7/2014-ST dated 10th December 2014 of the Central Government to be ultra vires the Finance Act and strike it down as such.

The Court quashed the letter dated 30th April 2015 issued by the Commissioner of Service Tax, Audit-1, New Delhi addressed to the Petitioner as being unsustainable in law.

The Court declared that the CBEC Circular No. 995/2/2015-CX dated 27th February 2015 on the subject — Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates and the Central Excise and Service Tax Audit Manual 2015 issued by the Directorate General of Audit of the CBEC were ultra vires the Finance Act, do not had any statutory backing and could not the relied upon by the Respondents to legally justified the audit undertaken by officers of the Service Tax Department.

The petition and the application were disposed of in the above terms with no order as to costs.

Cases Referred for

- *Travelite (India) v. Union of India 2014 (35) STR 653 (Delhi)*
- *Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills AIR 1968 SC 1232*
- *Union of India v. S. Srinivasan (2012) 7 SCC 683*
- *General Officer Commanding-in-Chief v. Subhash Chandra Yadav AIR 1988 SC 876*
- *Sahara India (Firm) v. Commissioner of Income Tax (2008) 14 SCC 151*
- *CCE v. Ratan Melting and Wire Industries 2008 (12) STR 416 (SC)*
- *K. Satyanarayanan v. Union of India ILR (1996)*
- *Inter Continental Consultants v. Union of India 2013 (29) STR 9 (Delhi)*
- *Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi (1979) 4 SCC 248*

- *SKP Securities Ltd. v. Deputy Director 2013 (29) STR 337 (Cal.)*
- *A.C.L. Education Centre (P) Ltd. v. Union of India 2014 (33) STR 609(All)*
- *Sadbhav Engineering Ltd. v. Union of India (decision dated 3rd December 2014 of the Gujarat High Court).*
- *Larsen & Toubro Ltd. v. Commissioner of Value Added Tax (2014)73 VST 190 (Delhi)*
- *Pandit Banarsi Das Bhanot v. State of M.P. AIR 1958 SC 909.*
- *Association of Leasing & Financial Service Companies v. Union of India 2011 (2) SCC 352*
- *Government of Andhra Pradesh v. P. Laxmi Devi 2008 (4) SCC 720*
- *R.K. Garg v. Union of India 1981(4) SCC 675*

Present for Petitioner	:	Mr. J.K. Mittal and Mr. Rajveer Singh, Advocates.
Present for Respondent	:	Mrs. Sonia Sharma, Sr. Standing counsel with Ms Neha Chugh, Advocate for R-2 and R-3 Ms. Jyoti Dutt Sharma, CGSC with Ms. Nimisha Gupta, Advocate for UOI/R-1

JUDGMENT

Dr. S. Muralidhar, J.

Introduction

1.1 The challenge in this petition by Mega Cabs Private Limited is to Rule 5A(2) of the Service Tax Rules, 1994 ('ST Rules') as amended by the Service Tax (Third Amendment) Rules, 2014 made by the Central Government in terms of a Notification No. 23/2014-Service Tax dated 5th December 2014 in exercise of the powers conferred under Section 94(1) read with Section 94 (2)(k) of the Finance Act, 1994 ('FA') to the extent that the amended Rule 5A(2) empowers deputing departmental officers or officers from the Comptroller and Auditor General of India ('CAG') to 'demand' documents mentioned therein. It is contended that this is in conflict with Section 72A of the FA and beyond the rule making power of the Central Government.

1.2 The Petitioner has also challenged the constitutional validity of Section 94(2)(k) of the FA on the ground that it gives "plainly unguided and uncontrolled" delegated powers to the Central Government for framing

rules. It is stated that Section 94(2)(k) of the FA suffers from the vice of excessive delegation.

1.3 Also challenged is the Circular No. 181/7/2014-ST dated 10th December 2014 issued by the Central Board of Excise and Customs (‘CBEC’) stating that since a clear statutory backing for conducting audit is available under Section 92(4)(k) of the FA, the Departmental Officers would be directed to audit service tax Assessee in terms of the departmental instructions already issued.

1.4 Lastly, the petition challenges a letter dated 30th April 2015 issued by the Commissioner of Service Tax, Audit-1, New Delhi (Respondent No.2) informing the Petitioner that a team of officers of Circle-4, Group-1 of the said Commissionerate comprising three Superintendents and an Inspector would be verifying the relevant records of the Petitioner’s business in terms of Rule 5A to the ST Rules read with Section 94(1), 94 (2)(k) and 94(2)(n) of the FA as amended, during the first week of May 2015 for the financial years 2010-11 to 2013-14. The Petitioner was asked to cooperate and facilitate the officers in conducting the audit and verification.

Background facts

2. The Petitioner states that it is in the business of running a radio taxi service and is also engaged in selling advertisement space. The Petitioner got registered with the Service Tax Department in Delhi on 27th December 2004. Since then it is stated to be regularly been paying service tax and also filing its service tax returns. The Petitioner changed its name from Mega Cabs Ltd. to Mega Cabs Pvt. Ltd. with effect from 27th October 2014.

3. By a Notification dated 28th December 2007, the Central Government in the Ministry of Finance, Department of Revenue inserted Rule 5A in the ST Rules. Consequent thereto, the CBEC also issued an instruction on 1st January 2008 explaining the scope of the powers of the various officers of the Department to carry out audit or scrutiny of the records of service tax payers.

4. Rule 5A as inserted by the aforementioned Notification dated 28th December 2007 reads as under:

> **“Rule 5A. Access to a registered premises**
>
> (1) An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the

purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

(2) Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be, -

(i) the records as mentioned in sub-rule (2) of Rule 5;

(ii) trial balance or its equivalent; and

(iii) the income-tax audit report, if any, under Section 44AB of the Income-tax Act, 1961 (43 of 1961),

for the scrutiny of the officer or audit party, as the case may be.'

5. Both the Notification dated 28th December 2007 inserting Rule 5A as well as the CBEC Instruction dated 1st January 2008 were challenged before this Court in a writ petition by Travelite (India). The challenge in the said petition was also to a letter issued by the Commissioner of Service Tax dated 7th November 2012 seeking the records of the said Petitioner Travelite (India) for the years 2007-08 till 2011-12 to be made available for scrutiny by an audit party.

6. In *Travelite (India) v. Union of India 2014 (35) STR 653 (Delhi)*, a Division Bench of this Court struck down Rule 5A(2) as being ultra vires Section 72A read with Section 94(2) of the FA. The consequent Circular of CBEC Instruction dated 1st January 2008 was also struck down. It was clarified that Service Tax Audit Manual, 2011 was merely an instrument of instructions for the Service Tax authorities and has no statutory force.

7. Against the aforementioned judgment of this Court in *Travelite (India) v. Union of India (supra)*, Special Leave Petition No. 34872/2014 was filed in the Supreme Court by the Union of India. By order dated 18th December 2014, the Supreme Court while directing notice in the said Special Leave Petition directed that there would be a stay of the operation of the decision of this Court in *Travelite (India) v. Union of India (supra)*.

8. To complete the factual narration, following the decision in Travelite (India) (supra), an amendment was made to Section 94 of the FA by the

Finance Act 2014 with effect from 6th August 2014 by inserting clause (k) of sub-section (2) which read as under:

> “94. Power to make rules.-(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely
>
> (k) “imposition, on persons liable to pay service tax, for the proper levy and collection of tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified”

9. An amendment was also made to the ST Rules by replacing Rule 5 A (2) with a new Rule 5A(2) by the aforementioned central government notification dated 5th December 2014. Soon thereafter on 10th December 2014, the impugned Circular No. 181/7/2014-ST was issued by the CBEC clarifying that in view of the insertion of Section 94 (2) (k), the officers of the Service Tax Departments could proceed with conducting audits as before. It was stated that that expression ‘verified’ used in Section 94 (2) (k) of the FA was of wide import and would include within its scope audit by the departmental officers.

10. Thereafter Circular No. 995/2/2015-CX dated 27th February 2015 was issued by the CBEC on the subject “Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates” and this too contemplated the Department‘s officers themselves undertaking audits. A Central Excise and Service Tax Audit Manual, 2015 was also issued by the Directorate General of Audit of the CBEC in this regard.

11. Meanwhile on 9th July 2013, the Additional Commissioner (Audit) issued a letter with 6 annexures to the Petitioner seeking information for conducting audit of the records of the Petitioner under Rule 5A of the ST Rules, 1994 as it then stood for the years 2008-09 to 2012-13. The Petitioner in a reply sought deferment of the audit in view of the challenge to Rule 5A of the ST Rules as it then stood in the petition filed before this Court by Travelite (India). After the insertion of Section 94 (2) (k) of the FA, the Assistant Commissioner of Service Tax Department issued a letter dated 25th September 2014 stating that the Department has deputed its officers to conduct the verification/scrutiny of the records of the Petitioner. By a reply dated 8th October 2014, the Petitioner referred to the decision

in Travelite (India) (supra) and took the stand that the Department had no power to conduct an audit. Thereafter the Deputy Commissioner Audit-I (Respondent No. 3) herein issued the impugned letter dated 30th April 2015 citing the impugned notification dated 5th December 2014, Rule 5A(2) of the ST Rules as amended, and Circular dated 10th December 2014, and informed that its officers had been deputed to conduct the audit/verification of the Petitioner's records for the period from 2010-11 to 2013-14.

12. Thereafter the present petition was filed seeking the reliefs as noted hereinbefore. Notice was directed to issue on 22nd May 2015.

13. The Court would like to clarify at the outset that in view of the fact that the decision of this Court in Travelite (India) (supra) has been stayed by the Supreme Court, the Court in the present petition proposes to examine the question of the constitutional validity of the amended Rule 5A(2) of the ST Rules and the circulars and letter in question independent of the decision in Travelite (India) (supra).

Submissions of counsel for the Petitioner

14. The submissions of Mr. J.K. Mittal, learned counsel for the Petitioner, could be summarised as under:

(i) Although Rule 5A(2) of the ST Rules has purportedly been amended to overcome the defect pointed out by the Court in Travelite (India), the amended Rule 5A(2) continues to be ultra vires Section 72A of the FA.

(ii) While Section 72A of the FA only contemplates a special audit to be got done by the Assessee on the direction of the Commissioner, by a Cost Accountant or a Chartered Accountant ('CA'), Rule 5A(2) permits any officer of the Department or an audit party deputed by the Commissioner or the CAG (in addition to the Cost Accountant and the CA undertaking the special audit) to ask for production by the Assessee for books of accounts etc. "on demand". Apart from the fact that Rule 5A(2) expands the list of persons who could seek production of records and that too on demand, none of the safeguards spelt out in Section 72A require to be observed by the persons making such demand under Rule5A(2) of the Rules.

(iii) Relying on the decisions in *Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills AIR 1968 SC 1232, Union of India v. S. Srinivasan (2012) 7 SCC 683, General Officer Commanding-in-Chief v. Subhash Chandra Yadav AIR 1988 SC*

876 and Sahara India (Firm) v. Commissioner of Income Tax (2008) 14 SCC 151, it is submitted that the essential conditions for a validity of a subordinate legislation viz., that it (a) must conform to the provision of the statute under which it is framed (b) must be within the scope and purview of the rule making power of the authority, are not fulfilled in the present case. (iv) Relying on the decision in *CCE v. Ratan Melting and Wire Industries 2008 (12) STR 416 (SC)*, it is submitted that even the circulars and instructions issued by the CBEC would have to conform to the FA. Such circulars issued on the understanding of the Central or State Governments of the statutory provisions are not binding on the Courts.

(v) The provisions of the CAG's Duties Powers and Conditions of Service Act, 1971 ("CAG Act") and the provisions of Articles 148 and 149 of the Constitution of India do not envisage the CAG performing audit of private entities. Referring to the decision in *K. Satyanarayanan v. Union of India ILR (1996)* II Delhi, it is contended that the CAG is not expected to conduct audit of the books of accounts and records of an individual service tax Assessee. The decisions in *Inter Continental Consultants v. Union of India 2013 (29) STR 9 (Delhi)* and *Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi (1979) 4 SCC 248* were also referred to.

(vi) Drawing a comparison with the corresponding provisions of the Companies Act, 1956, the Income Tax Act, 1961 and Central Excise Act, 1944 ("CE Act") it was submitted that the safeguards incorporated in the above provisions are not to be found in Rule 5A(2) and, therefore, it gave a wide unguided powers to the officers of the Department and to the audit parties deputed by the Commissioner to 'demand' the past record of any number of years without explaining the reasons for doing so.

(vii) The requirements for an Assessee to have its accounts, records etc. audited in terms of Section 72A of the Finance Act had to be preceded by formation of a belief by the Commissioner that any of the four contingencies listed out in Section 72(1)(a) to 72(1)(d) prima facie exist. That function cannot be performed without putting the Assessee to notice i.e. at a stage prior to the Commissioner deciding to direct the Assessee to get its accounts audited. Reliance was placed on the decisions in *Sahara India (Firm), Lucknow v. Commissioner of Income Tax (supra), SKP*

Securities Ltd. v. Deputy Director 2013 (29) STR 337 (Cal.), A.C.L. Education Centre (P) Ltd. v. Union of India 2014 (33) STR 609(All) and Sadbhav Engineering Ltd. v. Union of India (decision dated 3rd December 2014 of the Gujarat High Court in Special Civil Application No. 14928/2014). Reference is also made to the decision of this court in *Larsen & Toubro Ltd. v. Commissioner of Value Added Tax (2014)73 VST 190 (Delhi)*.

(viii) Even assuming the information was being sought pursuant to the powers of assessment of the service tax under Section 72 of the FA, considering that the Petitioner has been regularly filing service tax returns and regularly paying service tax, there was no occasion for a special audit to be ordered.

(ix) The recent Circular No. 995/2/2015-CX dated 27th February 2015 issued by the CBEC on the subject “Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates” contemplated the Department‘s officers themselves undertaking the audit and had no statutory basis. The recent Central Excise and Service Tax Audit Manual, 2015 issued by the Directorate General of Audit of the CBEC again did not take in to account the statutory scheme of the FA which did not permit such exercise to be undertaken.

(x) Section 94 (2) (k) of the FA did not permit Rules to be made in respect of examination of accounts and records by any officer of the Service Tax Department. If the provision were so interpreted it would suffer from the vice of excessive delegation.

Submissions of counsel for the Respondents

15. Countering the above submissions, Mrs. Sonia Sharma, learned Senior Standing counsel appearing for Respondent Nos. 2 and 3 and Ms. Jyoti Dutt Sharma learned counsel appearing for Respondent No. 1 submitted as under:

(i) that the decision of this Court in Travelite (India) (supra) is of no avail to the Petitioner since the said decision has been stayed by the Supreme Court. It is submitted that the defect pointed out in Rule 5A(2) by this Court in Travelite (India) (supra) has been rectified by amending Rule 5A(2).

(ii) Rule 5A(2) has to be read in continuation of and consequent to Sections 72, 73 and 73A of the FA. Rule 5 A (2) so read cannot be said to be ultra vires the FA.

(iii) Section 94 (2) (k) did not suffer from the vice of excessive delegation. It only acted as a check on the general powers under the unamended Rule 5A. Section 94(2)(k) of the FA was not in conflict with Section 72A of the FA since Section 94(2) begins with the words "In particular and without prejudice to the generality of the foregoing power...". Reliance is placed on the decision in *Pandit Banarsi Das Bhanot v. State of M.P. AIR 1958 SC 909.* There was enough legislative guidance under Chapter V of the Finance Act for exercise of the rule making power under Section 94(2)(k) of the Act.

(iv) The Petitioner has not demonstrated how its rights were prejudiced by the audit party of the Department seeking to inspect the Petitioner's records. Reliance was placed on the decisions in *Association of Leasing & Financial Service Companies v. Union of India 2011 (2) SCC 352* regarding the legislative competence of the Parliament to levy and collect service tax. Reliance is also placed on the decision in *Government of Andhra Pradesh v. P. Laxmi Devi 2008 (4) SCC 720* to urge that a mere fact that a hardship would be caused to the Assessee as a result of the fiscal statute, would not invalidate such statute.

(v) The amendment was in the nature of a 'validating' law which was only to plug a loophole and correct the defects pointed out by this Court. Relying on the decision in *R.K. Garg v. Union of India 1981(4) SCC 675* it was submitted that greater play in the joints had to be allowed to the legislature and that too in the field of economic regulation. The Court should grant greater deference to legislative wisdom.

Analysis of the provisions of the FA

16. At the outset it requires to be noticed that unlike the Income Tax Act, 1961 or even the Delhi Value Added Tax Act, 2004 there is no provision in the FA for re-assessment of a service tax return. There can be a self-assessment in which case the return filed by the Assessee is accepted as such and the tax amount indicated therein is accepted as being correct. However under Section 72 of the FA two scenarios are envisaged. Section 72 reads as under:

"72. Best judgement assessment:- If any person, liable to pay service tax,-

(a) fails to furnish the return under section 70;

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made there under, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

17. Under Section 72 of the FA, one scenario is where a person who is liable to pay service tax fails to furnish a return under Section 70. The second is where such person has filed a return but "fails to assess the tax in accordance with the provisions of this Chapter or rules thereunder". The Assessing Officer (AO) is in the either scenario empowered to require the production of such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, give an order in writing after complying with the rules of natural justice. The assessment in such circumstance is made on the value of the taxable service "to the best of his judgment". The AO determines the sum payable by the Assessee or refundable to the Assessee on the basis of such assessment. Therefore, even for the purpose of Section 72 a prima facie satisfaction is to be arrived at that the return filed by the Assessee fails to assess the tax in accordance with law. Even in such an instance the calling for the accounts, documents and other evidence is not to be undertaken by an AO mechanically.

18. The second important factor to be noted as far as Section 72 of the FA is concerned is that it is not any or every officer of the service tax department who can exercise the power thereunder. The function of making an assessment has to be assigned to such officer. It is only such officer who is entrusted with such power who can proceed to ask for the documents, records, accounts etc.

19. Section 72 A of the FA, which deals with the special audit, reads as under:

"**72A. Special Audit: (1):** If the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax (herein referred to as ''such person'')—

(i) has failed to declare or determine the value of a taxable service correctly; or

(ii) has availed and utilised credit of duty or tax paid-

(a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or

(b) by means of fraud, collusion, or any wilful misstatement or suppression of facts; or

(iii) has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner, he may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

(2) The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of such person have been audited under any other law for the time being in force.

(4) The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit under sub- section (1) and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation. — For the purposes of this section—

(i) “chartered accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949;

(ii) “cost accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959.”

20. The scheme of Section 72A is that in the first instance the Commissioner has to record "reasons to believe" that the person who is liable to pay service tax has:

(i) failed to correctly declare or determine the value of the taxable service; or

(ii) wrongly availed or utilised credit or paid tax beyond the normal rebates having regard to the nature of the taxable services provided or by means of fraud, collusion or any wilful misstatement or suppression of facts; or

(iii) operations spread out in multiple locations and it is not practicable to obtain a true and complete picture of the accounts from the registered premises in the jurisdiction of the concerned Commissionerate.

21. It is only where one of the above three contingencies exists that the Commissioner may direct the Assessee to "get his accounts audited either by a Chartered Accountant or a Cost Accountant nominated by such Commissioner". The extent of the audit and the period for which it should be conducted is also to be specified by the Commissioner.

22. Although Section 72A of the FA itself does not expressly provide for giving the Assessee a hearing prior to passing of an order thereunder, the implied necessity for doing so has been explained by the Supreme Court in *Sahara India (Firm) v. Commissioner of Income Tax (supra)* in the context of Section 142 (2A) of the Income Tax Act, 1961 which also envisages the Assessee having to get its accounts audited by a special auditor appointed therein.

23. Under Section 72A (4) of the FA, the Assessee is given a hearing in respect of any material gathered on the basis of the audit under Section 72A (1). Section 142 (3) of the Income Tax Act, 1961 also contemplates such post-decisional hearing. However the Supreme Court was of the view that such post-decision hearing is "no substitute for pre-decisional hearing". It emphasised in para 32 of the decision as under:

> "32. The upshot of the entire discussion is that the exercise of power under Section 142(2-A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142(2-A) barring the giving of reasonable opportunity to an

> assessee, the requirement of observance of principles of natural justice is to be read into the said provision. Accordingly, we reiterate the view expressed in Rajesh Kumar case."

24. The Court is of the view that Section 72A would also envisage such a pre-decisional hearing which acts as an additional safeguard against the arbitrary exercise of the power of the Commissioner of Service Tax to order a special audit. The statutory limitation on the exercise of the powers of the Commissioner to order a special audit will have to be kept in view while analysing Rule 5A(2) of the ST Rules, as amended.

25. To complete the analysis of the provisions of the FA, notice must also be taken of Section 73 of the FA which talks of recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. Relevant to the present discussion is the requirement in Section 73 of issuing a show cause notice ("SCN") to the person who is suspected of having not paid or short-paid or having obtained erroneously a refund of service tax.

26. In the said proceedings it is possible that the Assessee may be required to produce records, documents, accounts etc. Even here there is no question of the Assessee being asked to produce records simply on demand without being given an opportunity of explaining the Assessee's version of the case. In the present case, it is not denied by the Respondents that the Petitioner has been filing ST returns and paying service tax on that basis regularly. The fact that the Department has sought to itself undertake audit of the Petitioner's accounts is also not denied.

27. Section 82 of the FA is relevant since it authorises search of the premises. It reads as under:

> **"82. Power to search premises:-**
>
> (1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorise in writing any Central Excise Officer to search for and seize or may himself search and seize such documents or books or things.
>
> (2) The provisions of the Code of Criminal Procedure, 1973, relating to searches, shall, so far as may be, apply to searches under this section as they apply to searches under that Code."

28. What is immediately relevant is that the above power to search the premises is also hedged in by certain limitations. One is the requirement of the officer to record reasons to believe that (i) there are documents or books that have been secreted in a place (ii) such documents or books are useful or relevant for any proceedings. A third safeguard is that the provisions of the Code of Criminal Procedure, 1973 (Cr PC) pertaining to searches apply in toto to any search in exercise of powers under Section 82 of the FA. Therefore even the power under Section 82 cannot be said to be totally without guidelines or restrictions.

Analysis of the amended Rule 5A(2)

29. It is in the above background that a scrutiny is now undertaken of Rule 5A(2) as amended by Notification No. 23/2014-Service Tax of the Central Government. The amended Rule 5A reads as under:

> “Rule 5A. Access to a registered premises.
>
> (1) An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.
>
> (2) Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, or a cost accountant or chartered accountant nominated under section 72 A of the Finance Act, 1994
>
> (i) the records maintained or prepared by him in terms of sub-rule (2) of rule 5;
>
> (ii) the cost audit reports, if any, under Section 148 of the Companies Act, 2013 (18 of 2013); and
>
> (iii) the income-tax audit report, if any, under Section 44 AB of the Income-tax Act, 1961 (43 of 1961),
>
> for the scrutiny of the officer or the audit party, or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case maybe.”

30. In the first instance it requires to be noticed that there are three distinct types of documents that can be asked to be made available “on demand” by an Assessee:

(i) the records mentioned in terms of Rule 5(2).

(ii) cost audit reports, if any, under Section 148 of the Companies Act, 2013

(iii) the income tax audit report, if any, under Section 44AB of the Income Tax Act, 1961.

31. Rule 5(2) requires the Assessee to furnish to the Superintendent of Central Excise at the time of filing of return for the first time or on 31st January 2008 whichever is later a list in duplicate of all the records prepared or maintained by the Assessee for accounting of transactions, in regard to providing any service receipt or procurement of anybody‘s service and payment of such service.

32. Interestingly, Rule 5A(2) does not restrict itself to such records as mentioned in Rule 5(2) but also required production of cost audit reports under Section 148 of the Companies Act, 2013 and the Income Tax Audit report under Section 44AB of the Income Tax Act 1961. These documents are not envisaged to be produced under Rule 5(2) and definitely not under any of the provisions of the FA. This is, therefore, going far beyond the FA itself.

33. Now turning to the persons who can make a demand for such documents from an Assessee, Rule 5A(2) lists out the following persons:

(i) officer empowered under Rule 5A(1).

(ii) the audit party deputed by the Commissioner.

(iii) the CAG

(iv) a Cost Accountant (v) a Chartered Accountant.

34. It must straightway be noted that as far as a Cost Accountant or a Chartered Accountant (CA) is concerned, Mr. Mittal made it clear that the Petitioner would have no objection to producing before a Cost Accountant or a CA the documents of accounts, records etc. but only if such Cost Accountant or CA has been nominated by the Commissioner for the purpose of special audit under Section 72A of the Act. As far as an officer of the Department was concerned, he submitted, and rightly, that although under Rule 5A(1) such officer is authorised by the Commissioner to have access to unregistered premises for the purposes of carrying out any “scrutiny, verification and checks as may be necessary to safeguard the interests of the Revenue”, such officer can, in terms of Rule 5A(2) simply demand the production of such documents without any requirement of recording

reasons to believe that the production of such document is necessary. There is also no requirement of such officer having to be authorised to carry out a search under Section 82 of the FA or an assessment under Section 72 of the FA. If any and every officer is going to be deputed for that purpose it would result in harassment of the Assessees.

35. Rule 5A(2) envisages that even the CAG can require production of documents from an individual service tax Assessee 'on demand'. This appears to have no rational basis. As rightly pointed out by Mr Mittal, the powers and functions of CAG flow from Articles 148 and 149 of the Constitution of India read with the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. This Court in K. Satyanarayanan v. Union of India (supra) explained that the essential function of the CAG is to audit the accounts of public sector undertakings. Although in Association of Unified Tele Services Providers v. Union of India AIR 2014 SC 1984 the Supreme Court has, in the context of the functioning of telecom companies accepted the plea that their accounts can be subjected to scrutiny by the CAG, to expect the CAG to undertake an audit of the records of every service tax Assessee would indeed be extraordinary. Importantly, as far as the telecom service providers are concerned they are subjected to conditions of their licence which envisage their making available all their accounts for scrutiny. As far as the service tax Assessees are concerned one would still have to turn to the provisions of the FA to examine whether this kind of an access to the books of accounts etc. of an Assessee can be given to the CAG or just about any officer of the Department. With there being no such authorisation under the FA, the answer has to be in the negative.

Analysis of the CBEC Instructions and Manual

36. The instructions issued by the CBEC in this regard justify the above apprehension regarding the indiscriminate use of the powers under Rule 5A (2) of the ST Rules. The latest instruction is contained in Circular No. 995/2/2015-CX dated 27th February 2015. It is a very detailed instruction regarding the norms to be followed by the Audit Commissionerates. It sets out the manner in which units would be selected for audit in a year. Para 5.1 of the said circular states that audit groups would be deployed to cover the large, medium and small units and their composition would be of two or three Superintendents and three to five Inspectors for conducting audit of large assesses/tax payers, two Superintendents for medium size Assessee and one to two for small size Assessees. There is no requirement that any of these officers should be duly authorised to carry out an assessment for the purpose of Section 72 of the Act or adjudication for the purposes under

Section 73 of the FA. The entire instruction appears to be without any reference to the applicable provisions in the FA or the Rules.

37. A recent Manual has been issued by the CBEC in 2015, in replacement of the earlier Manual of 2011 which was by this Court in Travelite (India) to not have any statutory force. This 2015 Manual again fails to acknowledge that there is no statutory backing for the officers of the Department to themselves undertake an audit of the Assessee's accounts and records. This lacuna pointed out by the Court in Travelite (India) has not been set right.

Section 94 (2) (k) of the FA

38. The main plank of the defence of the Respondents in the present case to justify the amendment to Rule 5A(2) is Section 94(2)(k) of the FA introduced by the Finance Act of 2014 with effect from 6th August 2014. Considerable reliance is placed on the expression "keeping records and the manner in which such records shall be verified" occurring in the above provision. Although in the circular issued consequent upon the amendment by the CBEC on 10th December 2014 it is asserted by the Department that the expression "verified" is of wide import and would include within its scope audit by the Department officers, the Court is unable to agree. The expression "verified" has to be interpreted in the context of what is permissible under the FA itself. The verification of the records can take place by the officers of the Department provided such officers are authorised to undertake an assessment of a return or of adjudication for the purposes of Section 73 of the FA. It is not any and every officer of the Department who could be entrusted with the power to demand production of records of an Assessee. Therefore, the Court does not agree with the submission that the expression "verify" is wide enough to permit the audit of the accounts of the Assessee by any officer of the Service Tax Department.

39. There is a distinction between auditing the accounts of an Assessee and verifying the records of an Assessee. Audit is a special function which has to be carried out by duly qualified persons like a Cost Accountant or a CA. It cannot possibly be undertaken by any officer of the Service Tax Department.

Rule 5A (2) is ultra vires the FA

40. This brings up the issue of excessive delegation of powers and whether Rule 5A (2) is ultra vires the FA? The basic rules as regards subordinate legislation have been spelt out in Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills (supra) as under:

"89. On a review of the cases the following principles appear to be well-settled:

(i) Under the Constitution the legislature has plenary powers within its allotted field;

(ii) Essential legislative function cannot be delegated by the legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of a particular topic or matter entrusted by the Constitution to the legislature;

(iii) Power to make subsidiary or ancillary legislation may however be entrusted by the legislature to another body of its choice, provided there is enunciation of policy, principles, or standards either expressly or by implication for the guidance of the delegate in that behalf. Entrustment of power without guidance amounts to excessive delegation of legislative authority;

(iv) Mere authority to legislate on a particular topic does not confer authority to delegate its power to legislate on that topic to another body. The power conferred upon the legislature on a topic is specifically entrusted to that body, and it is a necessary intendment of the constitutional provision which confers that power that it shall not be delegated without laying down principles, policy, standard or guidance to another body unless the Constitution expressly permits delegation; and

(v) the taxing provisions are not exception to these rules."

41. In General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav (supra) the following principles were elucidated:

"14. ....It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

42. Tested on the above legal principles, the Court has no hesitation in concluding that Rule 5A(2) exceeds the scope of the provisions under the

FA. This is the result whether Rule 5A(2) is tested vis-a-vis Section 72A of the FA which pertains to special audit or Section 72 which pertains to assessment or Section 73 which pertains to adjudication or even Section 82 which relates to searches. Under the garb of the rule making power, the Central Government cannot arrogate to itself powers which were not contemplated to be given it by the Parliament when it enacted the FA. This is an instance of the Executive using the rule making power to give itself powers which are far in excess of what was delegated to it by the Parliament.

Validity of the circulars, the manual and the impugned letter

43. The decision in Ratan Melting & Wire Industries (supra) is relevant in the context of the circulars issued and the Manual prepared by the CBEC. As pointed out in that decision, a circular or a manual cannot travel beyond the scope of the statute itself. It will have no binding effect if it does so. In the present case inasmuch as Section 94(2)(k) does not permit the exercise of audit to be undertaken by an officer of the Department, the attempt in the circular to recognise such powers in the officers of the Central Excise and Service Tax Departments is held to be ultra vires the FA and, therefore, legally unsustainable.

44. For all of the above reasons, the impugned communication dated 30th April 2105 issued to the Petitioner by Respondent No.2 informing it of the appointment of an audit team to inspect all the records, books and accounts by the officers cannot be sustained in law.

Conclusion

45. Resultantly, the Court:

(i) declares Rule 5A(2) as amended in terms of Notification No. 23/2014-Service Tax dated 5th December 2014 of the Central Government, to the extent that it authorises the officers of the Service Tax Department, the audit party deputed by a Commissioner or the CAG to seek production of the documents mentioned therein on demand is ultra vires the FA and, therefore, strikes it down to that extent;

(ii) holds that the expression ‘verify’ in Section 94 (2) (k) of the FA cannot be construed as audit of the accounts of an Assessee and, therefore, Rule 5A(2) cannot be sustained with reference to Section 94(2)(k) of the FA.

(iii) declares the Circular No. 181/7/2014-ST dated 10th December 2014 of the Central Government to be ultra vires the FA and strikes it down as such.

(iv) quashes the letter dated 30th April 2015 issued by the Commissioner of Service Tax, Audit-1, New Delhi addressed to the Petitioner as being unsustainable in law.

(v) Declares that the CBEC Circular No. 995/2/2015-CX dated 27th February 2015 on the subject "Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates" and the Central Excise and Service Tax Audit Manual 2015 issued by the Directorate General of Audit of the CBEC are ultra vires the FA, do not have any statutory backing and cannot be relied upon by the Respondents to legally justify the audit undertaken by officers of the Service Tax Department.

46. The petition and the application are disposed of in the above terms with no order as to costs.

[2015] 53 DSTC 168 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S.Muralidhar and Justice Vibhu Bakhru]

W.P (C) 11221/2015 & CM No. 29209/2015

Bajrang Fabrics Pvt. Ltd. ... Petitioner

Versus

Commissioner of VAT & Anr. ... Respondents

Date of Order : 02.06.2016

UNDER RULE 62 OF THE DVAT RULES, 2005 – THE MANNER OF SERVICE OF NOTICES, DOCUMENTS AND ORDERS-SERVICE OF NOTICES ISSUED U/S 59(2) OF DVAT ACT – NOTICES UPLOADED ON THE WEBSITE OF THE DEPARTMENT OF TRADE & TAXES IN THE ACCOUNT OF THE PETITIONER IN ACCORDANCE WITH ORDER ISSUED BY COMMISSIONER UNDER RULE 62(1)(VI) – THE PETITIONER COULD NOT VIEW THE NOTICE POSTED ON THE WEBSITE – PETITIONER FILED WRIT AND CLAIMED THAT THE NOTICES WERE NOT DELIVERED TO HIM IN TERMS OF RULE 62 OF DVAT RULES, 2005. – WHETHER SERVICE OF NOTICES WAS PROPER AS PER LAW. HELD – YES.

VALIDITY OF ORDERS OF ASSESSMENT OF TAX, INTEREST AND PENALTY – EACH ORDER WAS IDENTICALLY WORDED EXCEPT FOR TAX PERIODS AND FIGURES – TAX PAID AND TURNOVER ASSESSED SHOWN AS ZERO BUT TAX ASSESSED AT RS 14,43,938/- ERRORS SHOWING ON COMPUTER SYSTEM – NONAPPLICATION OF MIND BY AA- WHETHER SUCH ORDERS COULD BE VALID ORDERS AS PER LAW – HELD NO.

Fact of the Case

The petitioner was engaged in the business of trading in all kinds of fabric including imported fabric. He was registered under DVAT Act and CST Act. Notices u/s 59(2) were uploaded on the website of the department of Trade and Taxes in the account of dealer but he claimed that these were not delivered to him in terms of Rule 62 of DVAT Rules, 2005. The petitioner claimed that he was not aware that such notices had been uploaded on the website. Accordingly, he did not appear before AA. Who passed ex-parte notices of default assessment of tax, Interest and Penalty u/s 32 & 33 of DVAT Act raising huge demands for 14 tax periods stating similar reason in each order in respect of interstate sale made to a dealer of Rajasthan which had been found to be a bogus dealer. Dealer claimed that when it was written in the orders itself that dealer had undertaken an interstate sale, then it could not be taxed u/s 32 & 33 of DVAT Act. Further, that assessments were not framed by VATO but by a record keeper as per noting on the file of VATO.

Held

The Court was unable to find a legal infirmity in the order issued by the commissioner dated 17th January 2014. It was not inconsistent with Section 13 (1) read with Section 13 (2) of the IT Act. While there may not be an express agreement between the originator and the notice, an order validly passed by the Commissioner in exercise of his powers under Rule 62 (1) (vi) of the DVAT Rules is binding on the registered dealers. Therefore, the system put in place by the Commissioner by the order dated 17th January 2014 cannot be said to be inconsistent with Sections 12 and 13 of the IT Act. It appeared that the dealers registered under the DVAT Act were in fact adapting their functioning to the changed system of service of electronic notices, summons or orders by DT&T.

The Petitioner being a registered dealer under the DVAT Act ought to have been aware of the Order dated 17th January 2014 issued by the Commissioner. The Petitioner was required to go to its account on the DT&T website to view the notices posted on the said website. If the Petitioner had given the mobile phone details to the DT&T, it would have received SMS alerts as well. The failure by the Petitioner to go to the website to view the impugned notices, notwithstanding the order dated 17th January 2014 of the Commissioner, disables it from contending that there was no proper service on it of the said notices under Section 59 (2) of the DVAT Act.

The Court had perused the noting on the file. While there was a noting signed by the Record Keeper that reads: "default assessment orders and

penalty framed under Section 32 and 33", there was nothing beyond that to suggest that it was the Record Keeper who framed such orders. It was plausible that the Record Keeper was merely noting the facts of the notices having been framed. From this it was not possible to infer that the impugned notices of default assessments of tax, interest and penalty were issued by the Record Keeper and not by the VATO.

Each of the impugned notices of default assessment of tax and interest revealed inter alia the tax period for which the demand had been raised. While Column 2 titled "turnover reported by dealer" contained a figure as per return shown by the petitioners, Columns 3 and 4 titled "turnover assessed" and "tax paid" were shown as '0'. The remaining Columns 5, 6, 7 and 8 titled "tax assessed", 'additional tax due, 'interest' and 'total amount due contain figures. If the turnover assessed is zero, it was not possible that the tax assessed was at a figure for e.g., of Rs. 14,43,938 for the first quarter of 2014. This sort of obvious error could only be explained by some defect in the system through which the said notices had been generated. No attempt has been made by the DT&T to explain the error.

The second obvious error was that the impugned notices of default assessment claimed that the Petitioner made inter-state sales to the dealer in Rajasthan who was found to be a 'suspicious/bogus' dealer. The notices proceeds to state that "since the dealer had made ISS of fabrics to the tune of.......", he was being asked to pay additional tax and penalty under Section 86 (10) of the DVAT Act. If indeed the sale was an inter-state one, then only the CST Act would apply and not the DVAT Act.

Faced with this difficulty, revenue sought to suggest that what the VATO meant to convey was that since the dealer in Rajasthan was found to be a 'suspicious/bogus' dealer the sale made by the petitioner were not inter-state sales but local sales. However, the impugned notices stated the contrary. The question of bringing such inter-state sales within the ambit of the DVAT Act does not arise. There had been an obvious non-application of mind by the VATO. He (or the computer) had mechanically framed identical notices of default assessments without bothering to examine what had been written therein. The above ground was by itself sufficient to invalidate the impugned default notices of assessment of tax, interest and penalty. The Court set aside each of the notices of default assessment of tax, interest and penalty issued by the VATO under Sections 32 and 33 of the DVAT Act, which had been impugned in these petitions. The petitions allowed.

Present for Petitioner : Mr. Vasdev Lalwani and
Mr. Rohit Gautam, Advocates

Present for Respondent : Mr Gautam Narayan, ASC with
Mr. R.A. Iyer, Advocate

Order

Dr. S. Muralidhar, J.:

1. These are fourteen petitions filed by a dealer registered under the Delhi Value Added Tax Act 2004 ('DVAT Act') challenging the default notices of assessment of tax and interest dated 7th September 2015 under Section 32 of the DVAT Act passed by the Value Added Tax Officer ('VATO') for various quarters of the year 2013-14 and 2014-15 and default notices of assessment of penalty of the same date under Section 33 of the DVAT Act. The Petitioner also challenges the corresponding notices dated 11th August 2015 issued to the Petitioner under Section 59 (2) of the DVAT Act as being contrary to both the DVAT Act and the Central Sales Tax Act, 1956 ('CST Act').

2. The Petitioner is functioning in the jurisdiction of the Assistant Commissioner VAT/Assessing Authority Ward No. 70 and is holding a TIN number. It is engaged in the business of trading in all kinds of fabric including imported fabrics. The Petitioner is also undertaking inter-state sales. It is, therefore, also registered under the CST Act since November 2011. The Petitioner states that it has been regularly filing its returns under both the CST Act and the DVAT Act.

3. The Petitioner states that during the years 2013-14 and 2014-15 it had been regularly filing returns declaring its turnover both under the DVAT Act and the CST Act. Where there were interstate sales, the Petitioner obtained the requisite 'C' Forms from the purchasing dealers to claim the concessional rate of CST in terms of Section 8 (4) of the CST Act.

Notices under Section 59 (2) DVAT Act

4. Notices were received by the Petitioner on 11th August 2015 under Section 59 (2) of the DVAT Act from the VATO Ward 70, directing it to furnish various information/documents in respect of interstate sales made to M/s. Rajesh Traders, a registered dealer of Rajasthan for the period 1st April 2013 to 31st March 2015. The notices were uploaded on the website of the Department of Trade & Taxes ('DT&T') in the account of the Petitioner. According to the Petitioner, the said notices were not delivered to it in terms of Rule 62 of the Delhi Value Added Tax Rules 2005 ('DVAT Rules').

5. The Petitioner claims that it was not aware that the said notices had been uploaded on the website. Referring to Sections 12 and 13 of the Information Technology impugned *ex parte* notices of default assessments of tax, interest and penalty under Sections 32 and 33 of the DVAT Act came to be issued on 7th September 2015 raising demands for the periods mentioned therein. Hereunder, in a tabular form, are the details of the period, the dates of the notices issued, the dates of the notices of default assessments and the amounts which are impugned in these petitions:

Writ No	Tax Period	Date of S.(59)(2) Notice	Order u/s 32		Order u/s33	
			Date	Amount	Date	Amount
W.P.(C) 11221/2015	4th quarter of 2014	11th August 2015			7th September 2015	2,29,292
W.P.(C) 11222/2015	1st quarter of 2014	11th August 2015			7th September 2015	14,43,938
W.P.(C) 11279/2015	4th quarter of 2014	11th August 2015	7th September 2015	2,44,275		
W.P.(C) 11280/2015	1st quarter of 2014	11th August 2015	7th September 2015	17,00,880		
W.P.(C) 11383/2015	3rd quarter of 2013	11th August 2015			7th September 2015	7,32,972
W.P.(C) 11384/2015	1st quarter of 2013	11th August 2015			7th September 2015	7,35,678
W.P.(C) 11556/2015	4th quarter of 2013	11th August 2015	7th September 2015	16,58,932		
W.P.(C) 11557/2015	1st quarter of 2013	11th August 2015	7th September 2015	9,76,940		
W.P.(C) 11558/2015	2nd quarter of 2014	11th August 2015	7th September 2015	7,63,457		
W.P(C) 11559/2015	2nd quarter of 2014	11th August 2015			7th September 2015	6,69,619

W.P.(C) 11561/2015	2nd quarter of 2013	11th August 2015	7th September 2015	15,15,087		
W.P.(C) 11562/2015	4th quarter of 2013	11th August 2015			7th September 2015	13,64,991
W.P.(C) 11639/2015	3rd quarter of 2013	11th August 2015	7th September 2015	9,17,922		
W.P.(C) 11640/2015	2nd quarter of 2013	11th August 2015	7th September 2015	11,74,361		

7. The reasons given in each of the notices is identical except for change in the periods and the figures. The reasons in one such notice dated 7th September 2015 of default assessment of tax and interest for 1st, 2nd and 4th quarters of 2014-15 reads as under:

> "A notice under Section 59 (2) of DVAT Act 2004 was issued to the dealer on 11th August 2015 directing the dealer to file documents before 14.08.2015 in r/o interstate sales made to M/s. Rajesh Traders (TIN 08854055364) dealer of Rajasthan whose which has been found to be a suspicious/bogus dealer. Since the dealer has made ISS of fabrics to the tune of Rs.4,81,31,272/- in First Qtr. 2014-15, Rs.2,23,20,667/- in Second Qtr. 2014-15 & Rs.76,43,063/- in the Fourth Qtr. 2014-15 Taxable @5% additional tax and penalty under Section 86 (10) of DVAT Act, 2004 is imposed against the dealer along with interest up to date."

Petitioner's contentions on merits

8. It is contended by the Petitioner that if indeed it had undertaken inter-state sales as alleged in the above notices of default assessment, then clearly such transactions could not be taxed under Section 32 of the DVAT Act and no penalty under Section 33 of the DVAT could have been levied. Inter-state sales would be taxable only under the CST Act. Secondly, it is pointed out with reference to the notes in the relevant file of the DT&T that the above ex parte notices of default assessments of tax, interest and penalty under Sections 32 and 33 of the DVAT Act which were issued on 7th September 2015 were not framed by the concerned VATO of Ward 70 but by a Record Keeper and therefore, were without jurisdiction.

9. Notice was directed to be issued by this Court in each of the petitions on 2nd December 2015. The Respondents were restrained from adopting any coercive measures for recovery of the demands.

Stand of the DT&T

10. In reply to the petitions it is stated by the DT&T that the Petitioner has an equally efficacious alternative remedy to challenge the impugned order under Section 74 of the DVAT Act before the Objection Hearing Authority ('OHA').

11. On merits it is submitted by the DT&T that uploading of the notices on the website constituted deemed service on the Petitioner. Reference is made to an order issued by the Commissioner, Trade and Taxes on 17th January 2014 under Rule 62 (1) (vi) of the DVAT Rules which inter alia states that with effect from 1st February 2014, notices, summons or orders by Value Added Tax (VAT) Authorities shall be issued to dealers by electronic means by pasting the same on the webpage of the individual dealers and that such manner of service shall be deemed to be service of the document/notice/order for the purposes of Rule 62 of the DVAT Rules.

12. It is further denied by the DT&T that the impugned assessment orders were framed by the Record Keeper and not by the concerned VATO. It is denied that VATO has not disputed that the transactions between the Petitioner and M/s. Rajesh Traders were interstate sales and that the impugned order was passed without application of mind.

13. The Court has heard the submissions of Mr. Vasdev Lalwani, learned counsel for the Petitioners, as well as Mr. Gautam Narayan, learned Additional Standing counsel for the Respondents.

Alternative remedy

14. The first issue concerns the efficacious alternative remedy available to the Petitioner before the OHA by Section 74 of the DVAT Act. The Court finds, for reasons to be discussed hereafter, that there are obvious glaring errors in each of the impugned orders which appear to system generated and issued without application of mind. In the circumstances relegating the Petitioner to the alternative remedy of going before the OHA would cause further delays in resolving the disputes that have arisen and would not be efficacious. Therefore, the above preliminary objection is rejected.

Service of notice

15. The second issue concerns the service of the notices under Section 59 (2) DVAT Act on the Petitioner. Section 100 A of the DVAT Act 2004

speaks of automation i.e. the preparation and issue of notice and orders in electronic form. It reads as under:

> **"100A Automation**
>
> (1) The Government may, by notification in the Official Gazette, provide that the provisions contained in the Information Technology Act, 2000 (21 of 2000) as amended from time to time, and the rules made and directions given under that Act, including the provisions relating to digital signatures, electronic governance, attribution, acknowledgement and dispatch of electronic records, secure electronic records and secure digital signatures and digital signature certificates as are specified in the said notification shall, insofar as they may, as far as feasible, apply to the procedures under this Act.
>
> (2) Where a notice or communication is prepared on any automated data processing system and is properly served on any dealer or person, then the said notice or communication shall not be required to be personally signed by the Commissioner or any other officer subordinate to him, and the said notice or communication shall not be deemed to be invalid only on the ground that it is not personally signed by the Commissioner."

16. Under Rule 62 of the DVAT Rules the manner of service of notices, documents and orders has been set out. Under Rule 62 (1) (vi) the Commissioner can prescribe any manner of service of notice other than those mentioned in Rule 62 (1) (i) to (v). The order dated 17th January 2014 issued by the Commissioner in exercise of the power under Rule 62 (1) (vi) of the DVAT Rules states that with effect from 1st February 2014 all notices or summons or orders under the DVAT Act or DVAT Rules or the CST Act shall be served upon the dealer(s) in the following manner:

(a) All VAT Authorities shall issue the notices/summons/ orders to the dealers by electronic means by passing the same on webpage of individual letters. In addition to this, an SMS alert on the registered mobile numbers of the respective dealer may also be sent, wherever a mobile number has been furnished to the Department. The documents shall also be emailed to the dealers, if the email id has been intimated by dealer to the department.

(b) The documents so generated will be available on the department's website www.dvat.gov.in and will be accessible

> to dealers in their respective login ID. Such documents shall be deemed to have been issued and served for the purposes of Delhi Value Added Tax Act, 2004, Delhi Value Added Tax Rules, 2006 and the Central Sales Tax Act, 1956."

17. In addition in para 2 of the said Order, it has been provided that as soon as the document was issued by the VAT Authority, it would be available "instantly" to the dealer for view that the dealer under the link "Notices/ Summons/Orders". It states that as soon as the dealer logs on to its web page, a pop-up message will appear and after reading the "document", the dealer shall click on "ok" button available at the end of the notice, as a proof of reading the document. Afterwards, the dealer may access other links. It is then stated "the manner of service, shall be deemed to be a service of document for the purpose of Rule 62 of the Delhi Value Added Tax Rules, 2005 at par with other manners prescribed under the said Rule". Further the dealers are advised to visit their webpage regularly in order to have immediate access of notice/summon/order issued.

18. Mr. Lalwani however contends that this is contrary to Section 12 and 13 of the IT Act which read as under:

> **"12. Acknowledgement of receipt** – (1) -where the originator has not agreed with the addressee that the acknowledgment of receipt may be given by
>
> (a) Any communication by the addressee, automated or otherwise.; or
>
> (b) Any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.
>
> (2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then unless acknowledgement has been so received, the electronic record shall be deemed to have been never sent by the originator.
>
> (3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then, the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no

acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

13. Time and place of despatch and receipt of electronic record - (1) - Save as otherwise agreed between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of electronic record shall be determined as follows - namely,

(a) if the addressee has designated a computer resource for the purpose of receiving electronic record, -

 (i) receipt occurs at the time when the electronic, record enters the designated computer resource, or

 (ii) if the electronic record is sent to a computer recourse of the addressee i.e. not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee,

(b) If the address has not designated computer resource along with specified timing, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee; an electronic record is deemed to be dispatch at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

(4) the provisions of Sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub -section(3).

(5) For the purposes of this section, - (

a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) 'usual place of residence', in relation to a body corporate, means the place where it is registered.

19. The originator of the notice in the present case is the Commissioner, VAT. Unless it has been agreed to the contrary between the originator and the noticee, the service of an electronic record will occur only when it enters a computer resource outside the control of the originator. Section 100A of the DVAT Act, inserted with effect from 16th November 2005, enables the Commissioner to issue summons/notices/orders in electronic form. Section 100A of the DVAT Act appears to be in conformity and consistence with Sections 12 and 13 of the IT Act. The originator of the notices is a statutory authority, having the powers in terms of the DVAT Act read with the DVAT Rules to prescribe the manner of service of electronic orders, summons, notices etc. The Commissioner, as the originator of the notices under Section 59 (2) of the DVAT Act, has in terms of the order issued by him on 17th January 2014 deemed that pasting of the notices on the web page of the dealer would be deemed service of notice on the dealer.

20. The Court is unable to find a legal infirmity in the Order dated 17th January 2014. It is not inconsistent with Section 13 (1) read with Section 13 (2) of the IT Act. While there may not be an express agreement between the originator and the notice, an order validly passed by the Commissioner in exercise of his powers under Rule 62 (1) (vi) of the DVAT Rules is binding on the registered dealers. Therefore, the system put in place by the Commissioner by the order dated 17th January 2014 cannot be said to be inconsistent with Sections 12 and 13 of the IT Act. It appears that the dealers registered under the DVAT Act are in fact adapting their functioning to the changed system of service of electronic notices, summons or orders by DT&T.

21. The Petitioner being a registered dealer under the DVAT Act ought to have been aware of the above Order dated 17th January 2014 issued by the Commissioner. The Petitioner was required to go to its account on the DT&T website to view the notices posted on the said website. If the Petitioner had given the mobile phone details to the DT&T, it would have received SMS alerts as well. The failure by the Petitioner to go to the website to view the impugned notices, notwithstanding the order dated 17th January 2014 of the Commissioner, disables it from contending that there is no proper service on it of the said notices under Section 59 (2) of the DVAT Act.

Notices not issued by the Record Keeper

22. The next contention that has been raised concerns the events leading to the passing of the impugned default notices of assessment of tax, and interest as well as penalty. The Petitioner had access to the notings on the file with the DT&T and on that basis it is sought to be contented that the order has been issued not by the VATO concerned but by the Record Keeper. The above contention is vehemently denied by the DT&T.

23. The Court has perused the said notings on the file. While there is a noting signed by the Record Keeper that reads: "default assessment orders and penalty framed under Section 32 and 33", there is nothing beyond that to suggest that it was the Record Keeper who framed such orders. It is plausible that the Record Keeper was merely noting the fact of the notices having been framed. From this it is not possible to infer that the impugned notices of default assessments of tax, interest and penalty were issued by the Record Keeper and not by the VATO.

Default assessments unsustainable in law

24. The central issue in these petitions concerns the validity of the impugned notices of default assessments of tax, interest and penalty all dated 7th September 2015. A perusal of the notices of the assessment of tax and interest dated 7th September 2015 reveals that they have all been issued under Section 32 of the DVAT Act. Each of them is identically worded except for the periods and the figures. Each notice records the fact that a notice under Section 59 (2) was issued to the dealer on 11th August 2015 asking him to file documents before 14th August 2015 in respect of the inter-state sales made to M/s. Rajesh Traders, a dealer in Rajasthan which was found to be a 'suspicious/bogus dealer'. The next paragraph simply directs the dealer to pay a sum as tax and furnish proof of such payment on or before 6th October 2015.

25. Each of the impugned notices of default assessment of tax and interest reveal inter alia the tax period for which the demand has been raised. While Column 2 titled 'turnover reported by dealer' contains a figure (presumably as shown in the return filed by the dealer), Columns 3 and 4 titled 'turnover assessed' and 'tax paid' are shown as '0'. The remaining Columns 5, 6, 7 and 8 titled 'tax assessed', 'additional tax due, 'interest' and 'total amount due contain figures. If the turnover assessed is zero, it is not possible that the tax assessed is at a figure for e.g., of Rs. 14,43,938 for the first quarter of 2014. This sort of obvious error can only be explained by some defect in the system through which the said notices have been generated. No attempt has been made by the DT&T to explain the error.

26. The second obvious error is that the impugned notices of default assessment claim that the Petitioner made inter-state sales to the dealer in Rajasthan who was found to be a 'suspicious/bogus' dealer. The notices proceeds to state that "since the dealer has made ISS of fabrics to the tune of.......", he is being asked to pay additional tax and penalty under Section 86 (10) of the DVAT Act. If indeed the sale was an inter-state one, then only the CST Act would apply and not the DVAT Act.

27. Faced with this difficulty, Mr. Gautam Narayan, learned Additional Standing counsel for the DT&T, sought to suggest that what the VATO meant to convey was that since the dealer in Rajasthan was found to be a 'suspicious/bogus' dealer the sale made by the Petitioner were not inter-state sales but local sales. However, the impugned notices state the contrary. The question of bringing such inter-state sales within the ambit of the DVAT Act does not arise. There has been an obvious non-application of mind by the VATO. He (or the computer) has mechanically framed identical notices of default assessments without bothering to examine what has been written therein.

28. The above ground is by itself sufficient to invalidate the impugned default notices of assessment of tax, interest and penalty dated 7th September 2015.

Conclusion

29. For the aforementioned reasons, the Court sets aside each of the notices dated 7th September 2015 of default assessment of tax, interest and penalty issued by the VATO under Sections 32 and 33 of the DVAT Act, which have been impugned in these petitions.

30. Mr Narayan maintains that what the DT&T is seeking from the Petitioner is the information and documents mentioned in the notices dated 11th August 2015 issued under Section 59 (2) of the DVAT Act. Therefore, there is no need to issue fresh notices. The Court accordingly directs that the Petitioner through its Authorized Representative to appear before the VATO Ward 70 on 20th July 2016 at 11 am in response to the above notices dated 11th August 2015 and provide the information and documents that are available with it. After examining the said information and documents, and after affording the Petitioner an effective opportunity of being heard, as well as the returns already filed for the periods mentioned in the notices, and after complying with the principles of natural justice, the VATO concerned will pass appropriate orders in accordance with law.

31. The petitions and applications are disposed of in the above terms with no orders as to costs.

[2015] 53 DSTC 181 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Justice S.Muralidhar and Justice Vibhu Bakhru]

W.P.(C) 1358/2016

Jain Manufacturing (India) Pvt. Ltd. ... Petitioner

Versus

The Commissioner Value Added Tax & Anr. ... Respondents

Date of Order : June 1, 2016

RETROSPECTIVELY CANCELLATION OF 'C'-FORM – POWER TO CANCEL A 'C' – FORM UNDER CENTRAL SALES TAX ACT, 1957 & RULE 5(4) OF CENTRAL SALES TAX (DELHI) RULES, 2005.

WRIT PETITION FILED BY PETITIONER BEING A SELLING DEALER TO CHALLENGE THE CANCELLATION ORDER OF C FORM – WHETHER THE PETITIONER WAS ENTITLED TO FILE THE PETITION.

PETITIONER WAS ESSENTIALLY CONCERNED ABOUT THE CANCELLATION OF 'C' FORM ISSUED TO HIM AND CONSTRAINED TO CHALLENGE THE CANCELLATION OF THE REGISTRATION OF RESPONDENT NO. 2 – THE COURT REJECTED THE PLEA OF THE REVENUE THAT THE PETITIONER DID NOT HAVE LOCUS – REGISTRATION WAS ALIVE OF THE PURCHASING DEALER ON THE DATE OF TRANSACTION AND THE 'C'-FORM HAVING BEEN VALIDLY ISSUED – THERE COULD NOT HAVE BEEN A RETROSPECTIVE CANCELLATION OF THE 'C'-FORM – THERE WAS SPECIFIC PROVISION UNDER RULE 5(4) TO WITHHOLD THE 'C' FORM IF SOME ADVERSE MATERIAL FOUND BY THE COMMISSIONER BUT DID NOT EMPOWER TO CANCEL THE 'C'-FORM – THE ORDER PASSED BY REVENUE CANCELLING 'C'-FORM SET ASIDE.

Facts of the Case

This was a writ petition by a company having its registered office in Kanpur, Uttar Pradesh engaged in trading of duty entitlement pass book scrips. The Petitioner is registered under the Central Sales Tax Act, 1956 (CST Act) and had been given a Tax Identification Number (TIN) in the State of Uttar Pradesh.

The Petitioner was aggrieved by the action of the Commissioner, Value Added Tax (VAT) in the Department of Trade and Taxes (DT&T), New Delhi in, inter alia, cancelling the Form-C issued by the DT&T with regard to the purchases made from the Petitioner by Respondent No.2 i.e. Keshav Corporation at 334/1, Gali No. 3, Vishwas Nagar, Delhi-110032.

The Petitioner made an inter-state sale of goods to Respondent No. 2 (Purchasing Dealer) by way of two invoices both dated 10th March, 2015.

The first invoice was for a sum of Rs.7,53,373/- and the second for a sum of Rs.2,49,715/-. In terms of Section 8(1) (b) of the CST Act with Respondent No. 2 being a dealer registered under the CST Act in New Delhi [apart from being registered under the Delhi Value Added Tax Act, 2004 (DVAT Act)] as of that date, and had purchased the goods from the Petitioner by way of inter-state sale, tax at the concessional rate of 2% was chargeable in the invoices and was accordingly included in the invoices raised by the Petitioner. The said two invoices accordingly mentioned the CST amounts as 15,067 and 4,994 respectively. The total sums of the 2 invoices were Rs. 7,68,441/- and Rs. 2,54,709/- respectively. The payments for these invoices were made by RTGS into the Petitioner's bank account.

On 13th April 2015, Respondent No. 2 obtained C-Form from the DT&T in respect of the aforementioned two invoices. A copy of the said C-Form was enclosed with the petition as Annexure P-4. It shows that it was a system generated C-Form containing details of the purchasing dealer i.e. Respondent No.2 with its Registration Certificate Number and the amount up to which such registration was valid. The name and address of the purchasing dealer i.e. Respondent No. 2 had also been indicated. It also bears the TIN and name of the selling dealer i.e. the Petitioner. It contained the details of the two invoices dated 10th March, 2015 with the respective amounts.

The Petitioner later learnt that the above C-Form had been cancelled by the DT&T. In order to verify this, the Petitioner checked the website of the DT&T. The status of the C-Form issued to the petitioner was shown as cancelled on 27th November, 2015. The petitioner also obtained a copy of an order passed by the Assistant Value Added Tax Officer (AVATO) in Form DVAT-11 on 4th August, 2015 cancelling the registration of Respondent No.2. A copy of the said cancellation order had been enclosed as Annexure P-6 to the petition. It was noticed that the cancellation was made retrospective from 26th February, 2014.

The petition had been filed contending that there was no power under the CST Act or in the Rules there under, viz., the Central Sales Tax Act (Registration & Turnover) Rules, 1957 or the Central Sales Tax (Delhi) Rules to cancel a C-Form issued by the DT&T.

Held That

In the case with their being a valid registration of the purchasing dealer on the date of the transaction and the C-Form had been validly issued on the date it was so issued, there could not have been a retrospective

cancellation of the C-Form. At the risk of repetition, it must be observed that there was no statutory power that permited cancellation of a C-Form that had been validly issued, much less retrospectively. The only circumstance perhaps that could lead to the cancellation of a C Form was the failure by the issuing authority to notice the cancellation of the purchasing dealer's CST registration previous to the date of the sale. That would be a case of a purchasing dealer obtaining a C Form by fraudulent mean concealing the fact of cancellation of his CST registration. The issuance of a C Form in such instance would be void ab initio since it would not satisfy the requirement of Section 8 (1) of the CST Act read with Section 7 (4) thereof.

It was submitted by Revenue that there would be a practical difficulty in the DT&T seeking to inform every selling dealer in the country of the cancellation of registration of a purchasing dealer registered under the CST Act in Delhi and that the remedy of the selling dealers in such instance would be to proceed against the purchasing dealers. In the considered view of the Court, if the selling dealer had after made a diligent enquiry confirmed that on the date of the sale the purchasing dealer held a valid CST registration, and was also issued a valid C Form then such selling dealer could not later be told that the C Form was invalid since the CST registration of the purchasing dealer had been retrospectively cancelled. Where, a selling dealer failed to make diligent enquiries and proceeds to sell goods to a purchasing dealer who did not, on the date of such sale, hold a valid CST registration then such selling dealer cannot later be seen to protest against the cancellation of the C-Form. As observed by the Supreme Court in Commissioner of Sales Tax, Delhi v. Shri Krishna Engg. The selling dealer in such instance will have to pay for his "recklessness".

To answer the problem highlighted by Revenue, the best course of action would be for an authority to cancel the CST registration prospectively and immediately place that information on its website. In such event, there would be no difficulty in the selling dealer being able to verify the validity of the CST registration of the purchasing dealer. However, where the cancellation of the registration and, consequently of the C-Form was sought to be done retrospectively, it would adversely affect the rights of bonafide sellers in other states who proceeded on the basis of the existence of valid CST registration of the purchasing dealer on the date of the inter-se sale. That outcome was not contemplated by the CST Act and the Rules thereunder.

For the above reasons, the order passed by the DT&T cancelling the C Form issued to the Petitioner in the case with effect from 27th November 2015 was hereby set aside. The Petitioner will continue to treat the said C-Form issued to it as had been validly issued.

Cases Referred to:

- *State of Maharashtra v. Suresh Trading Company (1998) 109 STC 439 (SC)*
- *State of Orissa v. Santosh Kumar & Co. (1983) 054 STC 322 (Orissa)*
- *Shanti Kiran India Pvt. Ltd. v. Commissioner Trade & Tax Department (2013) 57 VST 405 (Delhi)*
- *Commissioner of Sales Tax, Delhi v. Shri Krishna Engg. Co. (2005) 2 SCC 692*
- *State of Madras v. Radio Electrical Ltd. and Anr. 1966 (18) STC 222 (SC)*

Present for Petitioner : Mr Vinod Srivastava,
Mr Ravi Chandhok and
Ms Vertika Sharma, Advocates.

Present of Respondent : Mr Gautam Narayan,
Additional Standing counsel with
Mr R. A. Iyer, Advocate

Order

Dr S. Muralidhar, J:

1. This is a writ petition by a company having its registered office in Kanpur, Uttar Pradesh engaged in trading of duty entitlement pass book scrips. The Petitioner is registered under the Central Sales Tax Act, 1956 (CST Act) and has been given a Tax Identification Number (TIN) in the State of Uttar Pradesh.

2. The Petitioner is aggrieved by the action of the Commissioner, Value Added Tax (VAT) in the Department of Trade and Taxes (DT&T), New Delhi in, inter alia, cancelling the Form-C issued by the DT&T with regard to the purchases made from the Petitioner by Respondent No.2 i.e. Keshav Corporation at 334/1, Gali No. 3, Vishwas Nagar, Delhi-110032.

Background facts

3. The Petitioner made an inter-state sale of goods to Respondent No. 2 (Purchasing Dealer) by way of two invoices both dated 10th March, 2015. The first invoice was for a sum of Rs.7,53,373/- and the second for a sum of Rs.2,49,715/-. In terms of Section 8(1) (b) of the CST Act with Respondent No. 2 being a dealer registered under the CST Act in New Delhi [apart from being registered under the Delhi Value Added Tax Act, 2004 (DVAT Act)] as of that date, and having purchased the goods from the Petitioner by

way of inter-state sale, tax at the concessional rate of 2% was chargeable in the invoices and was accordingly included in the invoices raised by the Petitioner. The said two invoices accordingly mentioned the CST amounts as 15,067 and 4,994 respectively. The total sums of the 2 invoices were Rs. 7,68,441/- and Rs. 2,54,709/- respectively. The payments for these invoices were made by RTGS into the Petitioner's bank account.

4. On 13th April 2015, Respondent No. 2 obtained C-Form from the DT&T in respect of the aforementioned two invoices. A copy of the said C-Form is enclosed with the petition as Annexure P-4. It shows that it was a system generated C-Form containing details of the purchasing dealer i.e. Respondent No.2 with its Registration Certificate Number and the amount up to which such registration is valid. The name and address of the purchasing dealer i.e. Respondent No. 2 has also been indicated. It also bears the TIN and name of the selling dealer i.e. the Petitioner. It contains the details of the two invoices dated 10th March, 2015 with the respective amounts.

5. The Petitioner later learnt that the above C-Form had been cancelled by the DT&T. In order to verify this, the Petitioner checked the website of the DT&T. The status of the C-Form issued to the Petitioner was shown as cancelled on 27th November, 2015. The Petitioner also obtained a copy of an order passed by the Assistant Value Added Tax Officer (AVATO) in Form DVAT-11 on 4th August, 2015 cancelling the registration of Respondent No.2. A copy of the said cancellation order has been enclosed as Annexure P-6 to the petition. It was noticed that the cancellation was made retrospective from 26th February, 2014.

6. It is in these circumstances, the present petition has been filed contending that there was no power under the CST Act or in the Rules thereunder, viz., the Central Sales Tax Act (Registration & Turnover) Rules, 1957 or the Central Sales Tax (Delhi) Rules to cancel a C-Form issued by the DT&T.

Submissions of counsel for the Petitioner

7. It is contended by Mr. Vinod Srivastava, learned counsel for the Petitioner, that in the present case the C-Form was cancelled only because the registration of Respondent No.2 under the CST Act was cancelled retrospectively from 26th February 2014 although there was no power under the CST Act to do so. It is contended that as far as Petitioner is concerned, as a selling dealer it is only required to ensure that on the date of the sale to Respondent No. 2, the latter as a purchasing dealer held a

valid registration under the CST Act in Delhi. The subsequent cancellation of such registration retrospectively from a date earlier to the sale would not, according to the Petitioner, affect the validity of the C-Form issued to the Petitioner since on the date of issuance of such C-Form Respondent No.2 was validly registered under the CST Act.

8. Mr. Srivastava placed reliance on the decisions in *State of Maharashtra v. Suresh Trading Company (1998) 109 STC 439 (SC)* and *State of Orissa v. Santosh Kumar & Co. (1983) 054 STC 322 (Orissa)* to contend that the retrospective cancellation of the CST registration of the purchasing dealer would not affect right of the selling dealer to use the C-Form validly issued to such selling dealer. Reliance is also placed on the decision of this Court in *Shanti Kiran India Pvt. Ltd. v. Commissioner Trade & Tax Department (2013) 57 VST 405 (Delhi)* where it was held that the input tax credit could not have been denied for a period prior to the date on which the registration of the selling dealer was cancelled.

Submissions of counsel for the Respondent No.1

9. Mr Gautam Narayan, learned Additional Standing counsel appearing for the DT&T, first submitted that this was a proxy litigation on behalf of the Respondent No. 2 who has himself not come forward to challenge the cancellation of his CST registration. It is submitted that the Petitioner, a dealer in Kanpur, has no locus whatsoever to question the cancellation of the CST registration of Respondent No.2. Secondly, it is submitted that under Section 74 of the DVAT Act, the Petitioner has an alternative remedy of approaching the Objection Hearing Authority. It is pointed out that Section 74(1)(b) permits “any person who is dis-satisfied with any other order or decision made under this Act” to file objections before the OHA.

10. On merits, it is submitted by Mr Narayan that the transactions of sale involving the Petitioner and Respondent No. 2 were under a cloud because enquiries made by the DT&T revealed that the name of the Proprietor of Keshav Corporation in its bank account from where the RTGS transfer of the invoice amounts took place to the account of the Petitioner was different from the name of the Proprietor of Keshav Corporation available with the DT&T. The address of the said Keshav Corporation in the bank account was also different from the address shown in the DT&T records viz., 334/1, Gali No. 3, Vishwas Nagar, Delhi-110032. In other words, the entity which paid the sums to the Petitioner against the invoices raised by the Petitioner may have been “Keshav Corporation” but it was not the entity to which C-Forms were issued by the DT&T. Mr Narayan submitted that the DT&T was justified in cancelling the C-Form because it suspected

that there was collusion between the Petitioner, the entity which made the payment and perhaps Respondent No. 2 in obtaining the C-Form. Mr Narayan states that the CST (and the DVAT) registration of Respondent No. 2 was cancelled since Respondent No. 2 was not found at the address given, viz., 334/1, Gali No. 3, Vishwas Nagar, Delhi-110032.

11. Referring to Section 8(1) (b) of the CST Act as well as Rule 12(1) of the Central Sales Tax (Registration & Turnover) Rules 1957, Mr Narayan submitted that the for issuance of C-Form the existence of valid CST registration of the purchasing dealer was a sine qua non. Reliance is also placed on the decision of the Supreme Court in *Commissioner of Sales Tax, Delhi v. Shri Krishna Engg. Co. (2005) 2 SCC 692* to urge that there is no vested right in the purchasing dealer to insist issuance of C-Forms in his favour. Where, as in the present case, the purchasing dealer does not have a valid registration, then it is not open to the selling dealer to question the cancellation of the C-Form issued to such purchasing dealer.

12. Mr Narayan was unable to however to dispute the fact that there is no provision in the CST Act for cancellation of the C-Form. He submitted that under Section 7(4) of the CST Act the registration granted under the CST Act can be cancelled by the authority which granted it. However, he again did not dispute that under Section 7 (4) (b) of the CST Act retrospective cancellation of a registration is not contemplated.

Preliminary objections

13. As far as the plea of the Respondent No. 1 regarding this being a proxy litigation on behalf of the Respondent No.2, Mr Srivastava submits that the Petitioner is essentially concerned about the cancellation of the C-Form issued to it. The Petitioner was constrained to also challenge the cancellation of the registration of Respondent No.2 by the DT&T only because that was the main reason for the cancellation of the C-Form.

14. In view of the above clarification by Mr Srivastava, it is apparent that the Petitioner is pressing only for the relief of validation of the C-Form issued to it. Consequently, the Court rejects the plea of the DT&T that this is a proxy litigation by Petitioner on behalf of Respondent No.2. It is clarified that the Court is not expressing any view as far as the cancellation of the registration of Respondent No. 2 is concerned.

15. As regards the plea regarding the availability of an alternative remedy under Section 74 (1) (b) of the Act, it appears to the Court that the person directly affected the decision of the DT&T to cancel the C-Form

is the Petitioner i.e. the selling dealer. The purchasing dealer cannot be said to be affected by that decision since the purchasing dealer has taken advantage of Section 8 (1) (b) of the CST Act and paid the lesser tax of 2% on the interstate sale. The present petition raises an important question of law regarding the absence of a power under the CST Act or the Rules made thereunder to cancel a C-Form. This requires interpretation of the relevant provisions. In the circumstances, the Court does not consider it appropriate to relegate the Petitioner to the statutory remedy of going before the OHA as that is not efficacious in the facts of the present case.

No power to cancel a C Form

16. The central issue in the present case is whether there exists a power in the Commissioner VAT, Delhi under the CST Act and the Rules thereunder to cancel a C-Form and further if such power exists then whether in the facts and circumstances of the present case such power was rightly exercised.

17. No provision in the CST Act has been brought to the notice of the Court which enables an authority issuing a C-Form to cancel the C-Form. Rule 5(4) of the Central Sales Tax (Delhi) Rules, 2005 enables the authority which has to issue a C-Form to "withhold" the C-Form. The contingencies under which a C Form may be withheld are set out in Rule 5(4). For instance, Rule 5 (4) (v) envisages that some adverse material has been found by the Commissioner "suggesting any concealment of sale or purchase or furnishing inaccurate particulars in the returns." The Commissioner could, in terms of the proviso to Rule 5(4), instead of withholding the C-Form, issue to the applicant such forms in such numbers and subject to such conditions and restrictions, as he may consider necessary. However, there is no specific provision even under the aforementioned Rules which enables the Commissioner to cancel the C-Form that has already been issued.

18. There is merit in the contention that one of the primary requirements for issuance of a C-Form is that the dealer to whom the C-Form is issued has to have a valid CST registration on the date that the C Form is issued. If the purchasing dealer does not possess a valid CST registration on the date of the transaction of sale, then the selling dealer cannot insist on being issued a C-Form. In the present case, on the date of the transaction i.e. 10th March, 2015 the purchasing dealer viz., Respondent No. 2 did posses a valid CST registration. The name of the purchasing dealer as shown in the invoices, and the name and address of the registered purchasing dealer as reflected in the C-Forms issued by the DT&T matched. The cancellation of the CST registration of Respondent No. 2 took place subsequently on

4th August 2015. Therefore , there was no means for the Petitioner as the selling dealer to suspect as of the date of sale or soon thereafter that the payments made to it RTGS was not by Respondent No.2 but by some other entity with the same name. It is not possible, therefore, to straightaway infer any collusion between the Petitioner and Respondent No. 2 or for that matter the other entity of the same name spoken of by the DT&T.

19. In any event, from the point of view of the Petitioner, the requirement of Section 8(1) of the CST stood fully satisfied. The purchasing dealer had a valid CST registration on the date of purchase of goods by the Respondent No. 2 from the Petitioner. The C-Form issued by the DT&T confirmed the registration of Respondent No.2 under the CST Act.

20.1 In the State of Maharashtra v. Suresh Trading Company (supra), the facts were that between 1st January and 31st December 1967, the Respondents purchased goods from Sulekha Enterprises Corporation (SEC) who were registered dealers under the Bombay Sales Tax Act, 1959. On the date of such sale the registration of SEC was valid. The Respondents claimed deduction in the turnover of sales on that basis. This was disallowed by the Sales Tax Officer on the ground that the registration of SEC had been cancelled on 20th August 1967 with retrospective from 1st January 1967. Therefore, on the dates on which the Respondents had purchased the goods, SEC could not be said to be a registered dealer. The STO proceeded to impose penalty on the Respondents.

20.2 The High Court of Bombay reversed the decision of the STO and the High Court's decision was affirmed by the Supreme Court which observed as under:

> "A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current. The argument on behalf of the department that it was the duty of persons dealing with registered dealers to find out whether a state of facts exists which would justify the cancellation of registration must be rejected. To accept it would be to nullify the provisions of the statute which entitle persons dealing with registered dealers to act upon the strength of registration certificates."

21. This Court in Shanti Kiran India Pvt. Ltd. v. Commissioner Trade & Tax Department (supra) followed the above decision and observed as

under: "This Court is of the opinion that in the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled (as has happened in this case) the benefit of input credit, under Section 9(1) cannot be denied. Furthermore, this Court notices that the cancellation of both selling dealers' registration occurred after the transactions with the appellant. The VAT authorities observed that the scanty amounts deposited by the selling dealers was incommensurate with the transactions recorded, and straightaway proceeded to hold that they colluded with the appellant. Such a priori conclusions are based on no material, or without inquiry, and accordingly unworthy of acceptance."

22. In State of Orissa v. Santosh Kumar (supra), the deduction in respect of sales made to a registered dealer was disallowed on the ground that the purchasing dealer was fictitious although the purchaser dealer held a valid registration on the date of the transaction. In those circumstances, it was observed as under:

> "Once a certificate of registration is issued to a person and he becomes a registered dealer, he is entitled to certain benefits under the Act. Certificates granted by the public officers have their value and people in the commercial field would in normal course accept such certificates to be genuine. The fact that registration has been granted, yet the person holding the certificate is a fictitious one seem to be contradictions in term. A certificate of registration can be granted only when the dealer, apart from being a businessman, satisfies the other requirements prescribed by law. A registration certificate cannot be granted to a non-existent person. The fact that there have been some persons who are labelled by the department as fictitious dealers goes to show that the officers under the Act either collude with dishonest people in the field or fail to exercise due diligence and allow fraud to be practised in the commercial field. Whether it is collusion or negligence, these officers bring disrepute to the State and introduce uncertainty and lack of confidence into a true field of trust. It is high time that the State Government institutes appropriate enquiries, take such steps as are necessary to eliminate fictitious dealers from the field and also take strong action against persons connected with such matters so that there be no recurrence of it in future."

23. A reference in this regard is also made to the decision of the Supreme Court in *State of Madras v. Radio Electrical Ltd. and Anr. 1966*

(18) STC 222 (SC) where, inter alia, it was observed as under:

> "He (the seller) must satisfy himself that the purchaser is a registered dealer, and the goods purchased are specified in his certificate: but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate in Form 'C' the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be used. If the purchasing dealer misapplies the goods he incurs a penalty under section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer...."

24. The decision in *Commissioner of Sales Tax, Delhi v. Shri Krishna Engg. (supra)* relied on by learned counsel for the DT&T is distinguishable in as much as it dealt with a situation of no C-Form having been issued and the selling dealers approaching the Court for a direction to the concerned Sales Tax Department to issue such C-Forms. It is in that context that it was observed that the registration is really in the nature of a concession and not a matter of right and that it was conditional upon fulfilment of certain statutory requirements.

25. In the present case with their being a valid registration of the purchasing dealer on the date of the transaction and the C-Form having been validly issued on the date it was so issued, there could not have been a retrospective cancellation of the C-Form. At the risk of repetition, it must be observed that there is no statutory power that permits cancellation of a C-Form that has been validly issued, much less retrospectively. The only circumstance perhaps that could lead to the cancellation of a C Form is the failure by the issuing authority to notice the cancellation of the purchasing dealer's CST registration previous to the date of the sale. That would be a case of a purchasing dealer obtaining a C Form by fraudulent means concealing the fact of cancellation of his CST registration. The issuance of a C Form in such instance would be void ab initio since it would not satisfy the requirement of Section 8 (1) of the CST Act read with Section 7 (4) thereof.

The practical effect of cancellation of C Forms

26. It was submitted by Mr Narayan that there would be a practical difficulty in the DT&T seeking to inform every selling dealer in the country of the cancellation of registration of a purchasing dealer registered under the CST Act in Delhi and that the remedy of the selling dealers in such instance

would be to proceed against the purchasing dealers. In the considered view of the Court, if the selling dealer has after making a diligent enquiry confirmed that on the date of the sale the purchasing dealer held a valid CST registration, and is also issued a valid C Form then such selling dealer cannot later be told that the C Form is invalid since the CST registration of the purchasing dealer has been retrospectively cancelled. Where, a selling dealer fails to make diligent enquiries and proceeds to sell goods to a purchasing dealer who does not, on the date of such sale, hold a valid CST registration then such selling dealer cannot later be seen to protest against the cancellation of the C-Form. As observed by the Supreme Court in Commissioner of Sales Tax, Delhi v. Shri Krishna Engg. (supra) the selling dealer in such instance will have to pay for his "recklessness".

27. To answer the problem highlighted by Mr Narayan, the best course of action would be for an authority to cancel the CST registration prospectively and immediately place that information on its website. In such event, there would be no difficulty in the selling dealer being able to verify the validity of the CST registration of the purchasing dealer. However, where the cancellation of the registration and, consequently of the C-Form is sought to be done retrospectively, it would adversely affect the rights of bonafide sellers in other states who proceeded on the basis of the existence of valid CST registration of the purchasing dealer on the date of the inter-se sale. That outcome is not contemplated by the CST Act and the Rules thereunder.

Conclusion

28. For the above reasons, the order passed by the DT&T cancelling the CForm issued to the Petitioner in the present case with effect from 27th November 2015 is hereby set aside. The Petitioner will continue to treat the said C-Form issued to it as having been validly issued.

29. The DT&T shall, not later than ten days from today, make the necessary corrections on its website to indicate the validation of the above C-Form.

30. The writ petition is disposed of with the above terms. Dasti under the signature of the Court Master.

[2015] 53 DSTC 193 – (Madras)

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Hon'ble Mr. Justice R. Subbiah)

W.P.(MD)No.8426 of 2014
and M.P.(MD).Nos.1 to 3 of 2014

Sri Renga Polymers,
Rep. By its Managing Partner, K. Sankar ... Petitioner

Versus

1. The Principal Secretary/
   Commissioner of Commercial Taxes,
   Ezhilagam, Chepauk,
   Chennai-600 005.

2. The Assistant Commissioner (CT),
   Karur (East) Circle,
   Karur. ... Respondents

Date of Order : 29.10.2015

REVERSAL OF INPUT TAX CREDIT – CIRCULAR ISSUED TO REVERSE INPUT TAX CREDIT ON ACCOUNT OF INVISIBLE LOSS OF YARN PURSUANT TO MANUFACTURING ACTIVITIES – WRIT PETITION FILED – THE COURT SET ASIDE THE ORDER OF REVENUE REVERSING THE INPUT TAX CREDIT ON ADHOC BASIS – SECTION 18 CANNOT AS AN INDEPENDENT PROVISION BUT SUBJECT TO RESTRICTIONS AND CONDITIONS CONTAINED IN SECTION 19 OF TNVAT ACT.

Facts of the Case

The Writ Petition had been filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records on the file of the first respondent in VAT & quash the same. The subject matter in this Writ Petition was related to payment of VAT on the invisible loss of yarn pursuant to manufacturing activity. The petitioner had approached the Court by way of Writ Petitions challenging the circular as well as the orders of assessment which were in most cases exparte orders since the dealer did not respond to the show cause notice. The assessing officer also made an adhoc assessment and adopted a uniform percentage stating that the same was treated as invisible Loss and direction was issued to reverse the Input Tax Credit. The net result

was there has been no examination of the manufacturing process as to what was the actual manufacturing loss or production loss or invisible loss. This could not be done without examining each manufacturing process or identical manufacturing process.

Held That

The challenge to the impugned order was held to be unnecessary since the circular was a non-statutory circular and was in the nature of guideline and the prayer for quashing the circular was rejected. Section 18 of the TNVAT Act was not an independent or a separate stand alone provision under the provisions of TNVAT Act but subject to other provision of the Act including Section 19 of the VAT Act. For the reasons assigned, it was not sufficient for a dealer claiming refund under Section 18(2) of the Act to show that he had paid Input Tax on the goods purchased; that those goods were used in the manufacture and nothing more but there was duty upon the dealer to satisfy the Assessing Authority that the claim was not hit by any of the restrictions or conditions contained under Section 19 of the VAT Act.

It was held that the Assessing Authorities were not justified in adopting uniform percentage as invisible loss and calling upon the dealer to reverse the Input Tax Credit availed to that extent. Consequently, all notices issued to the petitioner for reopening and all consequential order passed reversing the Input Tax Credit to the extent of either 4% or 5% or on adhoc percentage were set aside. However, liberty was granted to the concerned Assessing Officer to issue appropriate show cause notices to the petitioners clearly setting out under what circumstances they propose to revise or call upon the petitioner to reverse refund sanctioned and after inviting objections proceed in accordance with law.

Cases Referred to:

- *Interfit Techno Products Ltd., Vs. The Principal Secretary, Commissioner of Commercial Taxes*
- *Steel Authority of India Ltd., Vs. Collector of Central Excise [1996(88) E.L.T.314(SC)]*

For Petitioner	:	Ms. R. Hemalatha
For Respondents	:	Mr. R. Rajakarthikeyan, Government Advocate

ORDER

The Writ Petition has been filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records on the file of the first respondent in VAT Cell/Roc.No.37188/2011/Circular No.22/2011 dated 20.10.2011, quash the same.

2. The subject matter in this Writ Petition is related to payment of VAT on the invisible loss of yarn pursuant to manufacturing activity. The said issue has been decided by this Court in a batch of Writ Petitions in W.P.Nos.13901, 30852 to 30880 of 2013 in the case of Interfit Techno Products Ltd., Vs. The Principal Secretary, Commissioner of Commercial Taxes, by order dated 26.11.2014. The relevant portion found in the said judgment reads as follows:-

> The decision in the case of Steel Authority of India Ltd., Vs. Collector of Central Excise [1996(88)E.L.T.314(SC)] is an appeal filed challenging the order passed by the CEGAT and the question was whether the appellant was entitled for concessional rate of duty. The exemption notification provided for exemption in respect of raw naphtha which is intended in the use of manufacture of fertiliser exempting the manufacturing process. It was held that raw naphtha is utilised in its plant for the manufacture of fertiliser and the benefit of exemption notification is extended. In the present proceedings, the petitioner has approached this Court by way of Writ Petitions challenging the circular as well as the orders of assessment which are in most cases exparte orders since the dealer did not respond to the show cause notice. The assessing officer also made an adhoc assessment and adopted a uniform percentage stating that the same is treated as ?invisible loss? and direction was issued to reverse the Input Tax Credit. The net result is there has been no examination of the manufacturing process as to what is the actual manufacturing loss or production loss or invisible loss.
>
> This cannot be done without examining each manufacturing process or identical manufacturing process. Infact, the association of Textile exporters were granted liberty by the Honourable Division Bench to make a demonstration before the concerned assessing officer. It is not known as to why they did not avail such opportunity which should have been availed as it is the appropriate method for ascertaining as to whether on facts there is a process loss or a manufacture loss. Therefore, the decision does not render support to the case of the petitioner.

....

63. In the result,

1. the challenge to the impugned order is held to be unnecessary since the circular is a non-statutory circular and is in the nature of guideline and the prayer for quashing the circular is rejected.

2. Section 18 of the TNVAT Act is not an independent or a separate stand alone provision under the provisions of TNVAT Act but subject to other provisions of the Act including Section 19 of the VAT Act.

3. For the reasons assigned, it is not sufficient for a dealer claiming refund under Section 18(2) of the Act to show that he has paid Input Tax on the goods purchased; that those goods are used in the manufacture and nothing more but there is duty upon the dealer to satisfy the Assessing Authority that the claim is not hit by any of the restrictions or conditions contained under Section 19 of the VAT Act. In this regard, it is essential for the Assessing Authority to embark upon the fact finding exercise to ascertain the quantum of loss of the goods which were purchased on which tax was paid vis-s-vis the goods manufactured from and out of the goods purchased and to examine as to whether they fall within any of the restrictions contained in Section 19 of the VAT Act. The Assessing Officer has to conduct an exercise by which it is to be ascertained as to whether the representation made by the dealer is justified and is not hit by any of the restrictions and conditions contained in Section 19 and in particular Section 19(9) of the VAT Act.

4. It is held that the Assessing Authorities are not justified in adopting uniform percentage as invisible loss and calling upon the dealer to reverse the Input Tax Credit availed to that extent. Consequently, all notices issued to the petitioner for reopening and all consequential order passed reversing the Input Tax Credit to the extent of either 4% or 5% or on adhoc per centage stands set aside. However, liberty is granted to the concerned Assessing Officer to issue appropriate show cause notices to the petitioners clearly setting out under what circumstances they propose to revise or call upon the

petitioner to reverse refund sanctioned and after inviting objections proceed in accordance with law.

5. The undertaking given by the dealer in Form W is with regard to information furnished for the purpose of verification by Assessing Officer under Rule 11(2) of the VAT Rules for being entitled to refund under Section 18(2). Therefore, it is not as if the Act does not provide a remedy in the event of a wrong or erroneous refund sanctioned when Section 18 cannot be treated as an independent provision but subject to restrictions and conditions under Section 19 of the VAT Act.?

3. Recently, following those orders, the batch of Writ Petitions in W.P(MD).Nos.5212 of 2014, etc., have also been disposed of, on 16.10.2015.

4. Since the issue involved in this Writ Petition is akin to the Writ Petition in W.P.Nos.5212 of 2014, etc. batch, following the earlier orders of the Principal Bench of this Court, this Writ Petition is also disposed of. Therefore, the directions given therein shall be followed by the respondents while passing fresh orders in respect of the issue related to invisible loss. No costs, consequently, connected miscellaneous petitions are closed.

[2015] 53 DSTC 198 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.1493-1494/ATVAT/12-13

Burberry India Private Limited,
3A-1, Taj Apartments, Rao Tula Ram Marg,
New Delhi –110022. ... APPELLANT

Versus

Commissioner of Trade & Taxes, Delhi ... RESPONDENT

Date of Order : April 22, 2016

POWER TO ENTER PREMISES AND SEIZE RECORDS AND GOODS U/S 60 OF DVAT ACT, 2004 – ENFORCEMENT SURVEY – VARIATION IN CASH AND STOCK FOUND – VARIATION IN IMPORTS IN EARLIER YEARS AND IN THE PERIOD OF SURVEY WAS ALSO FOUND – APPELLANT EXPLAINED THAT THE COST OF MATERIAL IMPORTED INCLUDED CERTAIN EXPENSES - NO LOOSE SLIPS OR PRIVATE BOOKS ETC WERE SEIZED – SINGLE COMPOSITE ORDER PASSED U/S 32 FOR VARIOUS TAX PERIODS OVER THREE FINANCIAL YEARS NO FINDINGS GIVEN BY OHA IN HIS ORDER IN THIS REGARD– DETAILED EXPLANATION GIVEN BY THE APPELLANT FOR CASH DEPOSITED WITH THE PICK UP VAN OF HSBC BANK PRIOR TO THE SURVEY - SUPPORTED DOCUMENTS PRODUCED –STOCK FOUND EXCESS ON SURVEY, NO STOCK TAKING DONE BY SURVEY TEAM, NO WORKSHEET OR CHART PREPARED TO SUPPORT VALUATION. APPELLANT EXPLAINED THE BASIS OF VALUATION BUT REVENUE FAILED TO GIVE ANY EXPLANATION FOR THE VALUATION DONE INSPITE OF REPEATED REQUESTS OF THE APPELLANT. WHETHER VARIATION IN CASH AND STOCK ON THE FACTS OF THE CASE AND IN LAW BE ASSESSED AS UNDISCLOSED TURNOVER. HELD – NO.

Facts of the Case

The appellant was a joint venture group of M/s. Burberry International Holdings Ltd. The goods were mainly imported from outside India and were further sold in the country on MRP basis. Showroom of the appellant and his warehousing and distributing company were surveyed on 02.09.2011. After the survey, Notice u/s 59(2) of the DVAT Act, 2004 was served to submit various documents and explain the variation in cash and stock and variation in the imports which arose due to variance of the figures obtained from CHA and the one reflected by them in the return filed during the relevant period. Variation in imports was in relation to A.Y.2009-10, 2010-11 & 2011-2012. Appellant submitted detailed written submissions.

As far as cash variation of Rs.13,49,795/- was concerned, the appellant placed on record that there was no variation as the same stands collected by the pick-up van of HSBC Bank with whom the account was maintained by the appellant. Detailed explanation with respect to the cash transactions made on 01.09.2011 and 02.09.2011, followed by reconciliation statement were tendered.

So far as stock was concerned, as per appellants books of accounts, the stock on the date of the visit stood at 9,52,16,010/-, whereas according to the department stock should have been valued at 10,14,27,543/-. On being asked as to how the valuation of imported material was arrived at, the appellant explained that the cost of the material imported includes the price paid to the exporter, international freight paid thereon, insurance charges paid thereon, basic customs duty paid therein, countervailing duty paid thereon, the Education Cess and Secondary & Higher Education Cess paid thereon and the charges paid to CHA and the local freight.

When the appellant asked the basis on which valuation of stock has been made at Rs.10,14,27,543/- by the department, no plausible explanation was offered by the VATO, neither VATO (Enforcement) gave any reason for arriving at such a valuation of stock. Appellant explained that the variation in stock was purely on assumption and presumption basis, when, in fact, no physical stock taking has been done at the premises. Further, there could not be any liability to tax under the Act because incidence of tax in terms of section 3 read with section 5 was only on taxable turnover, meaning thereby that for a charge to be created there has to be a sale to attract levy of tax. The variation in valuation of stock, as noticed by the department, comes to 62,11,733/-, that too in excess. No shortage in stock were found, which leads to that it was a case of clandestine clearance or surreptitious sale. If the valuation of stock in the understanding of the department was more than what was adopted by the appellant, then the liability of tax could not arise in the absence of sale being made by the appellant. Concerning the imports made during the period 2009-10, 2010-11, 2011-12, explanation was offered which was accepted by the VATO also with the exception that variation of imports of Rs.5,50,736/- for the year 2009-10, Rs.15,832/- for 2010-11 and Rs.32,703/- for the year 2011-12 were taxed without confronting or calling the CHA for which written request was also made.

The VATO without assigning any reason as to why the explanation tendered by the appellant with respect to variation in cash and stock was not acceptable to him, taxed such variation and imposed penalty as well. He also clubbed the variation in imports when such variations related to the financial year 2009-10, 2010-11 and 2011-12 respectively.

Appellant, being aggrieved of the default notice of tax, interest and penalty, filed separate objections before the Additional Commissioner. In support of the objections, grounds were stated in writing and the Additional Commissioner was prayed to record his finding on each and every ground. However, through the impugned order dated 04.12.2012, the Additional Commissioner dismissed the order in toto. In reference to the shortage in cash, the Additional Commissioner, ignoring the explanation as well as the documentary evidences placed on file, recorded a finding that the objector had asserted that cash was taken by the van of HSBC Bank. However, they failed to file any support or receipt of cash accepted by HSBC Bank van on 01.09.2011. This finding was quite contrary to the cash receipts issued by the van when the cash was picked up on respective dates. In the objections filed before the OHA, receipts issued by the cash van on 01.09.2011 and 02.09.2011 were enclosed and, therefore, it could never be the stand of the appellant that cash van does not provide any receipt at the time of accepting cash. On the stock variation/valuation (alleged to be in excess), instead of going into the method or the manner in which valuation of stock has been arrived at by the survey team, he held that the dealer did not provide exact stock on the date of survey and how they valued it. He observed that merely providing the method of calculation called "actual cost basis", does not provide complete part of the story by the appellant. He, therefore, without going into the contention and statutory provisions, where liability to tax was only on taxable turnover and without going into the definition of "turnover", "sale price" and "sale", upheld the difference in the stock as calculated by the survey team and confirmed imposition of tax, interest and penalty thereon. Similarly, he also confirmed the penalty u/s 86 (15) without appreciating as to whether the offence for which penalty had been imposed, falls within the realm of the provision or not.

Held

Explanation of the appellant along with deposit slips showing deposit of cash through pick up cash van of bank found acceptable. Revenue failed to exercise powers U/S 75 of DVAT Act to summon bank authorities to verify the aforesaid explanation of the appellant to reach at the bottom of truth. Further, no loose slips or any other book relating to business transactions were found at the time of survey on the basis of which one may reach to the conclusion that there was undeclared or unaccounted sale. So it would be appropriate and just in these circumstances to remand the matter on this count to the concerned VATO to verify the deposit slips, bank statement and reconciliation etc and reframe the assessment order.

On conjoint reading of terms `turnover', `sale price', `sale' as defined under DVAT ACT, and that constitution permits the states for making

legislation to tax purchase or sale but by no stretch of imagination to tax standing stocks, one reaches to the conclusion that unless there is a sale of goods under DVAT Act , Tax cannot be imposed. Tribunal agreed with the arguments of the appellant that liability to tax could only on sale and not on standing stocks which were in the premises for sale.

Further, as regards to variation in stock found excess on survey , no stock taking done by survey team, no worksheet or chart prepared to support valuation. Appellant explained the basis of valuation but revenue failed to give any explanation for the valuation done inspite of repeated requests of the appellant. There was no shortage of stock on the basis of which it may be said that cladestine sale was made by the appellant. Appellant referred the judgement of Hon'ble Supreme Court in the case of Girdhari Nannelal v/s sales tax commissioner, Madhya Pradesh and submitted that burden lies on the revenue to prove the valuation made by them to arrive at variation in stock.

It was cleared from the facts of the case that AO passed a single order of default assessment of tax, interest and penalty for three financial years. It was in violation of section 32. Further, no findings given by OHA in his order in this regard. Hence, the impugned order passed by OHA was liable to be set aside on this ground also.

That penalty u/s 86(15) can only be imposed when records and accounts which appellant was supposed to prepare under the Act had been prepared in a manner that was false, misleading or deceptive while, in the case, penalty had been levied on the ground that appellant had not maintained the books of accounts at the registered office . penalty u/s 86(15) due to this reason also liable to set aside as per the judgment of Hon'ble S.C in the case of CIT V/s vegetable products Ltd 88 ITR 192.Accordingly, penalty was wrongly assessed u/s 86(15) and was not sustainable and was liable to be quashed.

The considered view of the tribunal was that there was no sale of stock which was alleged to be found in excess by the revenue and there was no tax deficiency and penalty u/s 86(12) was wrongly imposed, hence it was not sustainable and liable to be quashed.

The appeals were party allowed as discussed above and to that extent the impugned order dated 04.12.12 by the OHA was hereby set aside. As regards issue of taxing the variation in cash was concerned it was remanded to the concerned VATO and also the matter with regard to verification of tax credit of Rs. 56501/-was concerned, it was also remanded

to the concerned VATO. The appellant was directed to appear before the VATO who will reframe the assessment in the light of the order passed by the Tribunal.

Cases Referred to:

- *M/s. Piara Ram Chetan Dass, Vs. Commissioner of Sales Tax, Delhi, Appeal No.1236 & 1237/STT/69*
- *Girdhari Nannelal Vs. Sales Tax Commissioner, Madhya Pradesh*
- *M/s Kent Electrical and Electronics Vs. CTT, 50 DSTC 125*
- *CIT Vs. Vegetable Products Limited (1973) 88 ITR 192*
- *C.A. Abraham Vs. Income Tax Officer(1961) 41 ITR 425 SC*

Present for the Appellant : Shri S.C. Ladi, Advocate

Present for the Respondent : Shri C.M. Sharma, Advocate/ Govt. Counsel

ORDER

1. These appeals have been filed against the impugned order dated 04.12.2012 passed by the Additional Commissioner (Zone-X), Objection Hearing Authority (in short, OHA), who vide this order rejected the objections and concurred with the findings of the Ld. VATO who vide order dated 08.05.2012 u/s 32 and 33 of the Delhi Value Added Tax Act (in short, DVT Act) issued subsequent to conduct of enforcement survey, passed order of default assessment of tax, interest and penalty against the appellant.

2. Brief facts giving rise to the present appeals are that appellant is a joint venture group of M/s. Burberry International Holdings Limited. It does not have any franchisee in India and goods dealt by them are only of a single brand i.e. “Burberry”. The product range is from readymade garments to leather goods, special goods, sun glasses, watches, fragrances, note books, photo frames, blankets, candles and jewellery. The goods are mainly imported from outside India and are further sold in the country on MRP basis.

3. On 02.09.2011, showroom of the appellant at DLF Emporio Mall, Vasant Kung, was visited by the Survey Team. Besides that, the premises of M/s. Mystique Logistics Pvt. Ltd., D-22, Okhla Industrial Area, Phase-I, New Delhi was also visited by another survey team. M/s. Mystique Logistics has been providing the warehousing and distributing service to the appellant which job includes scanning, labeling, packing and distributing after receipt of imports and local purchases. On visit by

the survey team, statement of Shri Shekhar Joshi, General Manager, M/s. Mystique Logistics was recorded, who, on being asked, gave details regarding the nature of business conducted by the appellant as well as the branch transfers made by them in the past period. Apart from the statement of Shri Shekhar Joshi, statement of Shri Vikas Agarwal, Manager (Accounts) of the appellant was also recorded. In his statement, Shri Vikas Agarwal informed that the Corporate Office of the appellant is at 51-52, Udyog Vihar, Phase-IV, Gurgaon, Haryana at which place the books of accounts of the appellant are maintained. He also pointed out that the appellant has two outlets in Delhi – one at DLF Emporio Mall and the other in Hotel Oberoi, Dr. Zakir Hussain Marg, New Delhi. After the survey was conducted, appellant was issued a notice u/s 59 (2) of the DVAT Act on 01.02.2012 whereby they were asked to appear in person and also to carry the documents mentioned in the said notice before Ld. VATO on 15.02.2012. All the documents in the notice of 01.02.2012 were submitted with a letter dated 28.02.2012, where after the matter was heard from time to time. During the course of hearing, Ld. VATO asked the appellant to explain the report submitted by Shri P.S. Dhariwal, VATO (Enforcement) on three issues. They were asked to explain the variation in cash and stock which was mentioned at S.No.12 of the said report and also variation in the imports which arose due to variance of the figures obtained from the CHA and the one reflected by them in the returns filed during the relevant periods. Variation in imports were spelt out in Annexure-A, which were in relation to the three assessment years 2009-10, 2010-11 and 2011-12. With respect to these observations and variations which the appellant was asked to explain, detailed written submissions vide letter dated 25.04.2012 were filed.

4. As far as cash variation of Rs.13,49,795/- is concerned, the appellant placed on record that there is no variation as the same stands collected by the pick-up van of HSBC Bank with whom the account is maintained by the appellant. Detailed explanation with respect to the cash transactions made on 01.09.2011 and 02.09.2011, followed by reconciliation statement were tendered.

5. So far as stock is concerned, as per appellant's books of accounts, the stock on the date of visit stood at Rs.9,52,16,010/-, whereas according to the Department the said stock should have been valued at Rs.10,14,27,543/-. On being asked as to how the valuation of imported material is arrived at, the appellant explained that the cost of the material imported includes the price paid to the exporter, international freight paid thereon, insurance charges paid thereon, basic customs duty paid therein counter-vailing duty paid thereon, the Education Cess and SHE Cess paid thereon and the charges paid to CHA and the local freight.

6. When the appellant asked the basis on which valuation of stock has been made at Rs.10,14,27,543/- by the Department, no plausible explanation was offered by the VATO, neither VATO (Enforcement) gave any reason for arriving at such a valuation of stock. Appellant explained that variation in stock is purely on assumption and presumption basis, when, in fact, no physical stock taking has been done at the premises. Further, there could not be any liability to tax under the Act because incidence of tax in terms of section 3 read with section 5 is only on taxable turnover, meaning thereby that for a charge to be created against, there has to be a sale to attract levy of tax. The variation in valuation of stock, as noticed by the Department, comes toRs.62,11,533/-, that too in excess. No shortage in stock were found, which leads to that it was not a case of clandestine clearance or surreptitious sale. If the valuation of stock in the understanding of the Department was more than what is adopted by the appellant, then the liability to tax could not arise in the absence of sales being made by the appellant. Concerning the imports made during the period 2009-10, 2010-11 and 2011-12, explanation was offered which was accepted by the Ld. VATO also with the exception that variation of imports of Rs.5,50,736/- for the year 2009-10, Rs.15,832/- for 2010-11 and Rs.32,703/- for the year 2011-12 were taxed without confronting or calling the CHA for which written request was also made.

7. The VATO, without assigning any reason as to why the explanation tendered by the appellant with respect to variation in cash and stock is not acceptable to him, taxed such variation and imposed penalty as well. He also clubbed the variations in imports when such variations related to financial year 2009-10, 2010-11 and 2011-12 respectively.

8. Appellant, being aggrieved of the default notice of tax, interest and penalty, filed separate objections before the Additional Commissioner. In support of the objections, grounds were stated in writing and the Additional Commissioner was prayed to record his finding on each and every ground. However, through the impugned order dated 04.12.2012, the Additional Commissioner dismissed the order in toto. In reference to the shortage in cash, the Additional Commissioner, ignoring the explanation as well as the documentary evidences placed on file, recorded a finding that the objector has asserted that cash was taken by the van of HSBC Bank. However, they failed to file any support or receipt of cash accepted by HSBC Bank van on 01.09.2011. This finding was quite contrary to the cash receipts issued by the van when the cash was picked up on respective dates. In the objections filed before the OHA, receipts issued by the cash van on 01.09.2011 and 02.09.2011 were enclosed and, therefore, it could never be the stand of the appellant that cash van does not provide any receipt at the

time of accepting cash. On the stock variation/valuation (alleged to be in excess), instead of going into the method or the manner in which valuation of stock has been arrived at by the survey team, he held that the dealer did not provide exact stock on the date of survey and how they valued it. He observed that merely providing the method of calculation called "actual cost basis", does not provide complete part of the story by the appellant. He, therefore, without going into the contention and statutory provisions, where liability to tax is only on taxable turnover and without going into the definition of "turnover", "sale price" and "sale", upheld the difference in the stock as calculated by the survey team and confirmed imposition of tax, interest and penalty thereon. Similarly, he also confirmed the penalty u/s 86 (15) without appreciating as to whether the offence for which penalty has been imposed, falls within the realm of the provision or not.

9. Appellant being still aggrieved by the impugned order, filed the present appeal on the following, among other grounds:

(i) The Additional Commissioner has grossly erred in taxing the variance in cash on the premise that the appellant could not produce any receipt issued by the van collecting cash on behalf of HSBC Bank on 01.09.2011. Fact of the matter is that such a finding recorded by him is contrary to the evidence placed on record. In the objection paper book filed by him is contrary to the evidence placed on record. In the objection paper book filed before him, the appellant had annexed reconciliation of cash in hand, supported with cash receipt issued by the van on 01.09.2011, then on 02.09.2011 and lastly on 03.09.2011. It could not be imagined that such a huge amount of cash would have been carried/taken away by a pick-up van of the bank without issuing any receipt and it also does not stand to any logic or business economics that an entrepreneur, while parting with the cash, would not ask for a receipt. Since the finding arrived at by the Additional Commissioner is in conflict with the evidences available on record, therefore, the confirmation of default notice of assessment of tax, interest and penalty on that front is liable to be set aside.

(ii) It is significant to mention that the Additional Commissioner, while arriving at this finding, did not exercise his powers u/s 75 of the Act. If at all, according to him, the appellant had not been able to produce cash receipts issued by the van (in fact incorrect), then there was no difficulty for him to have conclusively let this fact established as to whether the appellant

has deposited cash with the van or it is merely a ploy to cover up the shortage. He could have done that either by summoning any person from the bank authorities or in the alternative, he could have sought confirmation to the veracity of the statement made by the appellant that cash had been taken away by the van of HSBC Bank for which ample powers are available to him u/s 75 of the Act. The above proposition was specifically taken by the appellant in Group B of the objections, but for the reasons best known to the Additional Commissioner, neither he nor the VATO at any point of time ever thought of exercising the powers available to them under the Act to reach at the bottom of the truth which was laid bare by the appellant at very first stage for assessment. Therefore, taxing the shortage of cash is beyond the purview of the Act when no unaccounted sale has either been alleged or noticed by the lower authorities. There is no seizure of any paper slips, private books etc. to support undeclared sales being made by the appellant.

(iii) Because taxing of stock variation, which is alleged to be found in excess to the extent of Rs.62,11,533/- is not only without jurisdiction, but also outside the purview of the Act. After the survey was conducted, appellant was issued a notice u/s 59 (2) of the Act on 01.02.2012 and they were inter-alia asked to reply about the variation in the valuation of stock. As per appellant's books of accounts, the stock on the date of visit stood at Rs.9,52,16,010/-, whereas according to the Department, the stock should have been valued at Rs.10,14,27,543/-. In fact, no stock taking was done by the survey team on the date of visit. Neither any worksheet nor any chart was prepared by the survey team to support the value suggested by them. Repeatedly when it was asked in writing as well as in oral the basis of the Department to arrive at the valuation of Rs.10,14,27,543/-, no response or plausible explanation was offered by the VATO For arriving at the valuation of stock at Rs.9,52,16,010/- the appellant explained that what prices are included in it. In the absence of any explanation tendered by the Department and in the absence of any worksheet or chart prepared by them to support as to how they have valued the stock at Rs.10,14,27,543/-, it was next to impossible for the appellant to place their defence on that front. The Ld. OHA has, therefore, erred in putting the onus on the appellant to explain the valuation of stock when the enhanced valuation was arrived by the department. This fortified the stand that the exercise of valuation has been done by the department on assumptions and

presumptions and the value of Rs.10,14,27,543/- arrived at by them cannot withstand judicial scrutiny.

(iv) Because the Additional Commissioner failed to appreciate that the Act has been framed under Entry 54 of List II of the Seventh Schedule to the Constitution of India. The said Entry reads "Taxes on the sale or purchase of goods, other than newspapers, subject to the provisions of Entry 92A of List I". Thus, the field provided by Entry 54 permits the State for making a legislation which provides for taxation of either the purchases or sales, but by no stretch of imagination, it permits or allows the authorities to also tax the standing stock which had yet not been sold by an assesse. In his case, the valuation of stock arrived at by the Department was in excess by an amount of Rs.62,11,533/-. It was not a case of shortage of stock found at the time of survey. Liability to tax u/s 3 read with section 5 is only on taxable turnover of a dealer. The expression "turnover" has been defined u/s 2(zm), which means the aggregate of the amount of sale price received or receivable by the person in any tax period reduced by any tax for which the person is liable u/s 3 of this Act. When turnover means the aggregate of the amount of sale price, then one has to look to the definition of "sale price" given under the Act. The expression "sale price" stands defined u/s 2(zd), which means the amount paid or payable as valuable consideration for any sale including…….." Thus, the definition of "sale price" ropes in the element of sale and the sale price is the reward of that sale in terms of valuable consideration. The expression "sale" has also been defined u/s 2 (zc) of the Act. Now, all these three definitions, when seen in proper perspective, only make one to reach at a conclusion that liability to tax can only be on sale and not on standing stock which has been stacked in the premises for the purpose of sale. The Additional Commissioner, without referring to the statutory provisions of section 3 read with section 5 (1) and (2) and the definition clause of various expressions towards which his attention was invited not only in the grounds, but also at the time of hearing, has grossly erred in confirming the demand of tax, interest and penalty on this issue when the Act itself does not support a levy.

(v) The impugned order is also in violation of the principles of natural justice in as much as it does not give any finding to the fact

(a) That as to on what basis the Department has arrived at the valuation of stock of Rs.10,14,27,543/-;

(b) That there is no allegation of any extra commercial consideration being paid by the appellant to the exporters which could lead to an excess availability of stock;

(c) That no difference being pointed out by the Department on the physical availability of stock, that is to say, neither any shortages nor any excess was noticed to the number of pieces that were lying in stock on the day of visit;

(d) That no unaccounted stock was found lying either at the warehouse or at the outlets of the appellant;

(e) That there is no statement of any person to support the stand of the department that the stock has been appropriately priced by them at Rs. 10,14,27,543/-

(f) That the basis of arriving at the stock price by the appellant has also not been found fault with;

(g) That the books are regularly being audited by the Chartered Accountant which are submitted to various Departments like Income Tax, RoC, banks etc. and these documents are in public domain, whose credence has not been challenged by the VATO.

(vi) The Additional Commissioner has also not recorded any finding on the legality of default notice of assessment when through the single default notice the VATO has assessed the appellant for the three financial years viz. 2009-10, 2010-1 and 2011-12. Section 32 permits the VATO to assess or reassess to the best of his judgment, but not without recording the reasons in writing the amount of net tax for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year. In this case, the VATO has passed a single composite default notice for various tax periods spilling over the above three financial years for which he was required to pass separate default notices of assessment. A single notice issued by him for more than one financial year is also beyond the statutory provisions and, therefore, also the default notices should have been set aside by the Additional Commissioner. However, despite the fact that this ground/contention had been taken by the appellant in writing, no notice of the same has been taken by him while passing the order.

(vii) The Additional Commissioner has also erred in not giving any finding on Ground I taken before him. Appellant had stated that the VATO has erred in not giving the benefit of tax credit of Rs.56,501/- against the purchases made by them during the tax period September, 2011. Though all factual details with respect to the output tax liability and the purchases of other goods made in Delhi were provided to the VATO, but while calculating net tax, the credit of Rs.56,501/- was not extended to the appellant, to which they were legally entitled in terms of section 9(1) of the Act. No finding has been recorded on this ground.

(viii) The Additional Commissioner has erred in confirming penalty of Rs. 1 lakh imposed by the VATO u/s 86 (15) of the Act. The said penalty is imposed on the ground that the appellant has not maintained the books of accounts at the Reg. Office. However section 86 (15) reads as under

> "Where a person who is required to prepare records and accounts under this Act, prepares records and accounts in a manner that is false, misleading or deceptive, the person shall be liable to pay by way of penalty a sum of Rupees one lakh or the amount of tax deficiency, if any, whichever is greater"

Section (15) can only be invoked if the accounts maintained are either false, misleading or deceptive. But certainly it cannot be invoked for the reason of the appellant not maintaining the books of accounts at the Reg. Office. If this is the only ground for imposing penalty, then there is a tacit admission by the Department that the books of accounts, though maintained at the Regd. Office of the appellant, were true, correct and in accordance with the normal business principles. That way, section 86 (15) does not stand attracted. However, unfortunately, the Additional Commissioner has neither seen Ground (i) of the objections against penalty, nor he has referred to the statutory provisions of section 86 (15) under which he has confirmed the penalty on the appellant. Neither in the default notice of penalty nor in the impugned order, there is any allegation of the appellant maintaining false, misleading or deceptive accounts which could only invite imposition of penalty u/s86 (15).

(ix) The Additional Commissioner has also erred in confirming the penalty of Rs. 1 lakh because when the notice u/s 59(2) was issued

and the appellant was asked to file representation, they were only asked to explain variations on three counts, viz. variation in cash, stock and imports made by them during 2009-10, 2010-11 and 2011-12 respectively. They were never asked to explain as to why they should not be penalized for non-maintenance of records at Regd. Office. They were never asked as to why penalty u/s 86 (12) and (15) be not imposed upon them. Therefore, when VATO, by imposing penalties under the above two sub-sections, has traveled beyond the grounds taken by him while framing the default notice, the Additional Commissioner has added salt to the injury by confirming that order without considering and referring to Ground C taken by the appellant in their grounds of objection.

(ix) Because penalty of Rs.2,75,421/- which has been imposed by the VATO u/s 86 (12) has wrongly been confirmed by the Additional Commissioner. The impugned order is totally non-speaking on this issue. At one place, he merely refers to imposition of penalty u/s 86 (15) but in the entire length and breadth of the order, there is no reference of penalty of Rs.2,75,421/- imposed u/s 86 (12). Liability to penalty, whether u/s 86 (12) or (15) has a common measure and that is “tax deficiency”. Penalty u/s 86 (12) could only be imposed had there been a tax deficiency. But if the grounds on the issue of cash/stock variation are taken into account, this Tribunal will find that there is no ground/field available to the authorities to impose penalty on the basis of tax deficiency, because there is no tax deficiency at all. This expression has been succinctly explained u/s 86 (1) of the Act. If there is no liability to tax on the alleged variation, which have been well explained and ironed out by the appellant, the question of tax deficiency itself falls to the ground. Therefore, on that front, imposition of penalty u/s 86 (12) is not warranted and deserves to be set aside.

10. These appeals were listed for hearing on merit after compliance of stay condition vide order dated 25.02.2013.

11. Heard to appellant Ld. Counsel Shri S.C. Ladi and Shri CM Sharma on behalf of Revenue and perused the file on the basis of which these appeals are being disposed off as follows.

12. The impugned order dated 04.12.2012 passed by the Ld. OHA vide which he upheld the order of tax, interest and penalty u/s 32 and 33 of the DVAT Act passed by the Ld. VATO on 08.05.2012 has been assailed on various grounds. As it appears from the resume of facts that survey of the

appellant was conducted on 02.09.2011 and on the basis of survey report of tax, interest and penalty was issued. But before issuance of notices, on the basis of survey report, appellant was asked to explain variation in cash in stock and also variation in the imports which arose due to variance of the figures obtained from the CHA and the one reflected by them in the returns filed during the relevant periods. On survey cash variation of Rs.13,49,795/- was alleged to be found. In this regard, according to appellant, there was no cash variation because that amount was collected by pick-up van of HSBC Bank with whom account is maintained by the appellant. So far as this ground is concerned, Ld. OHA in his impugned order, has observed that no evidence to prove this fact has been submitted by the appellant side. But according to appellant he filed receipts issued by the cash van on 01.09.2011, 02.09.2011 and 03.09.2011 alongwith objections before the OHA and appellant has not taken the stand before the OHA that cash van does not provide any receipt at the time of accepting the cash. Appellant has also filed copy of cash receipts issued by the cash van before this Tribunal and reconciliation statement which amply prove that there was no cash variation of Rs.13,49,795/-. So, in this regard findings recorded by the OHA is contrary to the evidence placed on record by the appellant. We agree with the submissions of appellant's Ld. Counsel that such a huge amount of cash taken away by a pick-up van of the bank cannot be handed over without issuing any receipt.

13. Appellant's Ld. Counsel argued that Ld. VATO as well as Ld. OHA failed to exercise powers given u/s 75 of the DVAT Act. If they had any doubt about the fact that disputed amount was not deposited with the bank, they should have summoned any person from the bank. We agree with the arguments of the appellant's Ld. Counsel that if there was any iota of doubt that money was not taken away by the pick-up van on the relevant dates, then authorities below should have summoned any person from the HSBC Bank to reach at the bottom of the truth.

14. Appellant's Ld. Counsel also argued that Ld. VATO has grossly erred in taxing this cash amount, which has been upheld by the Ld. OHA. Appellant's Ld. Counsel, in this regard, supported his arguments with the case of *M/s. Piara Ram Chetan Dass, Vs. Commissioner of Sales Tax, Delhi, Appeal No.1236 & 1237/STT/69* and said that nothing adverse was found against the appellant at the time of survey. No loose slips or any other book relating to business transactions were found at the time of survey on the basis of which one may reach the conclusion that there was undeclared and unaccounted sale. As appellant has filed pick-up van's receipts of HSBC Bank, reconciliation statement and HSBC Bank statement of the appellant, so it would be appropriate and just in these circumstances

to remand the matter on this count to the concerned VATO. Appellant is directed to produce before the concerned VATO alongwith pick-up van receipts of the bank, reconciliation statement as well as appellant's bank statement of relevant dates, who after verification of these facts in the light of these papers, reframe the assessment.

15. Impugned order has also been assailed on the ground that taxing of stock variation, which was alleged to be found in excess to the tune of Rs.62,11,533/- was not only wrong but also without jurisdiction. In this regard, appellant's Ld. Counsel advanced interesting legal argument during the course of arguments. He argued that excess stock amount cannot be taxed and in this regard he traced the history of the DVAT Act and argued that this Act was framed under Entry 54 of List 2nd of the Seventh Schedule to the constitution of India, which entry reads as "Taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92A of List 1. According to him the power provided by Constitution permits the State for making a legislation which provides for taxation of either the purchases or sales but by no stretch of imagination it permits or allow the authority to also tax the standing stock which has yet not been sold by an assessee. He further argued that in case in hand the valuation of stock arrived at by the Department was in excess by an amount of Rs.62,11,533/-. It was not a case of shortage of stock found at the time of survey. He further explained that liability to tax u/s 3 of the DVAT Act read with section 5 is only on turnover of a dealer and then, he taking the help of the DVT Act, defined the meaning of "turnover" as given in section 2 (zm), "sale price" given in section 2 (zd) and lastly the meaning of term "sale" as given in section 2 (zc). On conjoint reading of all these terms, one reaches the conclusion that unless there is sale of goods under the DVAT Act, tax cannot be imposed. We agree with the arguments of the appellant's Ld. Counsel that liability to tax can only be on sale and not on standing stock which had been stacked in the premises of the appellant for the purpose of sale.

16. According to appellant, after the survey appellant was issued notice u/s 59(2) on 01.02.2012 and they were, inter-alia, asked to reply about the variation in the valuation of stock. As per appellant's books of account, the stock on the date of visit stood at Rs. 95,21,16,010/- whereas according to the department the stock should have been valued at Rs. 10,14,27,543/-. Appellant has assailed this valuation of stock by the Department firstly on the ground that no stock taking was done by the survey team on the date of visit. Secondly, neither any worksheet nor any chart was prepared by the survey team to support the value suggested by them. On the contrary appellant explained that cost of the material imported includes the price

paid to the exporter, international freight paid thereon, insurance charges paid thereon, basic customs duty paid therein, counter-vailing duty paid thereon, the Education Cess and SHE Cess paid thereon and the charges paid to CHA and the local freight. According to appellant, he time and again insisted before the local authorities that how they have calculated stock at Rs.10,14,27,543/-, but no reasonable or plausible explanation was offered by the VATO nor by the VATO (Enforcement) for arriving at such a valuation of stock. Appellant's Ld. Counsel also submitted that unless he was explained the basis on which valuation was made, how he could take his defence. In this case there is no shortage of stock on the basis of which it may be said that clandestine sale was made by the appellant and when in the understanding of the department, valuation of stock was more than what is adopted by the appellant then the liability to tax would not arise on the absence of sale being made by the appellant. In this regard he also submitted burden lies in the Revenue to prove that valuation of the stock was Rs.10,14,27,543/- and not 95,21,16,010/-, as alleged by the appellant. In this regard he referred to the judgment of Hon'ble Supreme Court in the case of *Girdhari Nannelal Vs. Sales Tax Commissioner, Madhya Pradesh*. In this case an entry was made in the Account Books of the appellant showing a credit of Rs.10,000/- in the name of wife of a partner of the appellant firm. The question was whether this amount represented profits from income realized as a result of transactions liable to Sales Tax and the Hon'ble Supreme, speaking through Justice H.R. Khanna, said as follows:

> "We have given the matter our earnest consideration and are of the opinion that the judgment of the High Court cannot be sustained in so far as it has answered question No.(1)(a) against the assessee-appellant. It would appear from the resume of facts that an entry was made in the account books of the appellant showing a credit of Rs.10,000 in the name of the wife of Kanji Deosi, partner of the appellant firm. In order to impose liability upon the appellant firm for payment of sale tax by treating that amount as profits arising out of the undisclosed sales of the appellant, two things had to be established, (i) the amount of Rs.10,000 was the income of the appellant firm and not of Kanji Deosi or his wife, and (ii) that the said amount represented profits from income realized as a result of transactions liable to sales tax and not from other sources. The onus to prove the above two ingredients was upon the department. The fact that the appellant firm or Kanji Deosi and his wife failed to adduce satisfactory or reasonable explanation with regard to the source of Rs.10,000 would not in the absence of some further

material have the effect of discharging that onus and proving both the ingredients."

17. Applying the ratio of the above case to the facts of the case in hand, we are also of the considered view that burden lies on the department to prove that valuation of stock was Rs.10,14,27,543/- and not Rs.95,21,16,010/-, as alleged by the appellant. No reasoning has been given by the VATO as well as by Ld. OHA that why the valuation made by the appellant is wrong while he has explained the basis of valuation of the stock and on what basis revenue has valued it at of Rs. 10,14,27,542/-.

18. The impugned order dated 04.12.12 passed by Ld. Objection Hearing Authority has also been assailed on the ground that Ld. OHA had upheld the notice of default assessment of tax, interest and penalty dated 08.05.12 passed by Ld. VATO even when through a single default notice, Ld. VATO has assessed the appellant for the three financial years viz. 2009-10, 2010-11 and 2011-2012. In this regard, he has referred to Section 32 of DVAT Act, according to which the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgement, the amount of net tax due for a tax period (for more than 1 tax period by a single order so long as all such tax period are comprised in one year).

19. As it is clear from the facts of the present case that Ld. VATO has passed a single order of default assessment of tax, interest and penalty for three financial years by a single order, it is in violation of section 32. Secondly, no finding has been given by the Ld. OHA in this regard. Hence, the impugned order passed by the Ld. OHA is liable to be set aside on this ground also.

20. The impugned order dated 04.12. i 2 passed by Ld. OHA has also been assailed on the ground that appellant had claimed tax credit of Rs. 56501/- against the purchases made by him during the tax period of September, 2011 and no finding in this regard has been given by the Ld. OHA despite the fact that all factual details with respect to the output tax liability and purchases of other goods made in Delhi were provided to the VATO but while calculating the net tax credit of Rs. 56501/- was not given to the appellant, to which they were legally entitled under section 9(1) of the DVAT Act. IN this regard perusal of the impugned order dated 04.12.12 shows that no finding has been recorded by the Ld. OHA in this regard. To this extent also the matter is remanded to the Ld. VATO who after verifying the details of purchases made by the appellant and verifying the output tax paid by the seller give benefit of tax credit to the appellant u/s 9(1) as per law.

21. The impugned order dated 04.12.12 passed by the Ld. 0HA has also been assailed on the ground that penalty u/s 86(15) to the tune of Rs. 1 lac was wrongly imposed. This penalty was imposed on the ground that the appellant has not maintained the books of accounts at the registered office. Now the question arises whether the penalty u/s 86(15) of DVAT Act was rightly imposed. Section 86(15) of DVAT Act provides as follows:-

> "Where a person who is required to prepare records and accounts under this Act, prepares records and accounts hi a manner that is false, misleading or deceptive, the person shall be liable to pay by way of penalty a sum of Rupees one lac or the amount of tax deficiency, if any, whichever is greater."

22. It is clear from the bare perusal of this provision, that penalty under this provision can only be imposed when records and accounts which appellant is supposed to prepare under the Act have been prepared in a manner that is false, misleading or deceptive then only penalty under this provision can be imposed. While penalty under the provision has, been imposed in the present case on the ground that the appellant has not maintained the books of accounts at the registered office. So penalty imposed under section 86(15) due to this reason is also liable to be set aside. In this regard the appellant has referred to the case of *M/s Kent Electrical and Electronics Vs. CTT decided by this Tribunal* (2012 Delhi Sales Tax Cases J-126). In this case while deciding the appeal, the Tribunal referred to the law laid down by the Hon'ble Supreme Court in *CIT Vs. Vegetable Products Limited (1973) 88 ITR 192* and *C.A. Abraham Vs. Income Tax Officer(1961) 4.1 ITR* page 425 (Supreme Court) in which Hon'ble Supreme Court held as follows:-

> "It is also well-settled that provisions dealing with penalty should be construed strictly within the term and language of the particular statute and in case of doubt, in a manner favourable to the assessee. If the court finds that the language of a taxing provisions is ambiguous or capable of more meaning than one, then the court has to adopt the interpretation which favours the assessee, more particularly so where the provision relates to imposition of penalty,"

23. If the order of the Ld. VATO as well as OHA is judged on the touchstone of the principles of law laid down by the Hon'ble Supreme Court then the obvious conclusion is that the order of the Ld. VATO which has been upheld by the Ld. OHA is not as per the provisions of Section 86(15) of the DVAT Act and the penalty was wrongly assessed

u/s 86(15) of DVAT Act and as such penalty assessment order is not sustainable and is liable to be quashed.

24. The penalty of Rs. 275421/-, which has been imposed by the Ld. VATO u/s 86(12) of DVAT Act and which has been affirmed by the Ld. OHA has also been assailed in the present appeal firstly on the ground that it is a non speaking order, secondly penalty u/s 86(12) can only be imposed when there is a tax deficiency and if the grounds of the issue of cash /stock variation are taken into account then one will find that there is no ground to impose penalty on the basis of tax deficiency because there is no tax deficiency at all. According to section 86(12) "Where tax deficiency arises in relation to a person, the person shall be liable to pay, by way of penalty, a sum equal to 1% of tax deficiency per week or a sum equal to 100 rupees per week whichever is higher for a period of default." At the same time, if there is no tax deficiency as given in section 86(1) of DVAT Act, penalty u/s 86(12) cannot be imposed. According to the appellant as there is no cash variation or stock variation as alleged in ground 1 & 2 of the appeal so there is no tax deficiency and penalty u/s 86(12) was wrongly imposed.

25. On the basis of aforesaid discussion in the facts and circumstances of the case, we are of the considered view that there was no sale of the stock which was alleged to be found in excess by the revenue so there was no tax deficiency and penalty u/s 86(12) was wrongly imposed, hence it is not sustainable and liable to be set aside.

26. On the basis of aforesaid discussion, we are of the considered view that present appeals are partly allowed as discussed above and to that extent the impugned order dated 04.12.12 by the Ld. OHA is hereby set aside. As regards issue of taxing the variation in cash is concerned it is remanded to the concerned VATO and also the matter with regard to verification of tax credit of Rs. 56501/- is concerned, it is also remanded to the concerned VATO. The appellant is directed to appear before the Ld. VATO on 25.05.2016 who will reframe the assessment in the light of the order passed by this Tribunal.

27. The appeal stands disposed off accordingly.

28. Order pronounced in the open court.

29. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 217 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
Diwan Chand; Member (A) And M.S. Wadhwa: Member (J)

Appeal No.110/ATVAT/10-11
Assessment Period: 2004-05
Assessment of tax, Interest & Penalty

Sleek Sales.
F-55, Bhagat Singh Market, New Delhi - 110 001 ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order : 26.04.2016

DELHI WORKS CONTRACT ACT,1999 – COMPOSITION SCHEME TAXABILITY OF PURE SERVICE CONTRACTS UNDER THE PROVISION OF WORKS CONTRACT TAX ACT – VALUE OF PURE SERVICE CONTRACTS WERE ADDED CONSEQUENTLY DEMAND CREATED – SERVICE CONTRACT AGREEMENTS REVEALED THAT AMOUNT RECEIVED TOWARD AMC DID NOT INCLUDE TO REPLACE THE DEFECTIVE PARTS – NO MATERIAL WAS PASSED ON – COMPOSITION SCHEME COVERED THE TRANSACTIONS THAT FALLEN WITHIN THE AMBIT OF WORKS CONTRACT – REVENUE HAD NOT PLACED ANY INCRIMINATING MATERIALS TO CONTRADICT AND DISCREDIT THE CONTENTION OF APPELLANT WHILE DOING THE ANNUAL MAINTENANCE WAS NOT PART OF THE CONTRACT – APPEAL ALLOWED AND IMPUGNED ORDERS SET ASIDE.

Facts of the Cases

Facts of the case briefly stated were that Appellant was a partnership firm and carrying out business of Sales, Purchases, Installation and Maintenance and Services of Music, Sound wave P.A. System etc. and was engaged also in the Works contract and exercised the option to pay the composition amount u/s 6 of the Delhi Works Contract Act, 1999 by moving a composition application. The appellant had filed composition application on 16.04.2004. He also claimed exemption on services charges for Rs.23,93,121/- and income from AMC for Rs.11,74,268/- during the period 2004-05.

Appellant's case was that during the assessment year 2004-05, appellant undertook three types of transactions:-

(a) Sales transactions of Rs 2,68,55,007/- on which Sales Tax was paid by the dealer.

(b) Composite Contracts (contracts in which material as well as services were involved) of Rs 67,15,013/- on which work contract Tax was paid by the dealer.

(c) Purely Services Contract (AMC's) of Rs 14,13,580/- on which service Tax was paid by the appellant.

The only issue in dispute was regarding taxability of 'Pure Service Contracts' under the provision of Work Contract Tax Act. The appellant was engaged in the Works Contract (Composite Contract) and exercised the option to pay the composition amount u/s 6 of the Act by moving an application. The appellant was assessed on the basis of the composition application. The Assessing Authority added Pure Service Contracts also in the turnover (Rs 23,93,121 + Rs. 11,74,268) in the GTO and taxed @ 4%. Aggrieved by the order of the Assessing Authority the Appellant filed an appeal before Appellate Authority who vide impugned orders rejected the first appeal and upheld the demand created. The appellant filed the appeals in VAT Tribunal.

***Held** allowing the appeals that*

From the service contract agreement entered into between the appellant and customers for Annual Maintenance Contract, it was apparent that amount received by the appellant towards AMC did not include in it any obligation to replace the defective parts. Replacement, if any, of any defective part/component was to be at the cost of the party and cost of the part so replaced was to be charged extra. In other words, no material was passed on in terms of terms and conditions of the AMC for which the amount taxed by the VATO had been received.

Appellant's claim of non-taxability of receipt on account of Annual Maintenance Contracts executed by him had been rejected and defended on the ground that the appellant had opted for the composition scheme and as such the entire receipt in his hand in respect of all the contracts was taxable. This argument of the Revenue was totally misplaced. Appellant as had been stated was engaged in three types of transactions. Purely sale transactions which were exigible to tax under Delhi Sales Tax Act, 1975, Works contract undertaken by him for which he was exigible to tax in terms of provisions of Delhi Sales Tax on works contract Act, 1999 and the third type of transactions were where he was only doing the annual maintenance of the equipments sold in which he was not providing the component or any material and if at all the material was to be used at the behest of the client then he had charged it separately for the part so replaced and for that as stated by the appellant he had charged the sales tax and deposited the same as well.

Composition scheme as envisaged by the department was only in respect of the transactions that fallen within the ambit of works contract. The transactions that fallen outside the purview of works contract could not be taken to be covered within the composition and taxed. Reliance of the authorities below on the decision of Builders' case was misplaced in as much as the said decision nowhere laid down that even if the transaction did not come within the purview of definition of works contract , the same was to be included in the composition.

Revenue had not placed any material or evidence on record to contradict and discredit the contention of the appellant that supply of material if any by the appellant while doing the annual maintenance was not part of the contract. On the other hand what contract states was that if the appellant replaced any part, then the cost of the same will be charged separately. Revenue had not been able to negate the contention of the appellant that as and when any part was replaced the tax was charged on it and deposited. Further, considering the overall turnover of the appellant the amount of AMC was so small to disbelieve the version of the appellant.

The appeal was allowed and the impugned orders were set aside.

Present for the Appellant : Sh. Harish Kapoor, Adv.,

Present for the Respondent : Sh. N.K. Gulati, Adv.,

ORDER

1. Appellant M/s Sleek Sales who is registered with Department of Trade & Taxes Delhi vide Registration No. WC/11162002675/0200, has filed above noted appeal challenging the impugned orders dated 10.03.2010 rejecting the First appeal and upholding the demand created by VATO, Special Zone on 29.03.2006 for the period 2004-05.

2. Facts of the case briefly stated are that Appellant is a partnership firm and carrying out business of Sales, Purchases, Installation and Maintenance and Services of Music, Sound wave P.A. System etc. and is engaged also in the Works contract and exercised the option to pay the composition amount u/s 6 of the Delhi Works Contract Act, 1999 by moving a composition application. The dealer had filed composition application on 16.04.2004. He also claimed exemption on services charges for Rs.23,93,121/- and income from AMC for Rs.11,74,268/- during the period 2004-05.

3. Appellant's case is that during the assessment year 2004-05, appellant undertook three types of transactions:-

(a) Sales transactions of Rs 2,68,55,007/- on which Sales Tax was paid by the dealer.

(b) Composite Contracts (contracts in which material as well as services were involved) of Rs 67,15,013/- on which work contract Tax was paid by the dealer.

(c) Purely Services Contract (AMC's) of Rs 14,13,580/- on which service Tax was paid by the dealer.

4. The only issue in dispute is regarding taxability of 'Pure Service Contracts' under the provision of Work Contract Tax Act. The dealer is engaged in the Works Contract (Composite Contract) and exercised the option to pay the composition amount u/s 6 of the Act by moving an application. The dealer was assessed on the basis of the composition application. The Assessing Authority added Pure Service Contracts also in the turnover (Rs 23,93,121 + Rs. 11,74,268) in the GTO and taxed @ 4%. Aggrieved by the order of the Assessing Authority the Appellant filed an appeal before Appellate Authority who vide impugned orders rejected the first appeal and upheld the demand created.

5. Aggrieved with the rejection of First appeal, appellant has filed appeal before the Tribunal and assailed the impugned orders broadly on the following grounds:-

(i) That the Annual Maintenance Contract and Service Contracts handled by the dealer are purely of service nature where no material has been supplied to the customers.

(ii) That the Annual Maintenance Contracts (AMC) usually entered after the warranty period of the goods, is a totally separate contract and has no relation with the supply of material, Composite Contract with the customers. AMC may be for the parties to whom material is supplied by the dealer and these services are also provided to the customers who might have purchased the material from other dealers/ suppliers.

(iii) That transfer of property in goods had not taken place to execute the contracts, which are the main ingredients for the purpose of identification of the transactions taxable under Work Contract Tax and Service Tax has been paid on these service charges.

(iv) That no tax under the Work Contract Act can be charged as there is no transfer of property in goods while executing the service contract and the transfer of property in goods is the first ingredient for determination as to whether a contract is taxable under Tax on Work Contract in Delhi.

(v) That the Assessing Officer has relied on the decision of Hon'ble Supreme Court as decided in the case of State of Kerala & Another Vs. Builders Association of India & Others (104 STC 134) (1996), and has held that as the appellant has opted for 'Composition', then tax is payable on all contracts handled by it, and accordingly added Rs. 14,13,580/- to the turnover which was of the nature of 'Services'.

(vi) That the Appellate Authority has not considered the submissions in its true perspective and stated that as in addition to servicing, cleaning and overhauling of the equipment, defective components will also be replaced by the appellant as such agreement will fall within the ambit of "Work Contract''. The same is factually incorrect. The customer is at liberty to purchase the defective parts from open market or any other source. The agreement binds the appellant for replacement of defective components i.e. only service and not the supply of defective material.

(vii) That there can be no tax liability to the Appellant on purely Annual maintenance contract (AMC) receipts of Rs 14,13,580/- Though under the Annual maintenance contract dealer has to replace the defective parts/material to the customers, however, the defective material is to be replaced at the cost of the customer and the appellant ,if has supplied material, has paid Tax on the cost charged by it from the customer. Separate Bills are raised for the material, if any used. As mentioned by the learned Commissioner that the customer is bound to replace/purchase the material from appellant is not true as he is free to purchase the material from the appellant or from outside. Further, there was no intention of the Appellant to avoid tax as dealer has paid Service Tax which was higher than the Work Contract Tax on the Service receipts. In this regard an affidavit was also submitted before the appellate authorities.

(viii) Appellant n support of his contentions has placed reliance on the decisions of PSN Motors (P) Ltd. Vs State of Kerala (1975) (35 STC 192 (Ker); CCT Vs Matushree Textiles Ltd. (2003) 132 STC 539 (Bom); Wipro Infotech Ltd. Vs Dy. CCT (2000) 120 STC 159

(Kar); Gujarat Ambuja Cement Ltd. Vs Union of India (2005) 01 STC 41 (SC) and Imagic Creative (P) Ltd. Vs Commissioner of Commercial Taxes (2008) 12 STT 392 (SC).

6. We have heard Sh. Harish Kapoor, Adv. Ld Counsel for the Appellant and Sh. Pradeep Tara, Adv., Ld. Counsel for the Revenue.

7. Ld Counsel for the appellant reiterating the grounds of appeal submitted that the Assessing Authority has stretched the judgment in such a manner as if this judgment decided a case where the dealer opts for composition scheme, then the same will be applied to all the contracts whether covered under Works Contract Act or not. In other words, even for annual maintenance, (service contract) which are outside the purview of the Work Contract Tax Act, will be covered under Works Contract Act. The Assessing Authority while rejecting the arguments *put* forward and taxed AMC with a view that tax has to be paid on all contracts entered by the dealer for which the dealer has prayed that the tax has to be paid on the contracts which comes under the ambit of Work Contract Tax Act, as defined under section 2(1) (u) read with section 2(1) (f) of WCT Act, and no tax is charged on the contracts which are outside purview of the WCT Act. The dealer has exercised his option to pay tax under composition scheme u/s 6 of the WCT Act in respect of the contracts entered by him which are of a composite nature. No tax is imposable on the contracts which are purely of the nature of service. In fact in the case referred to the Hon'ble Supreme Court has decided the validity of various provisions of Kerala General Sales Tax Act, 1963, more specifically the provisions of sub section (7) and (7A) of Section 7 of Kerala General Sales Tax Act. In the said order the Apex Court has decided that the above-referred provisions are legally valid as per the Constitution of India and does not in any case show disparity between two dealers one who has opted for composition and /or otherwise. Appellant also specifically states that the Composition Scheme under sub-section (7) or (7A) of Section-7 of Kerala General Sales Tax Act, 1963, will be applicable to the "contract" which contractor wish to cover under the said provision. The judgment does not indicate in case contractor opt for the composition scheme, then the scheme will be applicable for all contracts entered into by them. In fact composition will be applicable to the contracts the contractor has opted. In case dealer, has opted for composition with regard to contracts of installation covered under Work Contract Tax Act and nothing has been mentioned about Annual Maintenance and Service Contract in the composition application as the same are outside the purview of the Work Contract Tax Act.

8. Ld Counsel for the Revenue supporting the impugned orders submitted that the orders be upheld as there was no illegality or infirmity in the orders.

9. After hearing the Counsels for the parties we have gone through the record of the case, relevant provisions of law and the cited decisions.

10. Relevant provisions under the Delhi Sales Tax Act on Works Contract Act, 1999, defining "Work Contract" , "dealer" and "taxable turnover" and relating to the incidence of tax, levy of tax and composition are extracted hereunder:-

Section 2(1)(u)

"Works Contract" includes any agreement for carrying out for cash or for deferred payment or for any valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repairing or commissioning of any moveable or immoveable property but shall not include such contracts as may be prescribed. "

Section 2(1)(f)

"Dealer" means any person, who, whether for valuable consideration commission, remuneration or otherwise while executing a works contracts transfers property in goods (whether as goods or in some other form) involved in the execution of such works contract and includes any State Government and the Central Government which so transfers such property in goods, and any society, club, or association of persons, which so transfers the property in goods to its members"

Section 2(1)(t)

"turnover of sales" means the aggregate of the amount of sale price received or receivable by a dealer in respect of the execution of any works contract whether executed fully or partly during any period;

3 Incidence of tax

(1) Every dealer whose turnover of sales during the year immediately preceding the commencement of this Act exceeds the taxable quantum, shall be liable to pay tax under this Act on his taxable turnover effected by him on or after such commencement.

5 Levy of tax

(1) Same as provided in sub-sections (2), (3), (4), (5), and (6), every dealer shall file return and pay tax under this Act for each year on his taxable turnover of sales on transfer of property in goods (whether as goods or in some other from) involved in the execution of works contract, in the manner as may be prescribed at the rate of eight paise on every rupee of his net turnover of sales.

6. Composition of tax

Subject to such conditions and in such circumstances as may be prescribed, the assessing authority of the area may, if a dealer, liable to pay tax under this section so elects, accept in lieu of the amount of tax payable by him under section 5 of this Act during the year by way of composition an amount at the rate of four percent of his total amount of the contract or the total aggregate value of the contracts received or receivable towards the execution of works contract."

11. A conjoint reading of these provisions makes it clear that the Act applies only and only to these contracts which can be categorised as Works Contract and it is these contract in respect of which if the dealer elects can opt for a composition.

12. Ld VATO while framing the default assessment observed; "….. In this case, the dealer has exercised the option to pay the composition amount under section 6 of the Act by moving an application in respect of all the contracts awarded to the dealer and the dealer is being assessed on the basis of the composition application opting to pay under this alternate method composition scheme……"

13. The composition application made by the appellant on 15.04.2004 opting for composition scheme read as under:-

"1. I, SL Wadhwani (state status) Partner on behalf of M/s Sleek Sales holding Registration Certificate Number WC-1/162002675 dated 31.07.2000 carrying on business of executing works contracts in Delhi do hereby apply for permission to pay lump sum by way of composition of tax as per provisions of section 6 of the Delhi Sales Tax on Works Contract Act, 1999.

2. The nature of my/our business is "executing works contracts of the nature of supply & installation of public address and sound re-information system.

3. This application is in respect of contract no. …….awarded me/us by M/s …………"

Column 3 of this application has been struck off by the appellant and nothing is mentioned therein

14. This application nowhere gives an indication as inferred by the Ld VATO that the appellant had included those contracts also which do not fall under the category of works contract. Further, the Appellant has also filed an affidavit affirming that:

> "4. That turnover of the firm for the year 2004-05 includes Rs. 14,13,580/- receipt of service charges relating to Annual Maintenance Contract(AMC)
>
> 5. That during the execution of Annual Maintenance Contract (AMC) of Rs. 14,13,580/- no material were supplied to the customers by us. These were the purely service contracts on which the service tax as per the provisions of Finance Act, 1994 was also paid."

15. Appellant has also filed few sample invoices (page 19 to 30 in the appeal papers) regarding AMC and the Agreement format which is executed while taking up the AMC (page 31 & 32 of the appeal papers). The invoice at page 20 of the appeal papers is No. SS/AMC/5037(9)/04-05 addressed to Executive Engineer, E-I; ED-III; CP-DNICD, IP Bhawan for an amount of Rs 20,401/- AMC amount of Rs 18,890 + service tax of Rs 1511 @ 8%) and is for the period for 02.05.2003 to 01.05.2004 for maintenance contract for the Phillips Conference system. Invoice at page 21 of the appeal papers is numbered SS/AMC/5084/04-05 dated 31.07.2004 addressed to APIO, Press Information Bureau , Sanchar Bhawan New Delhi for an amount of Rs 2970 (Rs 2750 charges + 220 service tax @8%) for the period 01.05.2004 to 31.07.2004 for annual maintenance contract for Phillips conference system installed in conference hall of PIB.

16. Copy of agreement entered into by M/s Sleek Sales in respect of AMCs is placed at page 31 of the appeal papers and reads as under:-

This service contract is made between M/s Sleek Sales F-55, Bhagat Singh Market , ND-110001 (hereinafter called the First Party) and Transport Corporation of India Ltd , Gurgaon, (hereinafter called the Second Party) who witness as under:-

1. That the First Party is engaged in the service and repair of professional grade audio and electronic equipment and have

complete expertise and skilled staff on rolls to handle such service/repair at their service centre located at F-55, Bhagat Singh Market, 2nd Floor New Delhi-110001

2. That the second party is in possession of Onkyo Sound System installed in your Conference Hall and are keen to contract for the servicing, maintenance and upkeep of the said system.

Now under this agreement both the parties mutually agree to contract as follows:-

(a) that the first party shall carry on servicing, cleaning and overhauling of the said equipment every months and would also attend to any complaint received from the second party during the course of one year effective 01-03-2004 to 28-02-2005 they would also replace defective components at the cost of the second party depending upon their availability but shall not charge anything extra for repairing of equipment and /or for the labour involved in replacing the component.

(b) the second party will give to the first party an intimation on telephone numbers 55656178, 23747207, 23363296, 23742655 regarding malfunctioning of the said systems/ equipment and the first party will attend to such complaints / faults preferably on the same day during normal office hours or on the next working day.

(c) That the first party will endeavor to repair the equipment at site but incase the repairs are not possible at the premises of the second party, the equipment shall be sent to the service centre of F-55, Bhagat Singh Market; New Delhi where necessary repairs would be carried out

(d) That for rendering the aforementioned service the second party will pay to the first party a sum of Rs. 7,560/- (Rupees-Seven thousands five hundred sixty only) Inclusive of 8% service tax. 100% payment will be made in advance alongwith a copy of this agreement duty signed on 01-03-2004.

(e) That payment is to be made by A/c payee cheque payable at New Delhi which will be acknowledged by the first party under their official receipt. On receipt of the said Annual Maintenance Contract Charges it will be the moral duty of the first party to attend to the complaints immediately and maintain the equipment in perfect working order.

17. From the service contract agreement entered into between the appellant and customers for Annual Maintenance Contract, it is apparent that amount received by the appellant towards AMC does not include in it any obligation to replace the defective parts. Replacement, if any, of any defective part/component is to be at the cost of the party and cost of the part so replaced is to be charged extra. In other words, no material is passed on in terms of terms and conditions of the AMC for which the amount taxed by the VATO has been received.

18. Appellant's claim of non-taxability of receipt on account of Annual Maintenance Contracts executed by him has been rejected and defended on the ground that the appellant has opted for the composition scheme and as such the entire receipt in his hand in respect of all the contracts was taxable. This argument of the Revenue is totally misplaced. Appellant as has been stated is engaged in three types of transactions. Purely sale transactions which were exigible to tax under Delhi Sales Tax Act, 1975, Works contract undertaken by him for which he is exigible to tax in terms of provisions of Delhi Sales Tax on works contract Act, 1999 and the third type of transactions are where he is only doing the annual maintenance of the equipments sold in which he is not providing the component or any material and if at all the material is to be used at the behest of the client then he has charged it separately for the part so replaced and for that as stated by the appellant he has charged the sales tax and deposited the same as well.

19. Composition scheme as envisaged by the department is only in respect of the transactions that fall within the ambit of works contract. The transactions that fall outside the purview of works contract cannot be taken to be covered within the composition and taxed. Reliance of the authorities below on the decision of Builders' case is misplaced in as much as the said decision nowhere lays down that even if the transaction does not come within the purview of definition of works contract , the same is to be included in the composition.

20. Revenue has not placed any material or evidence on record to contradict and discredit the contention of the appellant that supply of material if any by the appellant while doing the annual maintenance was not part of the contract. On the other hand what contract states is that if the appellant replaces any part, then the cost of the same will be charged separately. Revenue has not been able to negate the contention of the appellant that as and when any part is replaced the tax is charged on it and deposited. Further, considering the overall turnover of the appellant the amount of AMC is so small to disbelieve the version of the appellant.

21. In view of the foregoing discussion we are of the considered view that the impugned orders taxing the amount received by the Appellant on account of Annual Maintenance Contract are not sustainable. Accordingly, the appeal is allowed and the impugned orders are set aside.

22. Order pronounced in the open court.

23. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 228 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

M.S. Wadhwa, Member (J) And Diwan Chand, Member (A)

Appeal Nos.34-41/ATVAT/10-11

Nitin International ... Appellant
1/510, Upper Floor, Ganda Nala Bazar,
Kashmere Gate, Delhi- 110006

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : 28-03-2016

DEEMED EXPORT – EXEMPTION U/S 5(3) OF CENTRAL SALES TAX ACT – FURNISHING OF H FORMS – FURNISHED H FORM AND BILL OF LADING, BANK CERTIFICATE, PACKING LIST, INVOICES AND CERTIFICATE OF FOREIGN EXPORTER – NOT PRODUCED AGREEMENT WITH FOREIGN BUYERS – DEFAULT ASSESSMENT OF TAX & INTEREST AND NOTICE OF ASSESSMENT OF PENALTY ISSUED – PRODUCTION OF AGREEMENT FOREIGN BUYERS NOT MANDATORY AS PER LAW

VAT TRIBUNAL HELD THAT THE ORDER PASSED BY VATO (AUDIT) AND CONFIRMED BY OHA SET ASIDE AND THE MATTER REMANDED WITH A DIRECTION TO DECIDE THE MATTER AFRESH

Facts of the Case

The short matrix of the facts of these appeal was that the appellant was engaged in the business of manufactures and sale of auto parts and was registered with the Department. Books of accounts of the appellant were liable to compulsory statutory audit.

Notice of default assessment of tax u/s 32 of the Delhi Value Added Tax Act, 2004 were issued against the appellant by the VATO (Audit) after the audit was conducted and sales made by the appellant to the exporters

for which they had duly furnished the declaration form H, were wrongly subjected to tax. The appellant had made sales to the exporters against the declaration in form H. All the exporters who were duly registered with the Department were issued form-H by the Department after being satisfied that the purchases made by them were for the purpose of complying with and in relation to the order for export of those goods in accordance with the provisions of Section 5 (3) of Central Sales Tax Act, 1956 (in short CST Act).

The appellant in support of its claim for exemption under Section 5(3) of the CST Act, 1956 apart from furnishing form H, had also furnished copies of bills of lading, sales/purchase invoices, packing list and bank certificate for realization of foreign exchange for export and export invoice.

The VATO had subjected the sales made to the exporters to tax on the ground that the appellant had failed to produce copies of export agreements between the exporters and the foreign buyers without appreciating and realizing that no exporter would part with his agreement with theforeign buyer and divulge information about his business dealings and his buyers. All the exporters were confirming that they had made the purchases from the appellant for the purposes of complying with the agreement of export with the foreign buyers. Even otherwise, the exporters having furnished forms-H to theobjector, the objector was entitled to the claim for exemption and the liability, if any, for violation of the same had to fall on the exporters.

The VATO framed the default assessment of tax, interest and penalty as follows:

Notices of Default Assessment of Tax & Interest

Period	*Tax*	*Interest*	*Total*
Third Qtr. 2007-08	*2,24,386.00*	*45,369.00*	*2,69,755.00*
Fourth Qtr. 2007-08	*1,34,439.00*	*22,010.00*	*1,56,649.00*
First Qtr 2008-09	*1,12,067.00*	*14,369.00*	*1,26,436.00*
Second Qtr 2008-09	*2,21,118.00*	*20,173.00*	*2,41,291.00*

Notices of Assessment of Penalty

Period	*Tax*
Third Qtr. 2007-08	*2,24,386.00*
Fourth Qtr: 2007-08	*1,34,439.00*
First Qtr 2008-09	*1,12,067.00*
Second Qtr 2008-09	*2,21,118.00*

Being aggrieved by the said notices of tax, interest and penalty , the appellant preferred objection petitions before the OHA, who also rejected the objection petition again on the ground that the appellant did not produce the agreement between the exporter and the foreign buyer. Exporters from whom form-H had been received by the appellant also issued certificates to the appellant confirming that the purchases made by them from the appellant were for the purposes of complying with the orders of the foreign buyers for exports of those goods to them.

Being aggrieved by the orders dated 9.03.2010 passed by OHA the appellant has filed appeal in VAT Tribunal.

Held

The tribunal found that no mandatory requirement to file agreement between exporter and foreign buyer be filed for claiming exemption under Section 5(3).The actual exporter had issued form H to the appellant and he has also certified that he made purchases from appellant for the purpose of complying with the export order which were made to him by the foreign buyer.

In the case of V. Wing Garment (Supra) referred by appellant's Ld. Counsel to support his arguments, Hon'ble Madras High Court was also seized with the identical issue and the Hon'ble High Court after allowing the petition held as follows:-

> *"what is required on the part of the dealer is to prove the factum of the transaction and once he is able to do so with sufficient and satisfactory documents, the value thereof is exempt from tax liability and no rule says it is mandatory to produce the agreement with the foreign buyers. That being so, the failure on the part of the assessing authority to consider the documents already produced by the dealer and to pass appropriate orders in the light thereof amount to non-application of mind. The order passed by the Additional Deputy Commercial Tax Officer was to be set aside and the matter remanded with a direction to decide the matter afresh in the light of form H and other documents available on record and fresh documents if any produced by the dealer"*

The appellant proved beyond doubt factum of the transaction between him and the actual exporter by producing H forms, bills of lading, sales purchase invoices, packing list, bank certificates for realization of foreign exchange for export and export invoice even then VATO (Audit) as well

as OHA refused to give him the benefit under Section 7 of DVAT Act, the orders passed by lower authority were unfair, arbitrary and contrary to law. Hence, the impugned orders set aside and the present appeals were allowed and the matter remanded back to the VATO with further directions to decide the matter afresh.

Present for the Appellant : Sh. H.C. Bhatia, Advocate

Present for the Respondent : Shri C.M. Sharma, Advocate/Govt. Counsel

ORDER

1. These 08 appeals have been filed challenging the impugned orders dated 09.03.2010 passed by Ld. Joint Commissioner-V hereinafter called Objection Hearing Authority (in short, OHA) who vide this order upheld the order of VATO (Audit) dated 18.03.2009 in respect of notice of default assessment u/s 32 and section 33 read with Section 86(10) of the Delhi Value Added Tax Act.

2. The short matrix of the facts of these appeal is that the appellant is engaged in the business of manufactures and sale of auto parts and is registered with the Department. Books of accounts of the appellant are liable to compulsory statutory audit.

3. Notice of default assessment of tax u/s 32 of the Delhi Value Added Tax Act, 2004 were issued against the appellant by the VATO (Audit) after the audit was conducted and sales made by the appellant to the exporters for which they had duly furnished the declaration form H, were wrongly subjected to tax. The appellant had made sales to the exporters against the declaration in form H. All the exporters who are duly registered with the Department are issued form-H by the Department after being satisfied that the purchases made by them are for the purpose of complying with and in relation to the order for export of those goods in accordance with the provisions of Section 5 (3) of Central Sales Tax Act, 1956 (in short CST Act).

4. The appellant in support of its claim for exemption under Section 5(3) of the CST Act, 1956 apart from furnishing form H, had also furnished copies of bills of lading, sales/purchase invoices, packing list and bank certificate for realization of foreign exchange for export and export invoice.

5. The VATO had subjected the sales made to the exporters to tax on the ground that the appellant had failed to produce copies of export

agreements between the exporters and the foreign buyers without appreciating and realizing that no exporter would part with his agreement with the foreign buyer and divulge information about his business dealings and his buyers. All the exporters are confirming that they had made the purchases from the appellant for the purposes of complying with the agreement of export with the foreign buyers. Even otherwise, the exporters having furnished forms-H to the objector, the objector was entitled to the claim for exemption and the liability, if any, for violation of the same had to fall on the exporters.

6. The Ld. VATO framed the default assessment of tax, interest and penalty as follows:

Notices of Default Assessment of Tax & Interest

Period	*Tax*	*Interest*	*Total*
Third Qtr. 2007-08	*2,24,386.00*	*45,369.00*	*2,69,755.00*
Fourth Qtr. 2007-08	*1,34,439.00*	*22,010.00*	*1,56,649.00*
First Qtr 2008-09	*1,12,067.00*	*14,369.00*	*1,26,436.00*
Second Qtr 2008-09	*2,21,118.00*	*20,173.00*	*2,41,291.00*

Notices of Assessment of Penalty

Period	*Tax*
Third Qtr. 2007-08	*2,24,386.00*
Fourth Qtr: 2007-08	*1,34,439.00*
First Qtr 2008-09	*1,12,067.00*
Second Qtr 2008-09	*2,21,118.00*

7. Being aggrieved by the said notices of tax, interest and penalty , the appellant preferred objection petitions before the. Ld. OHA, who also rejected the objection petition again on the ground that the appellant did not produce the agreement between the exporter and the foreign buyer. Exporters from whom form-H had been received by the appellant also issued certificates to the appellant confirming that the purchases made by them from the appellant were for the purposes of complying with the orders of the foreign buyers for exports of those goods to them.

8. Being aggrieved by the orders dated 9.03.2010 passed by Ld. OHA the appellant has filed present appeals on the following among other grounds:-

(i) That the notices of default assessment of tax, interest and penalty as well as the order passed in objection by the OHA are contrary to law and the facts of the case.

(ii) That the Ld. OHA failed to note and appreciate that sales made by the appellant to the exporters which were duly supported by declaration in form-H were in accordance with and in terms of section 5(3) of the Central Sales Tax Act, 1956 and were, therefore, wrongly rejected by the VATO.

(iii) That there was nothing on record to suggest that the sales made by the appellant to the exporters were not for the purpose of complying with or in relation to the order for export of goods by the exports to the foreign buyers and therefore, the sales made by the exporters duly supported by declaration in form – H have been wrongly subjected to tax.

(iv) That without prejudice to the above, the impugned order is also bad in law as in case the VATO wanted to Verify the date of order placed by the foreign buyer on the exporter, the VATO ought to have made and conducted inquires from the actual exporters of the goods .who had made purchases from the appellant.

(v) That the exporters to whom the appellant had effected the sales are certifying and confirming that they had made the purchases from the appellant for the purpose of complying with and in relation to the order for export of those goods.

(vi) That the Ld. OHA had failed to appreciate that the appellant had not only filed form-H but had also filed the proof of actual export of those goods such as bills of lading, sale purchase invoices, packing list and bank certificate for realization of foreign exchange for export and export invoice by the exporters and, therefore, the claim for exemption u/s 5(3) of the Central Sales Tax Act, 1956 has been wrongly refused.

(vii) That Ld. OHA failed to appreciate that any violation of form-H must be visited with penalty on the purchasing dealer and no liability can be fastened on that account on the selling dealer.

(viii) There have been no tax due according to returns filed by the appellant but VATO has wrongly charged interest on tax assessed.

(ix) That the Ld. VATO has failed to note the distinction between the tax due and tax assessed and has charged interest on the tax assessed which is contrary. to the judgment of the Supreme Court in J.K. Synthetics & Frick India Ltd.

(x) That penalty u/s 86(10) of the Act has been wrongly imposed merely because the VATO had framed the default assessment of tax, could not render the return filed by the appellant as false, misleading or deceptive.

(xi) That the transaction between the appellant and the actual exporter, form-H and other supporting evidence being genuine and not in dispute, the return furnished could not be branded as false, misleading or deceptive.

(xii) That the Ld. OHA failed to appreciate that an omission of third party, namely the exporter to mention the date of his agreement with the foreign buyer could not render the return of the appellant as false, misleading or deceptive.

(xiii) That the impugned notice of assessment of penalty under section 86 is also liable to be quashed as no reasons have been recorded by the VATO concerned before imposing the penalty.

9. These appeals were heard on merit after compliance of order of pre-condition passed on 14.09.2012 under Section 76(4) of DVAT Act.

10. Heard to appellant's Ld. Counsel Sh. H.C. Bhatia and Sh. C.M. Sharma on behalf of the revenue and perused the file and the relevant provisions of law and the ruling of V.Win Garments Vs. Additional Deputy Commercial Tax Officer, Central Assessment Circle, Tirupur, (2011)42 VST 330 (Mad) filed in support of the arguments by appellant's Ld. Counsel on the basis of which these appeals are being disposed of as follows:-

11. The short controversy with which we are seized with is whether in absence of copy of agreement between the exporter and the actual purchaser, the exemption under Section 5 (3) of the CST Act can be denied to the appellant though he has filed in support of the export sale, bill of lading, packing list, retail invoices and the certificate by the actual exporter issued in favour of the appellant certifying that the purchases which were made by the appellant from the appellant were made after receiving of export order from foreign buyer and the said purchases were made for the purpose of complying with the said export order, order of those goods and against which even declaration form H were issued to the appellant.

12. Before proceeding further, it would be appropriate to reproduce Section 5 of the CST Act which is as follows:

"5 When is sale or purchase of goods said to take place in the course of import or export.

(i) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(ii) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(iii) Nothwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

13. A bare perusal of the above provision shows that there is no mandatory requirement under law to claim tax exemption on export to file the agreement between the exporter and the foreign buyer. It would not be out of place to mention that under Section 7 of the DVAT Act, tax cannot be imposed on sale of goods when such sales take place in the course of export of the goods out of territory of India.

14. The Ld. VATO rejected the export sale made by the appellant on the ground that appellant failed to submit agreement of purchase order between the exporter and the foreign buyer though he filed H Form issed by the local exporter to the appellant. Not only that in support of export exemption, he also filed the bill of lading, packing list, sale purchases invoices, bank certificate for realization of foreign exchange for export and export invoices.

15. Appellant has also filed certificate of Ardison International who is the exporter in present case and who made purchases for the purpose of

export from the appellant, to the effect that he made purchases from the appellant, he also mentioned the invoice No. and H form issued to him by Department to the appellant.

> Section 5(1) of the CST Act provides that “A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.”
>
> While Section 5 (3) provides that “Nothwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.”

16. Applying above provisions of law to the case at hand, we find that there is no mandatory requirement to file agreement between exporter and foreign buyer be filed for claiming exemption under Section 5(3). The actual exporter had issued form H to the appellant and he has also certified that he made purchases from appellant for the purpose of complying with the export order which were made to him by the foreign buyer.

17. In the case of V. Wing Garment (Supra) referred by appellant’s Ld. Counsel to support his arguments, Hon’ble Madras High Court was also seized with the identical issue and the Hon’ble High Court after allowing the petition held as follows:-

> “what is required on the part of the dealer is to prove the factum of the transaction and once he is able to do so with sufficient and satisfactory documents, the value thereof is exempt from tax liability and no rule says it is mandatory to produce the agreement with the foreign buyers. That being so, the failure on the part of the assessing authority to consider the documents already produced by the dealer and to pass appropriate orders in the light thereof amount to non-application of mind. The order passed by the Additional Deputy Commercial Taxd Officer was to be set aside and the matter remanded with a direction to decide the matter afresh in the ligh of form H and other documents available on record and fresh documents if any produced by the dealer”

18. If we apply the ratio of the decision of the above case, we find that appellant has proved beyond doubt factum of the transaction between him and the actual exporter by producing H forms, bills of lading, sales purchase invoices, packing list, bank certificates for realization of foreign exchange for export and export invoice even then Ld. VATO (Audit) as well as OHA refused to give him the benefit under Section 7 of DVAT Act, so in our view the orders passed by lower authority are unfair, arbitrary and contrary to law. Hence, the impugned orders are set aside and the present appeals are allowed and the matter is remanded back to the Ld. VATO with further directions to decide the matter afresh, in the light of Form H and other documents which are already on record. Appellant may also produce fresh documents, if any, in support of the claim of export sales exemption and after giving him an opportunity for hearing. Concerned VATO shall dispose off these appeals as early as possible preferably within 2 months (from the date of first appearance). Appellant is directed to appear before the VATO on 18th April, 2016

19. Order announced in the open court.

20. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

21. File be consigned to record room.

[2015] 53 DSTC 237 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand, Member (A) and M.S. Wadhwa: Member (J)]

Appeal No.188/ATVAT/14-15
Assessment Period: 1st Qtr 2013-14
(Default Assessment of Penalty)

GTS Exports Pvt. Ltd. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : April 28, 2016

MITIGATION OF PENALTY U/S 87(6) OF DVAT ACT, 2004 – WHETHER VOLUNTARY DISCLOSURE OF TAX DEFICIENCY TO COMMISSIONER IN

WRITING DURING THE COURSE OF ENFORCEMENT SURVEY PROCEEDINGS U/S SECTION 60 OF THE ACT AND PAYMENT OF TAX DEFICIENCY MADE WITHIN 3 WORKING DAYS OF THE CONCLUSION OF SURVEY IS ENOUGH TO MITIGATE 80% OF THE PENALTY – HELD YES.

Facts of the Case

The premises of the Appellant were surveyed by the enforcement team. Variation in stock Rs. 24,37,329/- , Rs. 45,420/- in cash and Rs.14,61,199/- in sale figures of return and trading account were detected. Tax demand of Rs.506001/- on account of tax and interest and Rs.4,92,994/- on account of penalty was created. The appellant admitted tax deficiency Rs. 3,00,000/- during the enforcement proceeding and undertook to deposit same within two days from the conclusion of survey proceeding. Rs.3,00,000/- was paid by him towards tax and Rs.60,000/- towards penalty as 20% of Rs. 3,00,000/- tax deficiency within 3 days.

The enhancement of turnover of Rs. 14,61,199/- was deleted by OHA. Ld AO in the remanded proceeding assessed the net tax at Rs. 2,97,614/- and penalty u/s 86(10) was reduced to Rs. 2,97,614/-. However mitigation of penalty u/s 87(6) was not allowed as was directed by Ld. OHA. Hence, the appellant in appeal before Tribunal.

Held

It was apparent from the provisions of sub-section 6 of section 87, in case of a liability of a dealer for payment of penalty, for mitigation of the same there are two ingredients to be present essentially. First he has to voluntarily disclosed to the Commissioner in writing of the tax deficiency during the course of the proceedings under section 60 of the Act and then he has to make the payment of the tax within three working days of the conclusion of the said proceedings.

There was no denial by the authorities that the appellant during survey disclosed the tax deficiency as there was no specific mention to that effect in the orders nor this had been argued by the Revenue during hearing of this appeal. On the contrary the facts of the case support the case of the appellant. While the initial assessment created a tax deficiency of Rs 4,92,994/- and penalty of Rs 4,32,994/-, in the remanded assessment the tax deficiency created was of Rs 2,97,614/- and penalty of Rs. 2,97,614/-. Tax deficiency of Rs 2,97,614/- was much less than the amount of Rs 3,00,000/-deposited by the appellant within three days of the survey conducted by the department.

It was evident from the provisions of the Act, for availing the benefit of mitigation of penalties the twin requirements to be fulfilled are that the appellant during the survey himself ought to have given in writing admitting the tax deficiency and then made the payment of the same within three days of the conclusion of the proceedings. As such the fact that the payment of Rs 3,00,000/- on account of tax and Rs 60,000/- on account of penalty was made within three days of the completion of the survey attract the mitigating provisions. Accordingly, the impugned orders were set aside and the matter was referred back to the VATO for reframing the penalty orders after giving the relief to the appellant in terms of provisions of section 87(6) of the DVAT Act.

Present for the Appellant : Sh. A.K. Matta, Adv.,

Present for the Respondent : Sh. C.M. Sharma, Adv.,

ORDER

1. This order shall dispose off the above noted appeal by the appellant challenging the impugned order dated 02.05.2014 passed by the Additional Commissioner-(Zone-III & V) hereinafter called Objection Hearing Authority (in short the OHA) who rejected the objections and upheld the orders of default assessment of penalty of Rs.4,32,994/- u/s 33 r/w Sec. 86(10) of the DVAT Act for the 1st quarter of the year 2013-14 passed by the VATO.

2. Facts of the case briefly stated are that the appellant M/s GTS exports Pvt Ltd is registered under Delhi Value Added Tax Act, 2004 (DVAT Act) as well as under Central Sales Tax Act vide TIN No. 07060198125. The premises of the Appellant were surveyed by the Enforcement team on 11.05.2013. During the survey, variation of Rs 24,37,329/- in stock, Rs.45,420/- in cash in hand, Rs. 14,61,199/- in sale figures of return and the trading account totaling Rs. 39,43,948/- were detected by the Survey Team. The notice of default assessment of tax and interest u/s 32 of DVAT Act, 2004 and notice of assessment of penalty for the Ist Quarter of 2013-14 was framed in consequence to such survey. Tax demand of Rs. 5,06,001/- on account of tax & interest and Rs. 4,92,994 /- on account of penalty was created. Taking into account the deposit of Rs 3,00,000/-and Rs 60,000/- on account of tax and penalty respectively made on 13.05.2013 , the net demand raised was Rs. 2,06,001/- (including interest of Rs 13,007/-) was created u/s 32 of DVAT Act and a demand of penalty of Rs 4,32,994/-was created u/s 33 of DVAT Act.

3. Appellant’s case is that a survey was conducted on the premises of the appellant by Enforcement Team of VAT Department on 11.05.2013.

The appellant admitted tax deficiency during the Enforcement proceedings of Rs. 3,00,000/- and undertook to deposit the same within two days from the conclusion of survey proceedings. The admitted tax of Rs. 3,00,000/- along-with penalty of Rs. 60,000/- u/s 86(10) was deposited on 13.05.2013 (after mitigating penalty u/s 87(6) of DVAT Act) The appellant handed over a cheque of Rs. 6,00,000/- (representing tax of Rs. 3,00,000/- and equivalent penalty of Rs. 3,00,000/-) to the Enforcement Team as a security. The security cheque of Rs. 6,00,000/- was received back after payment of Rs. 3,60,000/- (Tax of Rs. 3,00,000/ & Penalty of Rs. 60,000/-) on 13.05.2013. The credit of tax of Rs. 3,00,000/- and penalty of Rs. 60,000/- has duly been allowed by the DVAT Officer while framing orders u/s 32 & 33 on 06.01.2014.

4. While framing order u/s 32 on 06.01.2014, the Assessing Officer enhanced the turnover by cash variation of Rs. 45,420/- and stock variation of Rs. 24,37,329/-. The variation in sales figure of return and trading account for year 2012-13 of Rs. 14,61,199/- (actual amount being 14,60,099/-) was also added to the turnover. The whole enhancement was taxed @ 12.5% inspite of the fact that the appellant is engaged in trading of items taxable@ 12.5% as well as 5 %. The enhancement of turnover of Rs. 14,61,199/- (actual amount being 14,60,099/-) was directed to be deleted by the Objection Hearing Authority from the turnover of Ist Quarter of 2013-14. This restricted the enhancement in the turnover to Rs.24,82,749/- (45,420/- + 24,37,329/-). Survey Report prepared by Enforcement Team admitted that the turnover taxable @ 5% was of Rs. 53,34,335/- while taxable @ 12.5% was of Rs. 5,24,160/- during the period 01.04.2013 to 11.05.2013. In other words, sales taxable@ 12.5°/o was to the tune of 8.95% only, while the taxable turnover@ 5% was 91.05%. While framing order u/s 32 dated 06.01.2014, the whole of the enhanced turnover was taxed @ 12.5%. The Objection Hearing Authority remanded the matter back to VATO. The VATO has re-framed orders u/s 32 as well as u/s 33 vide orders dated 31.07.2015 vide reference no. 150081829496 and 250012728350 respectively.

5. Appellant's submission is that the VATO has verified the records and variation of Rs. 1,69,725/- has been taxed@ of 5% and the balance variation of Rs. 22,67,604/- has been taxed@ of 12.5%. The net tax (additional) has been assessed at Rs. 2,97,614/-. The appellant voluntarily agreed to additional tax of Rs. 3.00 Lac during the course of survey proceedings. The admitted tax of Rs. 3.00 Lac was deposited on 13.05.2013, i.e., within three working days from the conclusion of the proceedings u/s 60 of DVAT Act, 2004. The order framed u/s 32 of DVAT Act, 2004 dated 31.07.2015 determines the tax payables at Rs. 2,97,614/-, which is less

than the admitted tax deficiency of Rs. 3.00 Lac. Pursuant to the remand order the penalty imposable u/s 86(10) was reduced to Rs. 297614/- vide orders framed u/s 33 dt, 31.07.2015. The penalty paid of Rs. 60,000/on 13.05.2013 has not been reduced from the total demand in such order, inspite of the fact of admitting the payment of such amount of 60000/-. The mitigation of penalty u/s 87(6) has not been allowed in view of the orders of the Objection Hearing Authority. The Enforcement Team accepted the tax deficiency of Rs. 3,00,000/- but AVATO enhanced the turnover by Rs. 24,82,749/- (excluding enhancement for the financial year 2012-13 resulting in tax deficiency of Rs. 3,10,343/-. The appellant without going in dispute, further deposited a sum of Rs. 11,190/- on 18.04.2014. The appellant requested for mitigation of penalty u/s 87(6) as the tax deficiency was deposited within three days from the conclusion of proceedings u/s 60. His further submission is that the matter of rate of tax was set aside by the Objection Hearing Authority and remanded to VATO to determine the tax deficiency. In absence of determination of tax deficiency, the finalization of penalty u/s 86(10) is illegal. The matter of determination of penalty u/s 86(10) should have been set aside along-with the setting aside of the matter of determination of rate of tax.

6. The Objection Hearing Authority rejected the claim of mitigation of penalty on the ground that the amount promised to be deposited was Rs. 6,00,000/- and not 3,60,000/-. He further stated that the undertaking given cannot be considered as voluntary disclosure. The findings of Objection Hearing Authority are contradictory to each other. On one hand he talks about the promised amount of Rs 6,00,000/- and on the other hand he declines to accept the undertaking as voluntary disclosure. The Objection Hearing Authority failed to appreciate the fact that the cheque of Rs 6,00,000/- was not encashed but was returned to the Appellant on depositing tax of Rs 3,60,000/- (including penalty of Rs 60,000/-) The whole of the conditions for mitigation of penalty u/s 87(6) have been complied with by the appellant.

7. Aggrieved with the impugned orders the appellant has come in appeal before this Tribunal and assailed the orders on the following grounds:-

(i) That the Ld Additional Commissioner/Objection Hearing Authority grossly erred in confirming the demand of penalty of Rs. 4,32,994/- imposed u/s 86(10) by AVATO.

(ii) That the Ld Additional Commissioner/Objection Hearing Authority further erred by not allowing the benefit of mitigation of penalty u/s 87(6) of DVAT Act, 2004.

(iii) That the Ld Additional Commissioner/Objection Hearing Authority further erred by misinterpreting the provisions of DVAT Act, 2004.

(iv) That the Ld Additional Commissioner/Objection Hearing Authority further erred by framing the order which is self-contradictory.

(v) The appellant craves leave to add, alter, amend or forego any of the grounds of appeal before or at the time of hearing.

(vi) The above grounds of appeal are without prejudice to each other.

8. We have heard Shri A.K. Matta, Adv., Ld. Counsel for the appellant, Shrl C.M. Sharma, Adv., Ld. Counsel for Revenue and have perused the material placed on record, grounds of appeal as well as the impugned orders carefully.

9. Ld. Counsel for appellant submitted that the Ld. OHA erred by not allowing the benefit of mitigation of penalty u/s 87(6) of DVAT Act and as such the impugned order passed by the Ld. OHA is illegal, unsustainable and contrary to the provisions of law.

10. Ld. Counsel for the Revenue submitted that the impugned orders passed by the Ld. OHA suffer from no infirmity or illegality.

11. For appreciating the issue in hand it is necessary to examine the relevant provision of mitigation of penalties which are extracted hereunder:-

Section 87 Automatic mitigation and increase of penalties

(1) XXXXXXX
(2) XXXXXXX
(3) XXXXXXX
(4) XXXXXX
(5) XXXXXX

(6) If-

(a) a person is liable to pay penalty under section 86 of this Act; and

(b) the person voluntarily discloses to the Commissioner, in writing, the existence of the tax deficiency, during the course of proceedings under section 60, and

(c) makes payment of such tax deficiency within three working days of the conclusion of the said proceedings

The amount of the penalty, otherwise due against the admitted and paid tax, shall be reduced by eighty percent.

12. As is apparent from the provisions of sub-section 6 of section 87, in case of a liability of a dealer for payment of penalty, for mitigation of the same there are two ingredients to be present essentially. First he has to voluntarily disclose to the Commissioner in writing of the tax deficiency during the course of the proceedings under section 60 of the Act and then he has to make the payment of the penalty within three working days of the conclusion of the said proceedings.

13. Coming to the facts of the case it is noticed that survey of the business premises of the appellant was conducted by the Enforcement Branch of the Department on 11.05.2013 when during survey, following undertaking was given by the appellant:

Dated 11.05.2013

UNDERTAKING

I Gaurav Sethi Director of the company do hereby voluntarily surrendered cheque amounting to Rs 6.00 lakh in lieu of variation pointed out during the enforcement survey held on 11.05.2013. I shall ensure that said payment is made online within 2 days and the said amount will not be adjusted in the regular VAT survey.

For GTS Exports Pvt Ltd
Director”

14. This undertaking speaks about giving of a cheque of Rs six lakh to the visiting team in lieu of variation pointed out during survey. This undertaking further states that the appellant undertook to make payment online within 2 days and that the said amount will not be adjusted in the regular VAT survey. As is evident from the record, assessment of tax in respect of survey was completed on 06.01.2014 when the default assessment orders were passed on 06.01.2014 creating a demand of tax & interest of Rs 4,92,994/- and after adjusting the amount of Rs three lakh deposited , the net demand was of Rs 2,06,001 (Tax Rs 1,92,994 and Interest of Rs 13007). As per remanded order dated 31.07.2015 the total additional tax demand is Rs 2,97,614/- and after adjusting the deposit of

Rs 3,00,000/- the net balance is excess credit of Rs 2386. A demand of penalty of Rs 4,32,994/- was initially created vide orders dated 06.01.2014. After the passing of the remand assessment order reducing the additional liability to Rs 2,97,614 the penalty has also been reduced to Rs 2,97,614 vide orders dated 31.07.2015. Admittedly the appellant did make payment of Rs. 3,00,000/- on account of tax and Rs. 60,000/- on account of penalty within three days of the said proceedings on 13.05.2013 and has filed copy of the relevant challan as proof of the payment having been made on the said date. Ld OHA in the impugned orders have observed that the tax deficiency found as per default assessment order was Rs 4,92,994/- whereas the tax deposited by the appellant on 13.05.2013 was of Rs 3,00,000/- only. These findings of the Ld OHA do not stand as the actual demand created in the remanded assessment order has been only of Rs. 2,97,614/-

15. There is no denial by the authorities that the appellant during survey disclosed the tax deficiency as there is no specific mention to that effect in the orders nor this has been argued by the Revenue during hearing of this appeal. On the contrary the facts of the case support the case of the appellant. While the initial assessment created a tax deficiency of Rs 4,92,994/- and penalty of Rs 4,32,994/-, in the remanded assessment the tax deficiency created is of Rs 2,97,614/- and penalty of Rs. 2,97,614/-. Tax deficiency of Rs 2,97,614/- is much less than the amount of Rs 3,00,000/- deposited by the appellant on 13.05.2013 within three days of the survey conducted by the department.

16. It is evident from the provisions of the Act extracted above, for availing the benefit of mitigation of penalties the twin requirements to be fulfilled are that the appellant during the survey himself ought to have given in writing admitting the tax deficiency and then made the payment of the same within three days of the conclusion of the proceedings. As such the fact that the payment of Rs 3,00,000/- on account of tax and Rs 60,000/- on account of penalty was made within three days of the completion of the survey attracts the mitigating provisions. Accordingly, the impugned orders are set aside and the matter is referred back to the VATO for reframing the penalty orders after giving the relief to the appellant in terms of provisions of section 87(6) of the DVAT Act. Appellant shall appear before the VATO on 30.05.2016.

17. Order announced in the open court.

18. Copies of this order shall be served on both the parties and the proof

[2015] 53 DSTC 245 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand, Member (A) and M.S. Wadhwa, Member (J)]

Appeal Nos.43-46/ATVAT/14-15
Assessment Period: March, 2010-11 & Jan, 2011-12
(Default Assessment of Tax, Interest & Penalty)

Dalmia Continental Pvt Ltd
Shop No. 10, Darya Ganj,
New Delhi-110002 ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : May, 2016

AGREEMENT TO DEFEAT THE INTENTION AND APPLICATION OF THIS ACT TO BE VOID UNDER SECTION 40A OF DVAT ACT, 2004 - WHETHER SUPPLY OF IMPORTED GOODS AS SAMPLES TO CUSTOMERS FREE OF COST BASIS OR BELOW THE FAIR MARKET PRICE CAUSES REVENUE LOSS TO THE EXCHEQUER AND IS VOID U/S 40A OF DVAT ACT, 2004 AND WHETHER TAX COULD BE LEVIED ON LANDED COST (PURCHASE PRICE) OF SUCH GOODS. HELD –NO

VARIATION IN STOCK AND CASH – WHETHER NON DISCLOSURE OF STOCK LAYING AT BRANCH AND WITH THE CLEARING AND FORWARDING AGENT DURING SURVEY PROCEEDING OR STOCK WAS PHYSICAL AVAILABLE AT HEAD OFFICE WOULD BE FINAL IN ALL RESPECT AND ANY SUBSEQUENT EXPLANATION DURING ASSESSMENT PROCEEDINGS TO EXPLAIN SHORTAGE IN STOCK AND CASH WOULD BE REJECTED WITHOUT PROPER EXAMINATION OF THE CASE AND THE EVIDENCES PRODUCED BY THE APPELLANT. HELD – NO

Facts of the Case

Survey of the business affairs of the appellant was conducted by enforcement branch. Stock was found short by Rs.1,57,57,573/- and cash short by Rs. 1,93,700/-. The appellant was importing edible oils taxable @ 5% and 12.5%. The authorized signatory of the appellant confirmed that he supplied the imported goods to its customers either at free of cost basis or below the 'Fair Market' price. Ld. AA taxed the landed cost of the same mentioning in the order that this practice has caused revenue loss to the exchequer and is void u/s 40A of DVAT Act, 2004. Penalty u/s 86(12) was also imposed.

Appellant submitted that out of imported goods he sold some of the goods in Delhi and some of the goods were distributed free as a sample

to its purchasing dealer. The variation in stock was due to the reason that survey team valued the stock without conversion of foreign currency into Indian Rupees. Also the enforcement team counted stock lying at head office only although appellant had stock lying at branches also. The appellant filed details of stock at all the branches. The variation in cash was also explained being difference due to cash received by sales executives from the market and giving account at a later date after meeting expenses therefrom.

Further, that before invoking section 40A, it must be necessary by the commissioner to record the satisfaction that an arrangement has been entered into between two or more persons or dealer to defeat the purposes of this Act or provisions of the Act .That the tax could be levied on the sale price and not on the purchase price. Ld. VATO imposed the tax on purchase price.

Held

The purchases made in the course of import did not attract tax and as such the question of reversal of ITC did not arise. Further, it was also pertinent to mention that Section 40 A applies in the case of purchase and sales occurring under the DVAT Act as was evident from the provisions of the section which talked of arrangement for tax advantage arising 'under this Act'. The purchases occurring in the course of import did not fall in the ambit of transactions covered under the DVAT Act and as such there being no input tax credit in the event of offering these goods as gift the question of reversal of the input tax credit or taxing such transactions did not arise.

Accordingly, the taxing of the goods at the landing cost on the grounds that the appellant had availed tax advantage by not selling these goods was beyond comprehension and could not be sustained. The taxable event under the DVAT Act was sale and not purchase and that the taxability had to be fixed by establishing in clear and unambiguous terms the transaction that falls within the ambit of the charging section. There was no such finding in respect of items gifted and the Revenue had failed to establish the taxability of these. Consequently the imposition of tax, interest and penalty on this account was illegal.

To hold that if someone had not disclosed the details during survey any subsequent explanation would be rejected without any proper examination as had been done in the case would render all the proceedings and the provisions of law of providing opportunity and seeking explanations a mere empty formality. This certainly could not be the intention of law. There was no whisper in the orders as to whether the contention of the appellant

that he was having other branches or not and if so how many branches and how much stock and what evidence if any was there in support of the same. Further there was no attempt to look into the contention that whether some stock was with the clearing and forwarding agent or not and if so what evidence the appellant had produced about it and what view was taken about it. In the absence of any such analysis and discussion / appreciation of the evidence produced the conduct of proceedings and the rejection of the explanations simply on the ground that if the appellant had failed to disclose these facts before the survey team then he must suffer the consequences of the same, vitiates the entire proceedings and we found ourselves unable to support and sustain such an order.

Consequently, the considered view of the tribunal was that the appeals be accepted, the impugned orders set aside and the matter remanded back to the VATO to reframe the assessment after providing an opportunity to the appellant, examining the explanations submitted with reference to the records produced and pass a reasoned order in accordance with law.

Present for the Appellant : Sh. Rajesh Mahana, Adv.,

Present for the Respondent : Sh. Pradeep Tara, Adv.,

ORDER

1. This order shall dispose off the appeals filed by the appellant challenging the impugned order dated 17.01.2014 passed by the Addl. Commissioner-(Zone-III & V) hereinafter called Objection Hearing Authority (in short the OHA) who rejected the objections and upheld the orders of default assessment of tax and interest u/s 32 of the DVAT Act and penalty u/s 33 r/w Sec. 86 (12) & 86 (15) of the DVAT Act for the respective month of March, 2010-11 & January, 2011-12 passed by the VATO Ward 207(Spl. Cell) who had created the following demand:

S.No.	A.Y.	Tax & Interest	Penalty
1	March, 10-11	3,39,258	2,66,015
2	Jan, 11-12	14,75,779	10,79,816

2. The brief facts of the case are that the survey of the business affairs of the appellant was conducted by the Enforcement Branch-I of the Department of Trade & Taxes on 10.01.2012. During the survey, stock was found short by Rs.1,57,57,573/- and cash was also found short by Rs.1,93,700/-. Further, during checking of the record of the appellant it

was noticed that appellant is engaged in trading of edible oil and imported goods/products taxable @ 5% and 12.5% respectively and has shown the sale of many items either at negligible value or free of costs to its customers. It was further noted by the AA that the authorised signatory of the company has also confirmed in the letter dated 25.03.2013 that these goods have been received by the company against import on which even custom duty was paid and were supplied to the customers on free of cost basis. Ld VATO taking the view that by adopting this unfair practice, the firm has sold its goods either at free of cost basis or below the 'fair market price' which is nothing but an attempt by the dealer to deprive the State of its legitimate tax and that this arrangement defeats the intention and application of the DVAT Act 2004 by making sales either at negligible value or free of cost which has caused revenue loss to the exchequer and is void under section 40A of the DVAT Act 2004 and to protect the government revenue, the landing cost of these goods which comes to Rs 45,74,817 in 2010-11 as provided by the dealer is taxed. Therefore, the dealer is liable to pay tax @ 5% on the value of goods amounting to Rs 41,12,941/- and @ 12.5% on the value of goods amounting to Rs 4,61,876/- supplied by the firm at negligible value or free of cost to its customers during 2010-11. Resultant tax deficiency attracts interest @ 15% p.a. and penalty under section 86(12) of the DVAT Act, 2004 is also imposed. Consequently demand of Rs 2,63,382/- tax, 75876 interest and was imposed for 2010-11 and tax of Rs 12,47,619/- and interest of Rs 2,28,160/- total Rs 14,75,779/- and penalty of Rs 14,75,779/- for 2011-12.

3. Aggrieved with the default assessments, the appellant filed objections which were rejected by the Ld. OHA vide impugned orders dated 17.01.2014.

4. The appellant assailed the impugned orders on the following grounds:-

1. Because the objection hearing authority has erred in law and on facts in not appreciating that section 40-A is not applicable in the present case. Before invoking section 40-A the commissioner must record the satisfaction that there is an arrangement which has been entered into between the dealer and the purchaser to avoid tax. Provision of section 40-A are invoked by the assessing authority purely on assumption basis. Hence the order passed by the assessing authority and further confirmed by the objection hearing authority is bad in law.

2. Because objection hearing authority failed to appreciate that without considering the explanation of the appellant and the

documents and without passing any speaking order giving any reasons passed the order to protect the Government revenue which approach is totally illegal and bad in law and the Ld OHA further erred in confirming the VAT order.

3. Because the objection hearing authority failed to appreciate that there was sufficient explanation provided for the stock difference which has not been considered as the stock details considered by the enforcement team were only of the main office and the stock lying elsewhere was not considered and the Ld. Objection Hearing Authority without considering all the details submitted, confirmed the order passed by the assessing authority which is totally illegal and bad in law.

4. Because Ld. Objection hearing authority failed to appreciate that due to nature of business of the dealer the dealer has to distribute some of the goods as a free sample to his purchasing dealer and filed details of free sample, but Ld. VATO assumed that the dealer has adopted unfair trade practice and created the demand on the basis of Sec. 40A of DVAT Act which was further confirmed by the objection Hearing Authority which is totally illegal and bad in law.

5. Because the Ld. Objection Hearing Authority passed a non speaking order inspite of all the details having been furnished and made available before him and has misunderstood the provision of section 40A of DVAT Act and without considering the details which were submitted by the appellant passed an order which is illegal and bad in law and not sustainable in the eyes of law.

5. We have heard Shri Rajesh Mahana Adv., Ld Counsel for the appellant and Shri Pradeep Tara, Adv., Ld. Counsel for Revenue and have perused the material placed on record, grounds of appeal as well as the impugned orders carefully.

6. Ld Counsel for the appellant reiterating the grounds of appeal submitted that appellant, a private limited company engaged in the business of trading of edible oil and other item, during survey by the Enforcement team of the department on 10.01.2012 the statement of the dealer was recorded and seized some loose paper, note book, bill book. In response to the notice issued the appellant appeared before the Ld. Assessing Authority and explained the documents which were seized by the enforcement officers and their connection with the business. Further submitted that the appellant imports the goods from outside the country and out of the import of the goods sells the goods in Delhi and some of the

goods appellant-dealer has distributed free as a sample to its purchasing dealer. Difference in inventory was also explained and informed that the dealer made purchases of entire goods from outside the country, Hence the cost price taken by the enforcement team as on date of visit was without conversion of the foreign currency into Indian rupee. The dealer submitted the entire set of document explaining the price difference along with explanation there to which were directed to be provided by the Ld. VATO Officer to the dealer to be produced. The appellant submitted that accounts are maintained at the head office at Daryaganj. Dealer filed details of the stock lying in the godown and stock lying in the office which was reconciled and were explainable. The appellant submitted that regarding cash difference at the time of survey, the dealer is engaged in the business of trading of edible oil and other items which were imported from outside India and for marketing purposes firstly distribute the product through sales executive to obtain the order and sales executive received cash for expenses from the company and give the details of his expenses later on. That the Ld VATO passed an order only to protect government revenue without passing any speaking order or giving any reasons under section 40A, of the DVAT Act. The Ld. VATO misunderstood the provisions and scope of law.

7. Further submitted that the objection hearing authority failed to appreciate that section 40-A of the Act cannot be invoked for the purposes to protect the government revenue. Before invoking the Section 40-A it must be necessary by the commissioner to record the satisfaction that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of this Act or any provision of this Act. That the Ld. Objection hearing authority failed to appreciate that arrangement means any contract or agreement, plan or understanding whether enforceable in law or not whereas in the present case, the dealer has filed all the returns and declared that the purchases made by the dealer through import and after sale the goods in Delhi or outside Delhi and paid the taxes which is applicable as per law. The Ld. VATO failed to appreciate that the tax is payable on the sale price and not on the purchase price. The Ld. VATO imposed tax on the purchase /import prices and further objection hearing authority confirmed the order of the Assessing authority.

8. Further submitted that the objection hearing authority failed to appreciate that the stock difference which was created by the Ld. Assessing authority was without considering that the appellant had more than one branch and Ld. Assessing authority only considered the stock lying only in the head office and appellant filed details of the stock held in all the branches and thus there was no difference in the stock. The objection

hearing authority failed to appreciate the explanation for the cash difference and that the appellant submitted details of the cash received by the sales executive and Ld. Objection hearing authority without considering the facts confirmed the order of the Ld. Assessing authority.

9. Ld. Counsel for the Revenue submitted that the impugned orders passed by the Ld. OHA suffers from no infirmity or illegality.

10. We have carefully considered the record of the case and the submissions made as well as the default assessment orders, impugned orders and the cited cases.

11. Ld VATO vide orders dated 29.03.2011 created a demand of Rs 3,39,258/- (Tax Rs. 2,63,382/- + Interest Rs 75,876/-) as per the following orders:-

> A survey of M/s Dalmia Continental Pvt Ltd, 10, Daryaganj, New Delhl-110002 was conducted by Enforcement-I Branch on 10.01.2012 and statement of Sh. R.P. Chatrath, Director of the company was recorded. Sh. R.P. Chatrath, Director of the company in his statement before the survey team of the Enforcement-I Branch of Trade and Taxes Deptt. having confirmed the fact that *M/s* Dalmia Continental Pvt Ltd, 10, Daryaganj, New Delhi-I 10002(Tin No.07290267596) is a registered dealer of Ward-8 and engaged in trading of edible oil and imported food products etc taxable@ 5% & 12.5% VAT. Subsequently, notice u/s 59(2) of DVAT Act, 2004 was issued to the dealer bearing No.SC/DT&T/2012/1378-79 dated 10.05.2012 calling upon the dealer to appear before the undersigned on the date and time mentioned therein. During the test check of the documents produced by the dealer it has been observed that the dealer has shown the sale of many items either at negligible value or free of costs to its customers. The Authorised Signatory of the company has also confirmed in the letter dated 25.03.2013 that these goods have been received by the company against import on which even custom duty paid and were supplied to the customers or free of cost basis. By adopting this unfair practice, the firm has sold its goods either at free of cost basis or below the fair market price' which is nothing but an attempt by the dealer to deprive the state of its legitimate tax. Since this 'arrangement' defeats the intention and application of the DVAT Act 2004 by making sales either at negligible value or free of costs, which has caused revenue loss to the exchequer and is void under section 40-A of the DVAT Act. Hence, to protect the government revenue,

the landing cost of these goods which comes to Rs. 45,74,817/- in 2010-11 as provided by the dealer is taxed. Therefore, the dealer *Is* liable to pay tax @ *5%* VAT on the value of goods amounting to Rs. 41,12,941/- and @12.5% VAT on the value of *goods* amounting to Rs. 4,61,876/- supplied by the firm at negligible value or free of cost to its customers during 2010-11. Resultant tax deficiency attracts interest @15% p.a and penalty u/s 86(12) of the DVAT Act, 2004 is also imposed."

12. Submission of the appellant is that in order to promote his business he has at times provided samples of the items dealt by him as free gifts/ samples to its prospective customers. Since all these items which have been provided free are out of the goods imported by him on which import duty had been paid, no ITC has been claimed and hence there cannot be any loss to Government and there being no element of sale no tax can be charged on it. Instead of appreciating the factual and legal position the department has treated this as an arrangement under section 40A and taxed all such transaction which is contrary to the provisions of the Act.

13. For this it is necessary to extract the relevant provisions of Act which are extracted hereunder:-

Article 286 of the Constitution lays restrictions on imposition of tax on sales and purchase of good by the States and stipulates:-

"286. Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub clause (b), sub clause (c) or sub clause (d) of clause 29 A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

9 Tax credit

(1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making -

(a) sales which are liable to tax under section 3 of this Act; or

(b) sales which are not liable to tax under section 7 of this Act.

Explanation.- Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries.

(2) No tax credit shall be allowed -

(a) in the case of the purchase of goods for goods purchased from a person who is not a registered dealer;

(b) for the purchase of non-creditable goods;

3 Imposition of tax

(1) Subject to other provisions of this Act, every dealer who is –

(a) registered under this Act; or

(b) required to be registered under this Act;

shall be liable to pay tax calculated in accordance with this Act, at the time and in the manner provided in this Act.

(zl) "turnover of purchases" means the aggregate of the amounts of purchase price paid or payable by a person in any tax period excluding any input tax;

(zm) "turnover" means the aggregate of the amounts of sale price received or receivable by the person in any tax period, reduced by any tax for which the person is liable under section 3 of this Act;

(zc) "sale" with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-

(i) xxxxxxx
(ii) xxxxxx
(iii) xxxxx
(iv) xxxxxx
(v) xxxxxx
(vi) xxxxx
(vii) xxxxx
(viii) xxxxx

7 Certain sales not liable to tax

Nothing contained in this Act or the rules made thereunder shall be deemed to impose or authorise the imposition of tax on any sale of goods when such sale takes place -

(a) in the course of inter-state trade or commerce; or

(b) outside Delhi; or

(c) in the course of import of the goods into or export of the goods out of, the territory of India.

Section 40A

"40A. (1) If the Commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat

the application or purposes of this Act or any provision of this Act, then, the Commissioner, may, by order; declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for the increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not such dealer or person is a party to the arrangement, such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that dealer from or under the arrangement.

(2) For the purpose of this section-

(a) 'arrangement' includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect;

(b) 'tax advantage' includes,

(i) any reduction in the liability of any dealer to pay tax.

(ii) any increase in the entitlement of any dealer to claim input tax credit or refund.

(iii) any reduction in the sale price or purchase price receivable or payable by any deafer.'

14. A conjoint reading of the provisions makes it clear that under Section 9 of the DVAT Act, a dealer shall be entitled to claim Input Tax credit in respect of turnover of purchases arising in the respective tax period which can be availed subject to conditions, restrictions and limitations as prescribed. As per section 7 of the Act the purchase made in the course of import are exempt from tax under the DVAT Act. This is in accordance with Article 286 of the Constitution which provides that state legislature cannot levy tax on the sales made in the course of import or export. Obviously, the imports being outside the purview of the DVAT Act, the ITC arises in respect of purchases made locally and the same can be availed subject to the conditions and restrictions provided under the law. Sub-section (2) of Section 9 interalia provides that a dealer in respect of goods purchased for self consumption or given as gifts is not entitled for tax credit. The ITC that arises in respect of purchases of goods that are used for self-consumption or for giving gifts is required to be reversed and cannot be availed. The tax that is paid on purchase is not available for set off as there is no sale, no output tax and the tax paid with the government. If a dealer availed the ITC the same being contrary to the provisions makes the dealer liable for

default assessment. Imports being tax free, there being no tax paid, no ITC arises and in the event of there being no sale no consequences arises and the there being no sale, there is no output and as such no tax is paid.

15. The purchases made in the course of import do not attract tax and as such the question of reversal of ITC does not arise. Further it is also pertinent to mention that Section 40 A applies in the case of purchase and sales occurring under the DVAT Act as is evident from the provisions of the section which talks of arrangement for tax advantage arising 'under this Act'. The purchases occurring in the course of import do not fall in the ambit of transactions covered under the DVAT Act and as such there being no input tax credit in the event of offering these goods as gift the question of reversal of the input tax credit or taxing such transactions does not arise.

16. Accordingly, the taxing of the goods at the landing cost on the grounds that the appellant had availed tax advantage by not selling these goods is beyond comprehension and cannot be sustained. The taxable event under the DVAT Act is sale and not purchase and that the taxability has to be fixed by establishing in clear and unambiguous terms the transaction that falls within the ambit of the charging section. There is no such finding in respect of items gifted and the Revenue has failed to establish the taxability of these. Consequently the imposition of tax, interest and penalty on this account is illegal.

17. Coming to the shortage of the stock and cash found during survey, the contention of the appellant is that some of his stock was lying with his clearing and forwarding agent and some stock was lying at his other branches which has not been taken into account and if the same is accounted for there would be no shortage or variation in the stock. This explanation of the appellant has been rejected by the authorities below on the ground that these facts were not disclosed before the survey team. While it is a relevant fact to look at as to how and why these facts were not disclosed to the survey team, this could not be a base to reject the explanation simply on this ground without looking into the explanation with reference to the records produced and making the necessary inquiries and deciding upon the admissibility of the explanation or otherwise in the light of overall facts and circumstances of the case. To hold that if someone had not disclosed the details during survey any subsequent explanation would be rejected without any proper examination as has been done in the present case would render all the proceedings and the provisions of law of providing opportunity and seeking explanations a mere empty formality. This certainly cannot be the intention of law. There is no whisper in the orders as to whether the contention of the appellant that he was having

other branches or not and if so how many branches and how much stock and what evidence if any was there in support of the same. Further there is no attempt to look into the contention that whether some stock was with the clearing and forwarding agent or not and if so what evidence the appellant has produced about it and what view was taken about it. In the absence of any such analysis and discussion /appreciation of the evidence produced the conduct of proceedings and the rejection of the explanations simply on the ground that if the appellant had failed to disclose these facts before the survey team then he must suffer the consequences of the same, vitiates the entire proceedings and we find ourselves unable to support and sustain such an order.

18. Consequently, we are of the considered view that the appeals be accepted, the impugned orders set aside and the matter remanded back to the VATO to reframe the assessment after providing an opportunity to the appellant, examining the explanations submitted with reference to the records produced and pass a reasoned order in accordance with law. Appellant shall appear before the Ld. VATO on 30.05.2016.

19. Order pronounced in the open court.

20. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 257 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand, Member (A) and M.S. Wadhwa, Member (J)]

Appeal No.1143-1151/ATVAT/12-13
Assessment Period:1st, 2nd, 3rd & 4th Qtrs. 2008-09
Default Assessment of Tax, Interest & Penalty

Navkar Traders,
210, Amber Tower,
Commercial Complex Azadpur, Delhi-110033 ... Appellant

Versus

Commissioner of Trade & taxes, Delhi ... Respondent

Date of Order : April 19, 2016

AUDIT U/S 58 CONDUCTED UNDER DVAT ACT, 2004 – EX-PARTE ASSESSMENT COMPLETED DUE TO NON APPEARANCE OF APPELLANT OR HIS COUNSEL

ON LAST HEARING DUE TO ILL HEALTH OF THE COUNSEL – SEVERAL OPPORTUNITIES WERE EARLIER ALLOWED TO THE APPELLANT TO PRODUCE BOOKS OF ACCOUNTS AND OTHER RECORDS – APPELLANT DID NOT PRODUCE PURCHASE INVOICES AND BOOKS OF ACCOUNTS – ALL OTHER RECORDS PRODUCED – TURNOVER ENHANCED BY 100% ON ESTIMATED BASIS WITHOUT HAVING ANY MATERIAL WITH AO MAKING BEST JUDGMENT ASSESSMENT – WHETHER VALID. HELD – NO.

MATTER REMANDED TO AO.

Facts of the Case

Dealer was engaged in trading of sand, bazree and building material on whole sale basis. He made purchases mainly from unregistered dealers and some inter-state purchases also. He did not claim any input tax credit on purchases. His case was picked up for audit u/s 58 of DVAT Act, 2004. Notice in the form of DVAT-37 was issued at his old address for the period 01.04.2008 – 31.03.2009 but could not be served upon the dealer due to change in his address as already recorded in Ward 79.

Thereafter, the audit team visited his new business premises and recorded statement of the Proprietor. Accounts books and records were not produced as the same were lying at residence of the proprietor outside the state of Delhi. Dealer was allowed time to produce the record and accounts books in the VAT Department. The dealer did not produce purchase invoices and books of accounts inspite of various opportunities granted and on the last date of hearing neither the dealer nor his counsel appeared due to ill health of the counsel. Hence the assessment was completed Ex-parte by enhancing the Turnover by 100% of the declared turnover on estimated basis by making best judgment assessment without enhancing the purchases ignoring that the accounts of the dealer were tax audited and audited balance sheet and profit & loss account were available with the department. No defect was found in DVAT-31 or sales invoices etc. revenue argued that the records could have been produced on the first hearing as the same were duly audited.

Held

After going through the record of the case, impugned orders, orders of assessment and the documents placed on record, while it is apparent from the facts detailed in the assessment order appellant failed to produce the complete record despite seeking number of adjournments and the contention of the appellant that he has been maintaining and having complete record that has been audited and copy of the audit report filed,

does not explain and it is not understood as to how he could not produce the entire record on the very first date when he was called upon to do that. Not only this, he failed to produce despite repeated adjournments sought. We do agree with the argument of the revenue that in the given facts and circumstances of the case the VATO was justified in making the ex-parte assessment. Non production of the record by the appellant was a sufficient ground to make the ex-parte assessment. Although on the facts of the case the Assessing Authority was justified in making the ex-parte assessment the assessment order fails to disclose the rationale for making the 100% enhancement and Ld. Counsel of revenue has not been able to justify such an enhancement and the basis thereof.

OHA while upholding the default assessment had also not gone into the issue of 100% enhancement and the material and the basis thereof.

Applying the principle of law well settled by many authorities to the facts of the case the ex-parte best judgment assessment and the impugned orders under challenge cannot be sustained. While the revenue had defended the impugned orders on the ground that in the absence of the production of the complete record there was no alternative before the VATO to frame the ex-parte assessment on Best Judgment Basis, it has failed to disclose the basis for making such a huge estimation of the turnover. Non-production of the record did not give unbridled power to the assessing authority to determine the gross turnover at his own whims and fancies without placing on record the material on which he fixed the quantum. In view of these facts and circumstances of the case of the impugned order deserved to be set aside. Consequently the appeal allowed, impugned orders set aside and the matter remanded back to the VATO to reframe the assessment after hearing the appellant and examine the records produced by the appellant and making such further inquiries as considered necessary in accordance with law.

Cases Referred to:

- *Commissioner of Income Tax, Central and United Provinces Vs Lakshmi Narain Badri Dass (1937) 5 ITR 170, 180*
- *Raghubar Mandal Harihar Mandal vs State of Bihar AIR 1957 SC 810*
- *State of Kerala vs. C. Velukutty (1966) 17 STC 465 SC*
- *State of Orissa vs. Maharaja Shri B.P. Singh DEO (1970) 76 ITR 690*
- *Commissioner of Sales Tax, MP vs H.M. Eusfali H.M. Abdulali (1973) 32 STC 77 (SC),*

Present for the Appellant : Sh. HC Bhatia, Adv.,

Present for the Respondent : Sh. Pradeep Tara, Adv.,

ORDER

1. This order shall dispose of the above noted appeals filed by the appellant M/s Navkar Traders challenging the impugned orders dated 26.09.2012 passed by Special Commissioner, hereinafter referred as Objection Hearing Authority (in short the OHA) who vide the said orders rejected the objections and upheld the default assessment of Tax & interest u/s 32 and default assessment of penalty u/s 33 r/w section 86(12) & 86(13) of the DVAT Act, 2004.

2. Facts of the case briefly stated are that the appellant dealer is a proprietorship concern and registered with Ward no.79 at TIN 07720326578. His Tax Period during the year is quarterly. He is engaged in Trading of sand, Bazree and building material on whole sale basis. He makes purchases mainly from unregistered dealers and some purchases are interstate also against 'C' forms. He has not claimed any input tax credit on its purchases, collected tax from customers and paid to the department of Trade & Taxes, Delhi. During the year his turnover was Rs.6,18,16,612/- and paid Rs.43,80,786/- as VAT. His case was picked up for Audit u/s 58 of DVAT Act, 2004 and notice in from DVAT-37 was issued dated 01.02.2011 to the dealer directing him to attend the VAT office with various records on 17.02.2011 for the period 01.04.2008 to 31.03.2009. That the above said notice was not served upon the dealer as recorded in the assessment order passed by Ld. VATO because of change in address of the dealer as per record of Ward 79.

3. Thereafter, the audit Team visited the new premises of the dealer and recorded the statement of the proprietor but accounts books and records of the dealer were not produced as the same were not available at the premises. Thereafter, audit Team allowed time to the dealer to produce the records and accounts books at the VAT Department Office on 12th floor. That some records were produced but purchase records and books of accounts were not produced even on the last hearing due to ill health of the counsel Sh. P. K. Jain CA of the dealer. That assessment was completed ex-party for non attendance of the dealer/ counsel and sales turnover was enhanced by 100% of the declared turnover on estimated basis and following demands towards tax, interest and penalty were raised by Ld. VATO:-

Sl. No.	A.Y. (2008-09)	Tax	Interest	Penalty
1	1st Qtr	14,48,847	6,18,042	21,58,782
2	2nd Qtr	15,07,368	5,86,015	20,50,020
3	3rd Qtr	10,56,119	3,70,654	12,88,465
4	4th Qtr	3,67,884	1,15,505	4,04,672
5	2008-09			50,000

4. Aggrieved with the default orders of assessment, the appellant filed objections which were rejected and the default assessment were upheld vide aforesaid impugned orders passed by the OHA.

5. Appellant has assailed the impugned orders on the following grounds:-

1. That Ld. VATO has erred both in law as well as on facts of the case in assessing the tax deficiency of Rs.14,48,847/- and interest Rs.6,18,042/-totaling to Rs.20,66,889/-.

2 That no notice in Form DVAT-37 has been served on the dealer to conduct the audit of his business affairs u/s 58 of DVAT Act, 2004 for the tax period 1.04.2008 to 30.06.2008 and, therefore; assessment framed u/s 32 based on such audit observations is bad in law and deserves to the quashed.

3. That tax period of the dealer is quarterly and notice issued by the Ld. VATO has been stated to be for the year 1.04.2008 to 31.03.2009 (composite notice for 4 Tax Periods) which is an invalid notice and any audit conducted or assessment framed on the basis of such notice is bad in law and needs to be quashed.

4. That Ld. VATO has assessed the turnover of purchase at the same figure as declared by the dealer and therefore, enhancing the turnover of sales by 100% has given absurd results to make the assessment wild which is not permissible in law.

5. That the Ld. VATO has erred in enhancing the turnover of sales of the dealer by 100% of the turnover of sales declared by him in the return ignoring DVAT-31 (Sales Summary date wise bill wise and party wise) submitted with Ld. VATO and sales invoice shown

to him in addition to Balance Sheet, Profit & Loss account and Tax Audit Report duly audited by a Chartered Accountant was available with Ld. VATO to verify the gross sale turnover with DVAT -31 and the return filed by the dealer.

6. That Ld. VATO has also erred in enhancing the sales turnover by 100% without having any adverse material with him or any evidence to show that the dealer has made any sales to any other customer as shown in DVAT-31. Thus Best Judgment Assessment made by Ld. VATO is a wild assessment and needs to be quashed.

7. That the Ld. OHA has also erred in confirming the order of Ld. VATO just by repeating the observations made by Ld. VATO ignoring the documents filed with Ld.OHA by the counsel of dealer such as summary of sales for the year 2008-09 DVAT-30 (Purchase Summary date wise, bill wise, party wise) bank statements, trial balance. Ld. OHA should have either verified such documents himself or could have remanded the matter to Ld. VATO.

8. That the dealer was prevented by a reasonable cause to appear on 20.5.2011 (last date fixed for hearing) as his counsel Sh. Pawan Jain CA who returned from Kashmir along with his family late night on 19.5.2011 and fell ill on 20.5.2011 and could not reach the VAT Department to attend the case and could not inform the dealer as well. The dealer being a proprietor and having a turnover of approx 6 crore remained busy on various sites in the night and solely depended on his counsel as far as his tax matters were concerned. The dealer is a semi literate person having studied up to 12 classes only.

9. That Ld. VATO also erred in reaching to the conclusion that dealer is buying time to manipulate his accounts of 2008-09 in the year 2011, ignoring the fact that these accounts were already audited by a chartered account , his income tax return had already been filed, Balance sheet, Profit and loss account and Tax audit report already filed with VAT Deptt in time on 25.01.2010 as required by DVAT Act, 2004 and, therefore, there was no possibility of theses being manipulated and there was no need as well. Hence, enhancing sales turnover by 100% on this basis has no legs to stand.

10. That the Ld. VATO has also erred in arriving at his conclusion that tax on sale by the dealer to the department is being claimed back

from the department by his buyers in the form of credit on their purchases ignoring the fact that the buyers can always claim input tax credit on their purchases /against tax invoice as per section 9 of DVAT Act, 2004 and, therefore, turnover of sales of the dealer cannot be enhanced by 100% without having any evidence with the department.

11. The dealer craves leave to add / amend/delete any of the grounds of appeal at the time of hearing.

6. We have heard Sh. HC Bhatia, Ld. Counsel for the appellant and Sh. Pradeep Tara, Ld. Counsel for the Revenue and gone through the record of the case.

7. Sh. HC Bhatia, Ld. Counsel for the Appellant re-iterating the grounds of appeal submitted that the turnover has been enhanced without having an adverse material available with Ld. VATO ignoring the fact that dealer has already placed on record DVAT-31 (Details of sales showing date, bill no, party name and address with TIN and amount) and has also produced the sales invoice to him. Therefore, there is no reason to enhance the sales without finding out any defect in DVAT-31 or sale invoices. That Accounts of the dealer were duly Tax audited by a Chartered Accountant and the report u/s 44 AB alongwith Balance sheet and Profit and loss Account were submitted with the department of Trade and Taxes on 25.01.2010. That dealer filed DVAT-30, Bank statements, Trial Balance, copy of Tickets of the counsel as an evidence that he returned from Kashmir on 19.05.2011 and also explained in writing to Ld. OHA that as Counsel had fell ill on 20.05.2011 he could not appear before Ld. VATO On 20.05.2011 That tax period of the dealer is quarterly and notice issued by the Ld. VATO has been stated to be for the year 1.4.2008 to 31.3.2009 (composite notice for 4 Tax Periods) which is an invalid notice and any audit conducted or assessment framed on the basis of such notice is bad in law and needs to be quashed. That Ld. VATO has assessed the turnover of purchase at the same figure as declared by the dealer and therefore, enhancing the turnover of sales by 100% has given absurd results to make the assessment wild which is not permissible in law. That turnover has been enhanced without having an adverse material available with Ld. VATO. That the dealer’s accounts were already tax audited, Balance Sheet, P&L A/C were already available with VAT Deptt. and his Income Tax return has already been filed. Hence, there cannot be any reason to manipulate the same as stated by the Ld. VATO in his order. That That Ld. OHA has also erred in confirming the order of Ld. VATO ignoring DVAT-30 (purchase summary showing name and address of supplier, date, bill no. and amount), Bank Statement, Trial balance etc.

In fact either he should have examined the records or have remanded the same to Ld. VATO to verify and pass fresh orders.

8. Further submitted that on the last hearing, the counsel of the dealer reached late from Kashmir on last night and fell ill on the date of hearing and accordingly he could not attend the case nor informed the dealer to seek adjournment. Since, the dealer being proprietor was looking after his business and has engaged a qualified person CA to look after his VAT matters, he was sure that his matters were taken care properly as per law. The dealer, therefore, should not be made to suffer for not handling the case properly by his counsel and the counsel also had a reasonable cause not to attend the case on last hearing. That ex-parte orders passed are not in accordance with law, without service of notice and dealer has reasonable cause to remain absent on the last date of hearing. Accordingly, case is fit to be remanded to Ld. VATO.

9. Ld. Counsel for the Revenue submitted that the impugned orders passed by the Ld. OHA suffers from no infirmity or illegality, when the appellant claims to have got his accounts audited and filed the audited balance sheet in the department on 25.01.2010 , he could have produced books of accounts on the very first hearing. Instead of it he went on seeking adjournments and did not produce the complete record and the Ld. VATO had to resort to best judgement assessment.

10. Ld Counsel for the Revenue supporting the default assessment orders and the impugned orders passed by the Ld OHA extensively referred to the findings recorded in these orders to support the orders passed by the authorities below, specially drawing attention to the facts that when the premises of the appellant firm were visited the business premises of the dealer did not show any sign of business activity; no documents or articles relating to the dealer’s business activity were available there; dealer in his recorded statement had admitted that ‘sale invoices along with cash book, ledger, stock register,DVAT-30,DVAT-31 maintained by the firm were presently lying at dealer’s residence , the dealer did not agree to get his books of accounts and records from his residence in Haryana; the firm does not have any godown, which is very much impractical for a firm considering the nature of business; the stock position as on the date of visit was Nil and his balance sheet for 2008-09 also shows his opening and closing stocks as Nil.

11. Further submission made by the Revenue is that the appellant undertook to produce all books of accounts and related documents before 08.04.2011 but despite repeated adjournments did not produce these and the VATO had to resort to the ex-parte assessment.

12. After going through the record of the case, impugned orders, orders of assessment and the documents placed on record, while it is apparent from the facts detailed in the assessment order appellant failed to produce the complete record despite seeking number of adjournments and the contentions of the appellant that he has been maintaining and having complete record that has been audited and copy of the audit report filed, does not explain and it is not understood as to how he could not produce the entire record on the very first date when he was called upon to do that. Not only this, he failed to produce despite repeated adjournments sought. We do agree with the argument of the appellant that in the given facts and circumstances of the case the Ld VATO was justified in making the ex-parte assessment. Non-production of the record by the appellant was a sufficient ground to make the ex-parte assessment. Although on the facts of the case the Assessing Authority was justified in making the ex-parte assessment the assessment order fails to disclose the rationale for making the 100% enhancement and Ld Counsel for Revenue has not been able to justify such an enhancement and the basis thereof.

13. Ld Special Commissioner disposed of the objections by observing as under:-

> "I have gone through the contents of the orders passed by the VATO and submissions made by the Ld.CA. Ld.CA has submitted that complete details of his arguments have been given in the statement of facts and grounds of objections. After perusal of grounds of objection, it seems that these have been prepared in a half-page and in a very casual & simple manner and also statement of facts is not showing any ground to contradict the observations made by the VATO concerned. The assessing authority has given reasonable and sufficient opportunities to the objector but in spite of show cause notice and, several adjournments, required books of accounts have not been produced by the objector. Moreover, books of accounts have been kept by the objector in his residence at Haryana which is also against the procedure. To contradict the observations of audit team and VATO concerned, nothing concrete has been"

14. Ld. OHA while upholding the default assessment has also not gone into the issue of 100 percent enhancement and the material and the basis thereof.

15. The leading authority on the principles relevant to best judgment assessment is the Privy Council decision in Commissioner of Income Tax, Central and United Provinces Vs Lakshmi Narain Badri Dass (1937) (5) ITR 170, 180 their Lordships have held:-

> "He (the assessing authority) must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the mater, it must be honest guess work. In that sense too the assessment must be to some extent arbitrary"

16. In Raghubar Mandal Harihar Mandal vs State of Bihar AIR 1957 SC 810 dealing with Section 10(2) of Bihar Sales Tax Act, 1944, their Lordships have held:-

> "The assessing authorities under Section 10(2)(b) are not entitled, after rejecting the returns and books of accounts of the assessee, proceed to estimate the gross turn over and made an assessment without reference to any evidence or any material at all, indulging in pure guess work."

17. In State of Kerala vs. C. Velukutty (1966) 17 STC 465 SC, their Lord-ships have held:-

> "The limits of the power are implicit in the expression "best of his judgment."" Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a best judgment assessment, it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (20) of section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material."

18. The following principles laid down by their Lordships of the Supreme Court in State of Orissa vs. Maharaja Shri B.P. Singh DEO (1970) 76 ITR 690, though in the context of income tax, are apposite hereat also:-

> "The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those

> authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power, it is an assessment. In other words, that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities"

19. In Commissioner of Sales Tax, MP vs H.M. Eusfali H.M. Abdulali (1973) 32 STC 77 (SC), their Lordships have held that once the assessing officer has found that assessee had dealings outside the accounts then it was not possible to find out precisely the turnover suppressed and only an estimate thereof can be made on the basis of the material before him" So long as the estimate made by the Assessing Officer was not arbitrary and had a reasonable nexus with the facts discovered, it could not be questioned, though material cannot be expected to be available before the Assessing Officer to prove that exact turnover suppressed. Their Lordships have further held:-

> "In estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the best judgment assessment, no doubt, should arrive at his conclusion without any bias and on a rational basis. That authority should not be vindictive or capricious. If the estimate by the assessing authority is a bonafide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prime facie, the assessing authority is the best judge of the situation. It is his best judgment and not anyone else's The High Court cannot substitute its best judgment of that of the assessing authority."

20. Applying the principle of law well settled by aforesaid authorities to the facts of the present case the ex-parte Best Judgement Assessment and the impugned orders under challenge cannot be sustained. While the revenue has defended the impugned orders as well as the assessment orders on the ground that in the absence of the production complete record there was no alternative before the Ld VATO to frame the ex-parte assessment on Best Judgement basis, it has failed to disclose the basis for making such a huge estimation of the turnover. Non-production of the record did not give unbridled power to Assessing Authority to determine the Gross Turnover at his own whims and fancies without placing on record the material on which he fixed the quantum. In view of these facts and circumstances of the case we are of the considered view that the impugned order deserve to be set aside. Consequently the appeal is allowed, impugned orders are set aside and the matter is remanded back

to the VATO to reframe the assessment after hearing to the appellant and examining the records produced by the appellant and making such further inquiries as considered necessary in accordance with law for which the appellant is directed to appear before the Ld VATO on 16.05.2016

21. Order pronounced in the open court.

22. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 268 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[Diwan Chand: Member (A) And M.S. Wadhwa: Member (J)]

Appeal No. 5/ATVAT/13-14
Penalty

Aar Tee Transport Company Pvt. Ltd.
5810, Block No.4,
Gali No. 8, Dev Nagar,
New Delhi ... Appellant

Versus

Commissioner Trade & Taxes, Delhi ... Respondent

Date of Order : May 05, 2016

POWER TO STOP, SEARCH AND DETAIN GOODS VEHICLE UNDER SECTION 61 OF DELHI VALUE ADDED TAX ACT – APPELLANT WAS NOT CARRYING WITH HIM PRESCRIBED RECORDS – CONTAINERS WERE DETAINED – APPELLANT FILED WRIT PETITION BEFORE DELHI HIGH COURT – THE COURT ORDERED TO RELEASE THE GOODS SUBJECT TO THE APPELLANT DEPOSITING FDR OF RS.FOUR LAKH.

REVENUE IMPOSED PENALTY OF RS.704628.00 – APPELLANT AGAIN FILED WRIT PETITION AGAINST PENALTY ORDER CONTENDING THAT HE WAS NOT A DEALER BUT ONLY A TRANSPORTER – THE COURT DIRECTED A.A. TO CONDUCT AN INQUIRY IN THIS REGARD ON PRODUCTION OF DOCUMENTS BEFORE HIM – ASSESSING AUTHORITY PASSED NON SPEAKING ORDER – THE APPELLANT FILED OBJECTION PETITION AS PER DIRECTION OF HIGH COURT – THE APPELLANT CONTENDED THAT OBJECTIONS HAD NOT BEEN DISPOSED OF WITHIN 15 DAYS OF THE NOTICE – OBJECTIONS HAVE TO BE DEEMED TO HAVE ACCEPTED AS PER SECTION 74(9) – OHA REJECTED THE OBJECTIONS AND UPHELD THE ORDER OF ASSESSING AUTHORITY.

APPELLANT TOOK PLEA BEFORE VAT TRIBUNAL THAT REQUISITE DOCUMENTS WERE FILED BEFORE INQUIRY OFFICER AND THE SAME WERE NOT EXAMINED AND A NON SPEAKING ORDER WAS PASSED – REVENUE DID NOT FIND ERROR IN THE DOCUMENTS FILED BY APPELLANT – TRIBUNAL FOUND THAT AMONG CONSIGNEES ONLY ONE BELONGED TO DELHI DEALER – REVENUE DID NOT CONTRADICT THE CASE OF APPELLANT - APPEAL ALLOWED AND IMPUGNED ORDER SET ASIDE AND MATTER REMANDED BACK TO ASSESSING AUTHORITY.

Facts

Facts of the case leading to the filing of the above mentioned appeal were that certain containers of the appellant were detained vide Mal Roko orders dated 26.04.2006 & 27.04.2006 since full documents in connection with the consignments were not provided. Appellant filed writ petition (W.P.(C) No.10434/2006) which came up for hearing on 23.06.2006 and after hearing the parties the Hon'ble High Court ordered for release of the goods subject to the petitioner depositing a Fixed Deposit Receipt of Rs four lakh. A notice of assessment of penalty dated 13.07.2006 under section 33 of the DVAT Act imposing a penalty of Rs. 7,04,628.00 was issued. Aggrieved by the order appellant again moved the High Court and the plea of the appellant was that he is not a dealer and is only a transporter and the goods were never sold in Delhi, but were meant for transportation to other states. Hon'ble High Court vide orders dated 5.10.2010 directed the Value Added Tax Officer to conduct an inquiry in this regard on production of documents before him after affording an opportunity of hearing to the petitioner. The Value Added Tax Officer passed the order on 8.11.2011 which was challenged by the petitioner in another writ petition bearing W.P.(C) No. 8929/2011. This writ petition was disposed of by an order dated 23.12.2011 with the directions to file objection petition.

The OHA examined the matter on merits also upheld the order of the VATO imposing the penalty. The appellant filed appeal before VAT Tribunal.

Held

It was apparent from the aforesaid inquiry report that though the requisite documents were filed by the appellant before the Inquiry officer, the same were not examined and a non-speaking order was passed simply stating that "the same were not found to be supporting their case sufficiently." In the subsequent proceedings held before the OHA also no examination of the record filed by the appellant seems to had been conducted and no evidence on record had been submitted by the Revenue discrediting the documents and record filed by the appellant. Even during the hearing before this Tribunal, while the appellant has filed the complete

record evidencing that the goods were meant for transportation to other states and were only passing through Delhi no contrary evidence has been filed by the Revenue to contradict the stand of the appellant.

In view of the foregoing discussion and documents placed on record, the Tribunal found that except for one transaction where the consignee was a firm of Delhi, the goods were in transit and not for consumption in Delhi. Revenue on its part had not led any evidence before this Tribunal to contradict the case of the appellant. Consequently, the appeal was allowed and impugned orders were set aside and the matter was remanded back to VATO to reframe the order in accordance with law after giving an opportunity of hearing to the appellant.

Cases Referred to:

- *Indo Arya Central Transport Ltd. Vs. Commissioner, Trade & Taxes, Delhi*

Counsel for the Appellant : Shri Rajesh Mahana, Adv.,

Counsel for the Revenue : Shri S.B. Jain, Adv.,

ORDER

1. This order shall dispose of the above noted appeal filed by the appellant challenging the impugned orders dated 19.11.2012 passed by Additional Commissioner, hereinafter referred as Objection Hearing Authority (in short the OHA).

2. Facts of the case leading to the filing of the above mentioned appeal are that certain containers of the appellant were detained vide Mal Roko orders dated 26.04.2006 & 27.04.2006 since full documents in connection with the consignments were not provided. Appellant filed writ petition (W.P.(C) No.10434/2006) which came up for hearing on 23.06.2006 and after hearing the parties the Hon'ble High Court ordered for release of the goods subject to the petitioner depositing a Fixed Deposit Receipt of Rs four lakh. A notice of assessment of penalty dated 13.07.2006 under section 33 of the DVAT Act imposing a penalty of Rs. 7,04,628/- was issued. Aggrieved by the order appellant again moved the High Court and the plea of the appellant was that he is not a dealer and is only transporter and the goods were never sold in Delhi, but were meant for transportation to other states. Hon'ble High Court vide orders dated 5.10.2010 directed the Value Added Tax Officer to conduct an inquiry in this regard on production of documents before him after affording an opportunity of hearing to the petitioner. The Value Added Tax Officer passed the order on 8.11.2011 which was challenged by the petitioner in another writ petition bearing

W.P.(C) No. 8929/2011. This writ petition was disposed of by an order dated 23.12.2011 with the following directions:-

> "11. In these circumstances and keeping in view the earlier order passed by the High Court dated 5th October, 2010 read with order dated 29th November, 2010, we grant liberty to the petitioner to file objections on or before 6th January, 2012. In case objections are filed within the aforesaid period, the same will not be dismissed on the ground that they are barred by limitation, as we have excluded the period during which the aforesaid writ petitions had remained pending and the period during which the inquiry was conducted. It is clarified that till the objections are disposed of, no further recovery will be made."

3. Pursuant to the aforesaid directions, the appellant filed his objections on 30.12.2011. On 24.8.2012, the counsel of the appellant sent a communication to the Commissioner stating that the appellant had filed objection on 30.12.2011 and the same were listed before Sh. Ajay Kumar Gupta, Addl. Commissioner for hearing. The proceedings were taken up by Mr. Ajay Kumar Gupta on various dates and when the case was fixed for hearing on 17.08.2012 the appellant along with the counsel reached the department and they were informed that the charge of Sh.A.K. Gupta is being transferred to the office of Sh. A.K. Kaushal Addl. Commissioner 6th Floor. On further enquiry from his office the appellant had come to know that the files have not reached the office of Sh. A.K. Kaushal, Addl. Commissioner. Today on 24th Aug 2012 all the list containing the particular of files transferred have been checked but the name of such file is not appearing. As per provision of sec 74(7) the objection hearing Authority is required to dispose the objection within a period of 8 months. Whereas the time limit of eight months would expire on 30th Aug 2012. The particular of file are not traceable with the result the appellant is suffering harassment as there is nobody who can look into the matter and decide the objections and requested the Commissioner to issue necessary directions for the hearing of the matter in order to decide the objection after hearing of the same. This letter received in the branch of the Commissioner is marked by the Commissioner to OHA (Zone-V).

4. On 10.09.2012, the appellant received a notice dated 31.08.2012 from the Additional Commissioner/Objection Hearing Authority indicating that the objections were to be heard on 20.09.2012. In response to this notice dated 31.08.2012, the appellant sent a further objection dated 19.09.2012 wherein he contended that since the objections had not been disposed of within 15 days of the notice dated 24.08.2012, in view of

the provisions of Section 74(9) of the said Act, the objections have to be deemed to have been accepted and therefore, there was no question of further hearing in the matter. Objection Hearing Authority disposed of the objections vide orders dated 19.11.2012 upholding the orders passed by VATO.

5. Appellant filed another writ petition no 7259/2012. During hearing the Hon'ble High Court noted that there was no reference to the appellant's notice dated 24.08.2012 or the further objection dated 19.09.2012. In fact, the Objection Hearing Authority has not at all considered the point raised by the appellant. Hon'ble High Court set aside the orders dated 19.11.2012 passed by the objection Hearing Authority and remitted the matter back to the Objection Hearing Authority for consideration of the issues raised by the appellant particularly with regard to the notice dated 24.08.2012 and the subsequent objection dated 19.09.2012 and also directed that it would also be open to the Objection Hearing Authority to examine the entire matter on merits.

6. In pursuance to the aforesaid orders of the Hon'ble High Court, the Objection Hearing Authority after rehearing the matter has passed the impugned orders dated 18.02.2013 observing that the appellant did not file the notice dated 24.08.2012 in prescribed format DVAT-41 under Rules 56 and hence his contention regarding the order dated 19.11.2012 being barred by limitation was without merits and was rejected. Ld OHA after examining the matter on merits also upheld the orders of the VATO imposing the penalty.

7. Against the said impugned orders dated 18.02.2013 appellant has come up in appeal and assailed the impugned orders inter alia on the ground that objections filed by him , in view of the notice dated 24.08.2012 sent by him were deemed to have been allowed and that the decision of the Ld OHA rejecting this ground is contrary to the law and insisted that this preliminary objection be decided first by the Tribunal before the matter is heard on merits as in terms of the Orders of the Hon'ble High Court the Objection Hearing Authority could have taken up the hearing of the case on merits only if the objections were not deemed to have been allowed and similarly this Tribunal also cannot hear the matter on merits unless and until the preliminary objection is disposed of. After hearing the said preliminary objection has been rejected by the Tribunal vide orders dated 19.06.2015.

8. Coming to the merits of the case, the appellant has assailed the impugned orders on the following grounds:-

1. Because the OHA has erred in law and on facts in deciding the objections filed by the appellants in accordance with the directions of High Court in answering the finding of fact, whether the goods were moving out of Delhi and there is no reasons of satisfaction of evasions of tax, in terms of section 61 (4) of the DVAT Act.

2. Because the OHA has erred in law on facts in passing of order of dismissal of objection instead of accepting the objections in terms of section 74 (9) consequent to notice under section 74 (8) of DVAT Act dated 24.08.2012.

3. Whether the VATO and OHA were right in law and on facts in dismissing the objections filed on the directions of the Hon'ble High Court and whether the OHA acted as per the various directions in orders of High Court.

4. Whether on the examination of documents filed with the VATO for verification and another set of documents filed before the OHA, there remains any doubt in observation that the goods were actually moving out of Delhi or passing through Delhi and whether OHA has considered those facts and direction of High Court.

5. Whether the OHA has disposed of the objections as directed by High Court to be decided by 21.02.2013 in accordance with law As per the orders of the High Court in WP (c) No. 7259 of 2012 and after consideration of submission or objections dated 19.09.2012 and clarification filed before OHA, the decision is as per law or not.

6. Because the orders passed by the OHA in confirming the penalty of Rs. 7,04,628/- out of which the appellants have deposited Rs. 4 lacs as per directions of the High Court as security is bad in law and against the facts of the case.

7. Because in none of the orders including maal-roko-aadesh, it is recorded as to what the necessary documents are nor the particulars of non-availability of documents have been disclosed.

8. Because the maal-roko-aadesh was on cyclostyled form which does not have any legal sanctity. Because the present case is not a case of tax evasion.

9. Because the cyclostyled order (aadesh) establishes pre-determined disposition of mind and arbitrary exercise of power by the Respondents.

10. Because the impugned orders are without jurisdiction as the jurisdiction of the respondent No.2 is in relation to goods in respect of which there has been infringement of payment of Value Added Tax. In respect of the said goods all necessary payments have been made and relevant documents have been submitted before the respondent No.2.

11. Because the Ld. Tribunal in similar case of Indo Arya Central Transport Ltd. Vs. Commissioner, Trade & Taxes, Delhi has held that no penalty under section 86(19) of the Act can be imposed when the transporter produced all the requisite documents.

9. We have heard Sh. Rajesh Mahana, Ld. Counsel for the Appellant and Sh. S. B. Jain, Ld. Counsel for the Revenue.

10. Ld Counsel for the Appellant submitted a paper book enclosing the details of the GRs, copies of the bills etc to demonstrate that the goods being transported were not meant for Delhi but were only passing through Delhi and ultimate destinations were various places in Punjab and Rajasthan. We have carefully considered the record and the documents filed by the appellant in support of his contentions. Goods transported vide containers seized by the Deportment are meant for destinations Ludhiana, Amritsar, Muradnagar, Gurgoan except for one transaction in which the consignee is M/s KL Trading Corporation 3/10 Kirti Nagar Industrial Area, Delhi. Appellant has filed copies of the GRs issued by Rashtriya Transport Company a unit of Aartee Transport Company wherein the consigner is Aartee Transport Company Bangalore and the consigner is Arte Transport Company Delhi, tax invoices issued by the Kerala VAT Department and the invoices issued by the Rubber board Kerala.

11. Ld Counsel for the Revenue submitted that in view of the documents now produced by the appellant, he has no objection if the matter is remanded back to the VATO for verification. Ld Counsel for the appellant objected to the suggestion of the revenue for remand of the matter vehemently arguing that all these papers which he placed before the Tribunal were in possession of the department as these were submitted to the Ld VATO who was directed to conduct an inquiry in terms of Hon'ble High Court order dated 29.11.2010. Despite these papers having been placed on the record of the Department, matter has been remained undecided by the VATO and the OHA who have exhibited total non-application of mind resulting in protracted litigation causing undue harassment to the appellant.

12. It is the case of the appellant that entire record was placed before the authorities who failed to scrutinise and see the same and decide the correct nature of transactions. As is apparent form the record produced

before us the goods being carried out were for transit only and the Revenue has failed to place even a single piece of evidence on record to establish that the goods having destination outside Delhi were meant for consumption in Delhi.

13. At this stage it is also necessary to examine the report of the inquiry officer conduced in 2010 during which the appellant had filed all the necessary documents. The said inquiry report is extracted as under;-

> " …..In compliance of orders of Hon'ble High Court of Delhi, the notices dated 12.07.2011 and 26.09.2011 were issued to Container Corporation of India, C-3, Mathura Road opposite Apollo Hospital, New Delhi but they utterly failed to respond.
>
> Notices were also issued to M/s. Aar Tee Transport, 5810, Block No.4, Gali No.8, Dev Nagar, Karol Bagh, Delhi u/s 34(2) of DVAT Act on 10.08.2011 and 26.09.2011 to produce all documents which were filed before Hon'ble High Court of Delhi for conducting the inquiry.
>
> M/s. Aar Tee Transport Company appeared and furnished documents like Form 15 for VAT paid in Kerala. Container Corporation Goods received bills, Rashtriya Transport Corporation consignment note. The Rubber Board Form, list of the consignors with bill number and TIN number, Consignor's bill for 07 consignors, copy of pay orders and order of Hon'ble High Court of Delhi through Shri Pradeep Kumar Jain, Proprietor of P. Kumar Jain and Co. CA.
>
> The documents filed by M/s. Aar Tee Transport Company were examined but the same were not found to be supporting their case sufficiently. Moreover, notice of assessment of penalty dated 13.07.2006 under section 33 of DVAT Act with the direction to pay the penalty of Rs.7,04,628/- imposed upon M/s. Aar Tee Transport Company under section 86 of Delhi Value Added Tax Act, 2004 to be paid on or before 20.07.2006 issued by my predecessor Ld. VATO has neither been interfered with by the Hon'ble High Court of Delhi or by any another authority. As such, the same stands and needs to be complied with by M/s Aar Tee Transport Company. Since, in compliance to the interim orders of Hon'ble High Court of Delhi an amount of Rs. 4.00 Lacs has already deposited by M/s Aar Tee Transport Company, the firm is therefore, directed to deposit the balance amount of Rs. 304628/- (out of penalty of Rs.704628/-) together with interest @ 15% p.a. by 15.11.2011 and submit the proof of payment in the shape of DVAT 20 before the undersigned."

14. It is apparent from the aforesaid inquiry report that though the requisite documents were filed by the appellant before the Inquiry officer, the same were not examined and a non-speaking order was passed simply stating that "the same were not found to be supporting their case sufficiently." In the subsequent proceedings held before the OHA also no examination of the record filed by the appellant seems to have been conducted and no evidence on record has been submitted by the Revenue discrediting the documents and record filed by the appellant. Even during the hearing before this Tribunal, while the appellant has filed the complete record evidencing that the goods were meant for transportation to other states and were only passing through Delhi no contrary evidence has been filed by the Revenue to contradict the stand of the appellant.

15. In view of the foregoing discussion and documents placed on record, we find that except for one transaction where the consignee is a firm of Delhi, the goods were in transit and not for consumption in Delhi. Revenue on its part has not led any evidence before this Tribunal to contradict the case of the appellant. Consequently, the appeal is allowed and impugned orders are set aside and the matter is remanded back to Ld VATO to reframe the order in accordance with law after giving an opportunity of hearing to the appellant for which the appellant shall appear before the Ld VATO on 31.05.2016. Ld VATO shall finalise the proceedings as early as possible but not later than two months from the date of first appearance of the appellant before him.

16. Order pronounced in the open court.

17. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 276 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.407-510/ATVAT/11-12

Asian Motors,
29, Shivaji Marg, Najafgarh Road,
New Delhi-110015 ... Appellant

Versus

Commissioner of Trade Taxes, Delhi. ... Respondent

Date of Order : June 21, 2016

ENFORCEMENT SURVEY UNDER DELHI VALUE ADDED TAX ACT – VAT ON REGISTRATION CHARGES AND LOGISTICS CHARGES WERE NOT PAID – DEFAULT ASSESSMENT OF TAX AND INTEREST AND NOTICE OF ASSESSMENT OF PENALTY ISSUED – CHARGES WERE IN NATURE OF SERVICE AND POST SALE CHARGES – WHETHER COVERED UNDER THE DEFINITION OF SALE PRICE – HELD NO.

Facts

Appellant was a proprietorship firm and having its show room and workshop at 29, Shivaji Marg, Najafgarh Road, New Delhi and were authorized dealers of Mitsubishi vehicles of Hindustan Motors Limited, Chennai. These appeals relate to tax period of 01.04.2005 to 31.07.2009. The appellant regularly submitted monthly returns for the above mentioned tax period within time as per provisions of the Delhi Value Added Tax Act. The petitioner purchases cars from Hindustan Motors Limited, Chennai and thereafter sells the same to the customers under its VAT registration. At the time of sale of vehicles, the appellant had collected the registration charges from its customers with the bifurcation as (i) registration charges; (ii) logistics and other charges.

This bifurcation was done only for the purpose of the leviability of the particular expenses in the respective statute. The logistic charges being in the nature of service come under the purview of the Service Tax laws.

The Enforcement Branch conducted the survey of the business premises of the petitioner for the relevant period of dispute and calculated the logistic charges and other charges on which the dealer had not paid VAT. The petitioner submitted all the documents (DVAT 30, 31, details of logistic charges etc.) as asked for by the Survey Team and provided all the necessary assistance. Thereafter, to the shocking surprise of the petitioner, department issued notices of default assessment of tax and interest u/s 32 for the period from April, 2005 to July, 2009 (one for each month). In these notices VATO relying upon the definition of "sale price", as contained under section 2 (zd)(iv) has enforced the demand of tax and interest for non-payment of VAT on logistic and other charges. Further VATO had not only created the demand for tax and interest but also had imposed penalty u/s 86 (12) of the DVAT Act. The details of the amount of tax, interest and penalty, as per notice of demand, was as follows:

S.No.	A.Y. (2006-07)	Tax &Interest	Penalty
1	April	193/-	25600/-
2	May	384/-	25100/-
3	June	571/-	24700/-
4	July	188/-	24300/-
5	August	187/-	18600/-
6	September	186/-	23400/-
7	October	1292/-	23400/-
8	November	733/-	22500/-
9	December	546/-	22100/-
10	January	1263/-	21600/-
11	February	3044/-	21200/-
12	March	1421/-	20800/-

S.No.	A.Y. (2006-07)	Tax & Interest	Penalty
1	April	734/-	20400/-
2	May	4362/-	19900/-
3	June	3968/-	19500/-
4	July	4650/-	19100/-
5	August	3193/-	18600/-
6	September	4928/-	18200/-
7	October	2792/-	17700/-
8	November	4154/-	17300/-
9	December	2060/-	16900/-
10	January	6465/-	6400/-
11	February	5061/-	16000/-
12	March	5689/-	15600/-

S.No.	A.Y. (2007-08)	Tax & Interest	Penalty
1	April	5058/-	15200/-
2	May	5013/-	14700/-
3	June	4142/-	14300/-
4	July	5746/-	13800/-
5	August	6099/-	13400/-
6	September	6045/-	13000/-
7	October	5191/-	12500/-
8	November	3957/-	12100/-

9	December	6663/-	11700/-
10	January	4269/-	11200/-
11	February	4231/-	10800/-
12	March	6857/-	10400/-

S.No.	A.Y. (2008-09)	Tax & Interest	Penalty
1	April	8348/-	9900/-
2	May	9506/-	9500/-
3	June	6139/-	9100/-
4	July	6077/-	8600/-
5	August	3609/-	8200/-
6	September	6352/-	7700/-
7	October	5500/-	7300/-
8	November	1944/-	6900/-
9	December	5001/-	6400/-
10	January	4171/-	6000/-
11	February	3391/-	5600/-
12	March	7080/-	5100/-

S.No.	A.Y. (2009-10)	Tax & Interest	Penalty
1	April	1106/-	4700/-
2	May	1094/-	4300/-
3	June	3245/-	3800/-
4	July	713/-	3400/-

Against this order of assessment of tax, interest and penalty, appellant filed objections, which were rejected so far as tax and interest was concerned whereas the amount of penalty was reduced to 20% of the original amount.

Held

Perusal of the order passed by OHA showed that no reasoning had been given by the OHA to justify the imposition of tax and interest on logistic charges but he reduced the penalty to 20% of the original amount on the ground that against a very normal tax amount, very harsh penalty has been imposed which was against the natural justice when there was no mala fide intention of the appellant. OHA was supposed to give definite finding on the point whether the logistic charges were covered under the definition of “sale price” of the vehicle, then only tax, interest and penalty

imposed by the VATO would have been justified. In considered view of the Tribunal was that default assessment of tax and interest by treating logistic charges as part of the sale price of the vehicle was not sustainable and same was set aside. When default assessment of tax and interest had been set aside, then obviously penalty imposed u/s 86 (12) was also not sustainable as there could be no tax deficiency under circumstances of these appeals. For the foregoing discussion, all appeals were accepted and impugned order dated 28.01.2011 passed by the OHA was hereby set aside.

Cases Referred to:

- *Additional Commissioner of Sales Tax, VAT III Mumbai Vs. Sehgal Autoriders Pvt. Ltd. (2011)*
- *Frostees Exports (India) Pvt. Ltd., Vs DCCT, Corporate Division, Kolkatta & Others (2012)]*

Present for the Appellant	:	Shri H.L. Taneja, Advocate
Present for the Respondent	:	Shri C.M. Sharma, Advocate/ Govt.Counsel

ORDER

1. These appeals have been filed challenging the impugned order dated 28.01.2011 passed by Ld. Objection Hearing Authority (in short, OHA), who vide this order upheld the imposition of tax, interest and penalty order dated 20.04.2010 passed by Ld. VATO.

2. As common question of law and facts are involved in these appeals, hence these appeals are being disposed off by following common order.

3. Brief fact of these appeals are that appellant M/s. Asian Motors is a proprietorship firm and having its show room and workshop at 29, Shivaji Marg, Najafgarh Road, New Delhi and are authorized dealers of Mitsubishi vehicles of Hindustan Motors Limited, Chennai. These appeals relate to tax period of 01.04.2005 to 31.07.2009. The appellant regularly submitted monthly returns for the above mentioned tax period within time as per provisions of the Delhi Value Added Tax Act. The petitioner purchases cars from Hindustan Motors Limited, Chennai and thereafter sells the same to the customers under its VAT registration. At the time of sale of vehicles, the appellant had collected the registration charges from its customers with the bifurcation as (i) registration charges; (ii) logistics and other charges. This bifurcation was done only for the purpose of the leviability of the particular expenses in the respective statute. The logistic charges being in the nature of service come under the purview of the Service Tax laws.

4. The Enforcement Branch conducted the survey of the business premises of the petitioner for the relevant period of dispute and calculated the logistic charges and other charges on which the dealer had not paid VAT. The petitioner submitted all the documents (DVAT 30, 31, details of logistic charges etc.) as asked for by the Survey Team and provided all the necessary assistance. Thereafter, to the shocking surprise of the petitioner, department issued notices of default assessment of tax and interest u/s 32 for the period from April, 2005 to July, 2009 (one for each month). In these notices Ld. VATO relying upon the definition of "sale price", as contained under section 2 (zd)(iv) has enforced the demand of tax and interest for non-payment of VAT on logistic and other charges. Further Ld. VATO has not only created the demand for tax and interest but also has imposed penalty u/s 86 (12) of the DVAT Act. The details of the amount of tax, interest and penalty, as per notice of demand, is as follows:

S.No.	A.Y. (2006-07)	Tax &Interest	Penalty
1	April	193/-	25600/-
2	May	384/-	25100/-
3	June	571/-	24700/-
4	July	188/-	24300/-
5	August	187/-	18600/-
6	September	186/-	23400/-
7	October	1292/-	23400/-
8	November	733/-	22500/-
9	December	546/-	22100/-
10	January	1263/-	21600/-
11	February	3044/-	21200/-
12	March	1421/-	20800/-

S.No.	A.Y. (2006-07)	Tax & Interest	Penalty
1	April	734/-	20400/-
2	May	4362/-	19900/-
3	June	3968/-	19500/-
4	July	4650/-	19100/-
5	August	3193/-	18600/-
6	September	4928/-	18200/-
7	October	2792/-	17700/-
8	November	4154/-	17300/-
9	December	2060/-	16900/-
10	January	6465/-	6400/-

11	February	5061/-	16000/-
12	March	5689/-	15600/-

S.No.	A.Y. (2007-08)	Tax & Interest	Penalty
1	April	5058/-	15200/-
2	May	5013/-	14700/-
3	June	4142/-	14300/-
4	July	5746/-	13800/-
5	August	6099/-	13400/-
6	September	6045/-	13000/-
7	October	5191/-	12500/-
8	November	3957/-	12100/-
9	December	6663/-	11700/-
10	January	4269/-	11200/-
11	February	4231/-	10800/-
12	March	6857/-	10400/-

S.No.	A.Y. (2008-09)	Tax & Interest	Penalty
1	April	8348/-	9900/-
2	May	9506/-	9500/-
3	June	6139/-	9100/-
4	July	6077/-	8600/-
5	August	3609/-	8200/-
6	September	6352/-	7700/-
7	October	5500/-	7300/-
8	November	1944/-	6900/-
9	December	5001/-	6400/-
10	January	4171/-	6000/-
11	February	3391/-	5600/-
12	March	7080/-	5100/-

S.No.	A.Y. (2009-10)	Tax & Interest	Penalty
1	April	1106/-	4700/-
2	May	1094/-	4300/-
3	June	3245/-	3800/-
4	July	713/-	3400/-

5. Against this order of assessment of tax, interest and penalty, appellant filed objections, which were rejected so far as tax and interest is concerned whereas the amount of penalty was reduced to 20% of the original amount.

6. Against the orders of Ld. OHA, appellant has filed present appeal on following grounds, which are as follows:-

(i) That the Ld. VATO has erred in imposing penalty as base of which tax has been demanded is totally illegal and bad at law and this order has been wrongly upheld by Ld. OHA.

(ii) That the penalty u/s 86 (12) cannot be imposed without providing an opportunity of hearing to the appellant.

(iii) That Ld. Lower authorities have failed to note and appreciate that levy of penalty is not automatic.

(iv) That there was no malafide intention on the part of the petitioner. Thus, any penalty is grossly unjustified.

(v) That penalty should not be levied simply because there is a default because presence of mind is a must for imposition of penalty.

7. These appeals were heard on merit after compliance of order dated 07.03.2014 passed u/s 76 (4) of the DVAT Act

8. Heard to appellant's Ld. Counsel Shri H.L. Taneja and Shri C.M. Sharma and perused the file on the basis of which these appeals are being disposed off as follows.

9. Appellant's Ld. Counsel during the course of argument strenuously argued that VAT cannot be charged on number plates and on logistic charges as appellant is paying Service Tax on these counts and these are post-sales services and are not covered under the definition of "sale price" of the sold vehicle u/s 2(zd)(iv) of the DVAT Act. Appellant further submitted that there are number of judgments by various High Courts as well as by the West Bengal Taxation Tribunal where logistic charges have been held to be not taxable under the VAT Act. This Tribunal also in the case of M/s. Bhasin Motors Pvt. Ltd. and M/s. Pashupati Motors, decided on 29.01.2013 and 23.08.2012, have held that on logistic charges, VAT cannot be charged as these are post-sale services. Appellant's Ld. Counsel also submitted that there is a Determination Order by the Ld. Commissioner, VAT, Delhi in the case of Dehradun Motors that logistic charges on which Service Tax is

being paid by the dealer, VAT cannot be charged. He further submitted that these services are post-sale services and are not covered by the definition of sale, hence VAT cannot be imposed. It is the duty of the buyer of the vehicle to get the vehicle registered. To facilitate the buyer, dealer provided these services to the buyer and he pays Service Tax for this purpose, hence VAT cannot be levied on these counts. So he prayed that these appeals be allowed and impugned order dated 28.01.2011, passed by the Ld. OHA, be set aside.

10. While Ld. Counsel for the Revenue Shri C.M. Sharma, during the course of arguments, fairly admitted that these are post-sale services and this Tribunal in the above mentioned cases have held in favour of the appellant, so appropriate order may be passed.

11. The short controversy with which we are seized with in these appeals is whether the charges collected by the appellant in respect of number plates and logistic charges form part of "sale price"? If answer is positive, then they are liable to be taxed under the VAT law. In Additional Commissioner of Sales Tax, VAT III Mumbai Vs. Sehgal Autoriders Pvt. Ltd. (2011), Hon'ble Dr. D.Y. Chandrachud (as he then was) while delivering the judgment, said as follows:

> "The obligation under the law to obtain registration of the motor vehicle is cast upon the buyer. The service of facilitating the registration of the vehicle which is rendered by the seller-assessee is to the buyer and in rendering that service, the seller acts as an agent of the buyer. The handling charges which are recovered by the respondent cannot therefore be regarded as forming part of the consideration paid or payable to the respondent for the sale. Those charged cannot fall within the extended meaning of the expression "sale price", since they do not constitute a sum charged for anything done by the seller in respect of the goods at the time of or before the delivery thereof."

12. In the case of Frostees Exports (India) Pvt. Ltd., Vs DCCT, Corporate Division, Kolkatta & Others (2012), again the point for consideration was whether the amount received by the dealer for registration of the vehicle, road tax and insurance from its buyer after sale of motor cycle under the West Bengal Sales Tax Act was taxable under the VAT Act. The Tribunal held as follows:

> "Any amount received by way of reimbursement and/or charges for any service post sale would not fall under the definition of "sale price".

13. In the case of Toshiba Anand Battery, the point that came up for consideration was whether the turnover of the handling charges that had been agreed to be collected separately from the customer would form part of the "sale price"? Hon'ble Court held that handling charges being the charges payable only on the post-sale had to be excluded from the taxable turnover of the dealer.

14. In the Determination Order No.279/CDVAT/2010 dated 27.04.2011 in the case of Dehradun Motors Pvt. Ltd., the question for determination before the Ld. Commissioner was whether post-sale logistic charges form part of the "sale price" under the provisions of the DVAT Act when the Service Tax is payable on such charge. Ld. Commissioner, vide above order held as under:

> "Those aspect of logistic charge exclude sale price of the car on which Service Tax has been paid by the dealer as they are identified, VAT would not be payable."

15. It is clear from the principle of law, as laid down in the above cases, that those services which are provided after the completion of sale viz. logistic charges, number plate charges are not part of the sale transaction of the vehicle, hence cannot be included in the sale price of the vehicle, hence not liable to VAT because the amount which is charged by the dealer for these services is in the nature of reimbursement.

16. Perusal of the order dated 28.01.2011 passed by Ld. OHA show that no reasoning has been given by the Ld. OHA to justify the imposition of tax and interest on logistic charges but he reduced the penalty to 20% of the original amount on the ground that against a very normal tax amount, very harsh penalty has been imposed which is against the natural justice when there is no malafide intention of the appellant. Ld. OHA was supposed to give definite finding on the point whether the logistic charges are covered under the definition of "sale price" of the vehicle, then only tax, interest and penalty imposed by the Ld. VATO would have been justified. In our considered view, default assessment of tax and interest by treating logistic charges as part of the sale price of the vehicle is not sustainable and same is set aside. When default assessment of tax and interest has been set aside, then obviously penalty imposed u/s 86 (12) is also not sustainable as there can be no tax deficiency under circumstances of these appeals. For the foregoing discussion, all appeals are accepted and impugned order dated 28.01.2011 passed by the Ld. OHA is hereby set aside. Appellant shall be entitled to refund of the amount paid as pre-condition amount u/s 76 (4) of the DVAT Act in compliance of order dated 07.03.2014 passed by this Tribunal

17. Order pronounced in the open court.

18. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

19. File be consigned to record room.

[2015] 53 DSTC 286 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal No. 156-161/ATVAT/15-16
Assessment Period: 2013-14
(Assessment of Penalty)

Equivalent Inks Pvt. Ltd.,
B-4/183-B,
Safdarjung Enclave,
New Delhi. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order : June 30, 2016

PENALTY U/S 86(9) OF DELHI VALUE ADDED TAX ACT 2004 FOR FILING LATE RETURNS – REASONABLE CAUSE – RETURNS WERE FILED LATE DUE TO THE SERIOUS HEALTH PROBLEM OF DIRECTOR – PRINCIPLES OF NATURAL JUSTICE - NO OPPORTUNITY WAS PROVIDED OF BEING HEARD – WHETHER JUSTIFIED. HELD –NO.

Facts

Appellant was a registered dealer of Ward-100 since 2008-09 vide TIN No.7700355495 and engaged in the business of trading of all kinds of inks, printing cartages and like chemicals etc. The appellant was filing his return and paid the resultant tax as well. The company was a small trading company constituted of two directors, father and son. The father being an old experienced chartered account had started this venture after his retirement to support his children. Due to his deteriorating condition of health, he could not devote time for the preparation of returns regularly but by fits and starts, being sometimes admitted to the nursing home or nearby

hospitals. The director was not well and still undergoing treatment at the time of filing of the objection and expired before the hearing could take place which tormented both of his sons immensely because how so big or rich one may be, one cannot get the parents and parental love in the world even spending all his wealth. The sons left no stone unturned to get their father treated and did whatever they could do. However, they kept their business running so that they could get the money to put in all the medical bills which are hefty in the current times. Having done so, they were late in filing the returns but paid their taxes alongwith interest before the notices could be issued to them. Even then OHA did not accept the plea of the appellant and rejected the objections substantially giving a major relief of Rs.12,000/- each in the third quarter only.

Held

Perusal of these orders showed that when there was delay of 94 days in filing return of 3rd quarter of 2013-14, penalty of Rs.47,000/- was imposed, when there was delay of 117 days in filing return of 1st quarter, penalty of Rs.10,000/- was imposed and when there was delay of 3 days, penalty of Rs.1,500/- was imposed. No criteria for imposing penalty had been mentioned by the VATO because there was no application of mind while passing these orders. Even according to Circular No. Legal/2007/489 dated 30.04.2007, instructions had been issued to the VATO/AVATO that they shall provide an opportunity to the dealer to explain the facts and grounds while framing a default assessment and penalty order passed u/s 86 of the DVAT Act. In the present appeals there was clear violation of circular order passed by VATO and upheld by OHA.

On the basis of foregoing discussion and in the light of the judgment of Hon'ble Delhi High Court in Bhumika Enterprises and Bansal Dye Chem, present appeals were allowed and impugned order passed by Additional Commissioner were set aside.

Cases Referred to:

- *Utkal Asbestos Ltd., Vs. Sales Tax Officer, 133 STC 22 (Orissa)*
- *Bhumika Enterprises Vs. Commissioner, Value Added Tax 52 DSTC 401*
- *Bansal Dye Chem Pvt. Ltd. Vs. Commissioner, Value Added Tax 52 DSTC 396*

Present for the Appellant : Kumar Jee Bhatt, Advocate

Present for the Respondent : M.L. Garg, Advocate

ORDER

1. In these six appeals appellant has challenged impugned orders dated 13.06.2015 passed by Ld. Additional Commissioner, hereinafter called the Objection Hearing Authority (in short OHA), who while disposing of the objections, partly allowed them. These objections were filed against the penalty order dated 02.09.2014 passed by Ld. VATO regarding 1st 3rd and 4th quarter of 2013-14 imposing penalty under each of the Delhi Value Added Tax Act (in short DVAT Act) and the Central Sales Tax Act (in short CST Act) to the tune of Rs.10,000/- in 1st quarter, Rs.47,000/- in 3rd quarter and Rs.1,500/- in 4th quarter for filing delayed returns. Ld. OHA, vide impugned order dated 13.06.2015, reduced penalty amount of Rs.47,000/- to Rs.35,000/- regarding 3rd quarter under each Act but upheld the penalty orders so far as 1st and 4th quarters are concerned.

2. Brief facts of the present appeals are that appellant is a registered dealer of Ward-100 since 2008-09 vide TIN No.7700355495 and engaged in the business of trading of all kinds of inks, printing cartages and like chemicals etc. The appellant is filing his return and paid the resultant tax as well. The company is a small trading company constituted of two directors, father and son. The father being an old experienced chartered account had started this venture after his retirement to support his children. Due to his deteriorating condition of health, he could not devote time for the preparation of returns regularly but by fits and starts, being sometimes admitted to the nursing home or nearby hospitals. The director was not well and still undergoing treatment at the time of filing of the objection and expired before the hearing could take place which tormented both of his sons immensely because how so big or rich one may be, one cannot get the parents and parental love in the world even spending all his wealth. The sons left no stone unturned to get their father treated and did whatever they could do. However, they kept their business running so that they could get the money to put in all the medical bills which are hefty in the current times. Having done so, they were late in filing the returns but paid their taxes alongwith interest before the notices could be issued to them. Even then ld. OHA did not accept the plea of the appellant and rejected the objections substantially giving a meager relief of Rs.12,000/- each in the third quarter only.

3. Still aggrieved, appellant has filed these appeals on following, among other grounds:

(i) That the order is bad in law and against the facts and circumstances of the case.

(ii) That no notice was served upon the company to afford an opportunity of being heard so that the facts and record could be placed before the Ld. VATO to decide the case in the right perspective. It is a fact on record that the notice of assessment of penalty dated 02.09.2014, which have been put up on the website of the department, are unsigned, hence no orders in the eyes of law. The notice was required to be digitally signed by the officer before putting up on the website of the department as per the provisions of the Information Technology Act, 2000.

(iii) That the petitioner filed his returns for the said quarters but were late due to reason that his father being one of the directors was taken seriously ill since last one year and it took lot of money to treat him but even then he could not be saved. It was due to death and his involvement with his father that returns got late, there being no deliberate intention to delay the returns. Ld. VATO has erred in law in levying penalty as the dealer is not in benefit of filing the returns late.

(iv) That merely referring to the GTO and circular which explained the legal provision and nothing else does not make an order speaking one, once you neglect to refer to the facts and the case law referred. Because only holding that the considering the above arguments, period of delay, GTO and in view of the Circular No.16 of 2013-14, the ends of justice will be met, if the penalty amount is reduced from Rs.47,000/- under each Act separately for the 3rd quarter to Rs.35,000/- under each Act separately, while retaining the other penalties, which the objector is directed to deposit.

(v) That in any case imposition of heavy penalty is not justified in the facts and circumstances of the present case where the dealer is restricted due to reasonable cause to do so. In this regard appellant Ld. Counsel referred to the case of Utkal Asbestos Ltd., Vs. Sales Tax Officer, 133 STC.

(vi) That the Ld. VATO did not appreciate the fact that while filing the return the dealer does not even gain anything as the dealer is not claiming major input tax but pays output tax. The delay in filing the return is too long because of peculiar circumstances of the case being serious illness of his father and one of the directors of the company.

(vii) That as regards the levy of penalty, Circular No.Legal/2007/489 dated 30.04.2007 is worth noticing in which instructions have been

issued to the VATO/AVATO that they shall provide an opportunity to the dealer to explain the facts and grounds while framing a default assessment and penalty order u/s 86 of the DVAT Act. Further as per Circular No.1 of 2007-08 dated 14.06.2007, guidelines for framing and issuance of statutory orders/notices under the DVAT Act and in Para 7 it is clearly directed that the "the Default Assessment and Penalty Orders should be passed judiciously stating why the Default Assessment and Penalty Orders are being issued and the reason for accepting/non-accepting the version of the dealer and the reasons/basis for assuming the turnover in the Default Assessment and Penalty Orders. In the present case no order sheet is maintained nor any notice issued, leave the application of mind aside. Hence the system generated order is passed according to whims and fancies of the department which is not permissible under the law and penalty is liable to be deleted.

On the basis of above facts and grounds of appeal, it has been prayed that impugned order dated 13.06.2015 passed by Ld. OHA be set aside and present appeals be allowed.

4. Present appeals were heard on merit after compliance of order dated 16.02.2016 passed by this Tribunal u/s 76 (4) of the DVAT Act.

5. Heard to appellant's Ld. Counsel Shri Kumar Jee Bhat and Shri M.L. Garg on behalf of Revenue and perused the file and the judgments cited by appellant's Ld. Counsel in support of his arguments on the basis of which these appeals are being disposed off as follows -

6. These appeals pertain to 1st, 3rd and 4th quarter of 2013-14. Ld. VATO, Ward-100 found that appellant has filed return of 1st quarter 2013-14 late by 117 days, 3rd by 94 days and for 4th quarter by 3 days only. So penalty to the tune of Rs.10,000/- under each Act for 1st quarter and Rs.47,000/- under each Act for 3rd quarter and Rs.1,500/- under each Act for the 4th quarter was imposed, which was assailed before the Ld. OHA who partly granted the relief to the appellant in view of the peculiar facts of the present appeals and reduced the penalty amount from Rs.47,000/- to Rs.35,000/- in 3rd quarter while maintaining the penalty and upholding the penalty amount regarding 1st and 4th quarter. So appellant has challenged Ld. OHA's order before this Tribunal on the above grounds.

7. Appellant's Ld. Counsel, during the course of arguments, reiterated the above facts and requested that penalty imposed by Ld.VATO and upheld by Ld. OHA be set aside and present appeals be allowed.

8. While Ld. Counsel for the Revenue submitted that returns were filed late, so penalty was rightly imposed. So impugned order deserves no interference, hence appeals be dismissed.

9. Appellant has challenged the impugned order not only on humanitarian grounds but also on legal grounds. First Ld. Counsel for appellant challenged these orders on the ground that impugned orders are system generated. The notices issued by Ld. VATO are unsigned, so they are no orders in the eyes of law. Rather on the application of the appellant's Ld. Counsel dated 05.04.2016, concerned VATO has made an endorsement that these penalty orders are system generated orders and no order sheets have been maintained. In support of this argument, appellant's Ld. Counsel referred to the order dated 28.08.2015 passed by Hon'ble Delhi High Court in bunch of writ petitions titled "Bhumika Enterprises Vs. Commissioner, Value Added Tax in which Hon'ble Delhi High Court deprecated practice regarding system generated notices and directed that notices and orders be passed in accordance with law and should not be system generated notices or orders without human interface. So, Hon'ble High Court in the above writs, quashed these notices and orders. Revenue has not challenged this fact that in present appeals notices were not system generated and unsigned. Hence on this ground notice of penalty issued by Ld. VATO on 29.01.2014 and upheld by Ld. OHA are liable to be set aside.

10. Secondly, impugned order dated 13.06.2015 passed by Ld. OHA has also been assailed on the ground that penalty orders have been passed without giving an opportunity of hearing to the appellant. So on this ground, they are also liable to be set aside. In this regard, he referred to the case of Utkal Asbestos Ltd (supra) in which Hon'ble High Court held as follows:

> "*The question is whether penalty could have been levied without grant of opportunity, it was urged by the Ld. Counsel for the revenue that the provision nowhere stipulates for any notice. We do not find any substance in the plea. Even if, it is accepted that there is no specific requirement principles of natural justice mandate it".*

11. To substantiate his arguments, he also referred to the judgment of jurisdictional Delhi High Court in Appeal No.29/2015 Bansal Dye Chem Pvt. Ltd. Vs. Commissioner, Value Added Tax, where similar question arose and Hon'ble Delhi High Court held that penalty orders cannot be passed without giving an opportunity of hearing to the assesse. The following observations of the Hon'ble HighCourt in the above case are important for disposal of these appeals:

> "The very nature of the proceedings under section 33 of the DVAT Act read with Rule 36 (2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the Assessee an opportunity of being heard prior to passing the penalty order. The imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case. The fact that an Assessee is found liable to pay enhanced taxes and interest does not ipso facto determine whether the Assessee is also liable to pay a penalty".

12. Applying ratio of the above judgment to the facts of the present appeals, we find that Ld. VATO imposed penalty without giving an opportunity of hearing to the assesse which is clear violation of natural justice. So on this ground also impugned orders are liable to be set aside.

13. So far as humanitarian aspect and reasonableness of these orders is concerned, perusal of these orders show that when there was delay of 94 days in filing return of 3rd quarter of 2013-14, penalty of Rs.47,000/- was imposed, when there was delay of 117 days in filing return of 1st quarter, penalty of Rs.10,000/- was imposed and when there is delay of 3 days, penalty of Rs.1,500/- was imposed. No criteria for imposing penalty has been mentioned by the Ld. VATO because there was no application of mind while passing these orders. Even according to Circular No. Legal/2007/489 dated 30.04.2007, instructions have been issued to the VATOA/VATO that they shall provide an opportunity to the dealer to explain the facts and grounds while framing a default assessment and penalty order passed u/s 86 of the DVAT Act. In the present appeals there is clear violation of circular order passed by Ld. VATO and upheld by Ld. OHA.

14. On the basis of foregoing discussion and in the light of the judgment of Hon'ble Delhi High Court in Bhumika Enterprises and Bansal Dye Chem, present appeals are allowed and impugned order dated 13.06.2015 passed by Ld. Additional Commissioner are set aside.

15. Order pronounced in the open court.

16. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 293 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.364-365/ATVAT/15-16

Euro Aircon International,
A-76, DDA Shed, Okhala Indl. Area,
Phase-II, New Delhi – 110020 ... APPELLANT

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : May 11, 2016

WAIVER OF PRE-DEPOSIT – CONDITIONS TO ENTERTAINMENT OF APPEAL U/S 76(4) OF DELHI VALUE ADDED TAX – FIRST PROVISO CONFERS POWERS TO ENTERTAIN THE APPEAL WITHOUT PAYMENT OF TAX BY VAT TRIBUNAL – DEFAULT ASSESSMENT OF TAX & INTEREST AND NOTICE OF ASSESSMENT OF PENALTY ISSUED ON ACCOUNT OF MISMATCH – ITC DISALLOWED AND PASSED SYSTEM GENERATED ORDER WITHOUT GIVING OPPORTUNITY TO APPELLANT – THE APPELLANT PRODUCED COPY OF ACCOUNTS AND BANK CERTIFICATE CERTIFYING TAX MENTIONED IN BILLS HAVE BEEN DEBITED WHICH PROVED ITC WAS RIGHTLY CLAIMED – APPELLANT GOT A PRIME FACIE CASE AND BALANCE OF CONVENIENCE IN HIS FAVOUR – ORDER PASSED WITHOUT PRE-FIXING ANY CONDITION TO DEPOSIT.

Facts

Appellant was engaged in the business of air conditioning systems and was registered with Ward No. 90 since 01.04.2005 vide TIN No. 07800223326.

That the appellant purchased goods from M/s Ankit Sales Corporation a registered dealer of Ward 61 amounting to Rs. 21,51,961/- and claimed input tax credit of Rs. 1,02,617/- u/s 9(2) of DVAT Act. The said claim was disallowed as the same did not match with the output tax according to revised return of the seller though the same matched with the original return. By a system generated default assessment order tax to the tune of Rs. 1,02, 617, interest Rs. 25,387 total amount Rs. 1,28,004 was levied and penalty of Rs. 1,02,617/- vide orders dated 15.06.2015 u/s 33 read with section 86(10) of the DVAT Act, 2004 was levied.

Held

A plane reading of the assessment orders passed in the case also made it clear that these orders were also system generated. OHA in

impugned order held that ratio of judgment in Bhumica Enterprises was not applicable to the case because these orders dated 19.06.2015 were assailed and no challenge was made to the order dated 15.06.2015. It was surprising that ratio of the above case was not applied to the case on the ground that in the above case order 19.06.2015 were assailed. It was not the date of order which was important but the ratio of the case that system generated assessment order were not sustainable in law which was applicable. Appellant had also filed a copy of account of selling dealer which reflects the payment made by the appellant to the selling dealer Ankit Sales Corporation and bank certificate certifying that tax mentioned in the certificates had been debited in the account of M/s Euro Aircon International and verification which proved that ITC was rightly claimed by the appellant and which was wrongly denied by the lower authorities.

Appellant had got a prima-facie case; balance of convenience also lies in favour of the appellant at this stage hence application was disposed off without pre-fixing any condition as to deposit.

Cases Referred to:

- *Bhumica Enterprises Vs Commissioner Value Added Tax dated 28.08.2015*
- *Shanti Kiran Industries Pvt. Ltd. Vs. CTT (2013)50 DSTC J 429*

Present for the Appellant : Shri R.P. Varshney, C.A.

Present for the Respondent : Shri S.B. Jain, Govt. Counsel

ORDER

Disposal of Application u/s 76(4) of DVAT Act for stay of disputed demand of tax, interest and penalty during pendency of these appeals.

1. This order shall dispose off application for stay of disputed demand filed along with these appeals vide which impugned order dated 17.02.2016 passed by Ld. OHA (Objection Hearing Authority) have been assailed who vide this order upheld the order of assessment of tax, interest and penalty dated 15.06.2015 passed by Ld. VATO for the 2nd Qtr. of 2013-14 u/s 32 and 33 read with Section 86(10) of DVAT Act respectively

2. The brief facts of these appeals are that the appellant is engaged in the business of air conditioning systems and is registered with Ward No. 90 since 01.04.2005 vide TIN No. 07800223326.

3. That the appellant purchased goods from M/s Ankit Sales Corporation a registered dealer of Ward 61 amounting to Rs. 21,51,961/-

and claimed input tax credit of Rs. 1,02,617/- u/s 9(2) of DVAT Act. The said claim was disallowed as the same did not match with the output tax according to revised return of the seller though the same matched with the original return.By a system generated default assessment order tax to the tune of Rs. 1,02, 617, interest Rs. 25,387 total amount Rs. 1,28,004 was levied andpenalty of Rs. 1,02,617/- vide orders dated 15.06.2015 u/s 33 read with section 86(10) of the DVAT Act, 2004 was levied.

4. According to appellant a system generated order without application of mind and without affording any opportunity of being heard was challenged in objections before Ld. OHA who vide impugned order dated 17.02.2016 rejected the objections and upheld the assessment order by Ld. VATO. Ld. OHA erroneously held that opportunity of being heard before completing the assessment is not necessary. In this regard order dated 15.06.2015 are not covered by order of Hon'ble High Court of Delhi in Bhumica Enterprises Vs Commissioner Value Added Tax dated 28.08.2015 where the date of order was 19.06.2015 when issue is the same. That appellant made genuine purchases and it is in possession of tax invoice, paid purchase consideration by account payee cheques, encashed from bank supported by bank certificate and copy of account of selling dealer. In this way appellant has discharged its onus fully and does not have any mechanism to access/control over the selling dealer. Even cancellation of Registration Certificate of the selling dealer retrospectively cannot be the ground of disallowance of appellant's ITC claim. Neither the selling dealer nor his records have been summoned even on the request of the appellant and has been erroneously concluded that there is violation of the provisions of section 9(2)(g) of the Act by disregarding the verdict of Hon'ble High Court of Delhi in case of Shanti Kiran Industries Pvt. Ltd. Vs. CTT (2013)50 DSTC J 429 wherein it was held that there is no mechanism for one dealer to have access/control over the other dealer.

5. On the basis of above facts and in the light of judgementof Delhi High Court in the case of Bhumica Enterprises and Shanti Kiran Industries Case it has been submitted that appellant has got a prima-facie case. Balance of convenience also lies in favour of the appellant hence present appeal be heard on merit without fixing any pre-condition of deposit of the disputed amount in each appeal.

6. The Ld. Counsel for the revenue submitted that orders passed by lower authorities are as per law because ITC was rightly denied to the appellant as per section 9(2)(g) of the DVAT Act which mandates that purchasing dealer shall not be allowed tax credit unless the tax paid by the purchasing dealer has actually been deposited by selling dealer with

the Government. As in the present case it has not been deposited by the selling dealer so ITC was rightly disallowed. The orders passed by lower authorities are as per law hence warrant no interference.

7. We have heard to parties Ld. Counsel and have gone through the documents on record as well as grounds of appeal and are of the considered view that appellant had got a prima-facie case in the light of the judgment of Hon'ble Delhi High Court in the case of Bhumica Enterprises (Supra) in which case Hon'ble High Court observed that "a lot of confusion has been generated on account of the system generated notices issued by the DT&T. The Court notice with concern that these were not human generated and were on the face of it clearly unsustainable in law and the Court emphasis the need for human interface" while making order of assessment.

8. A plane reading of the assessment orders passed in the present case also makes it clear that these orders are also system generated. Ld. OHA in impugned order held that ratio of judgement in Bhumica Enterprises is not applicable to the present case because these orders dated 19.06.2015 were assailed and no challenge was made to the order dated 15.06.2015. It is surprising that ratio of the above case was not applied to the present case on the ground that in the above case order 19.06.2015 were assailed. It is not the date of order which is important but the ratio of the case that system generated assessment order are not sustainable in law which was applicable. Appellant has also filed a copy of account of selling dealer which reflects the payment made by the appellant to the selling dealer Ankit Sales Corporation and bank certificate certifying that tax mentioned in the certificates have been debited in the account of M/s Euro Aircon International and verification which proves that ITC was rightly claimed by the appellant and which was wrongly denied by the lower authorities.

9. In view of these facts appellant has got a prima-facie case, balance of convenience also lies in favour of the appellant at this stage hence present applicationis disposed off without pre-fixing any condition as to deposit and the case is fixed for hearing on merit on 09.06.2016.

10. Orders pronounced in the open court.

11. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

12. File be consigned to record room.

[2015] 53 DSTC 297 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Review No. 51/ATVAT/14-15 in
Appeal No. 309-312/ATVAT/14-15
Assessment period: Feb & March 2010-11
Default assessment of Tax, Interest & penalty

Malkiat Singh & Sons
No.17, JBC, G-80, Basement,
Gupta Complex, Laxmi Nagar. Delhi - 110092 ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order : June 27, 2106

REVIEW – PRESCRIBING OF A PRE-CONDITION FOR ENTERTAINMENT OF APPEAL ON MERITS U/S 76(4) OF DELHI VALUE ADDED TAX ACT – PRIMA FACIE CASE – THE PETITIONER WAS DIRECTED TO DEPOSIT RS.10000/- OF AMOUNT IN DISPUTE OF TAX & INTEREST AND RS.5000/- OF THE AMOUNT IN DISPUTE OF PENALTY – AS CONDITION PRECEDENT U/S 76(4) – THE PETITIONER HAS A STRONG PRIMA FACIE CASE AS HE CURED THE IRREGULARITY IN THE INVOICES AND WAS ENTITLED TO ITC – PROOF PRODUCED THAT THE SELLING DEALER HAD PAID DUE TAXES – THE ORDER WAS MODIFIED TO DEPOSIT A CONSOLIDATE AMOUNT RS.5000/-.

Facts

Business premises of the appellant were audited by the audit team of the Department of Trade & Taxes and the audit team pointed out that as per section 50(2)(a) of the DVAT Act, the word "tax Invoice" should be printed at a prominent place to qualify as a valid tax invoice but in the case of invoices issued by one M/s Shri Mateshwari Automotives Pvt. Ltd. did not contain the word "tax Invoice" but contained only the word "Invoice" and thus rendering them as invalid tax invoice hence disallowed the ITC and created the below mentioned demands against the appellant as under:-

Sl. No.	A.Y. 2010-11	Tax & Interest	Penalty
1	Feb	68354	58381
2	March	27837	48773

Aggrieved with the orders of the OHA upholding the default assessment of tax, interest and penalty appellant had filed appeal before the Tribunal along with applications under section 76(4) of the DVAT Act, 2004.

Application filed u/s 76(4) of the Act was disposed of by this Tribunal vide order dated 11.02.2015 prescribing a condition of deposit of Rs 10,000/- of the amount in dispute of tax and interest and Rs 5000/- of the amount in dispute of penalty in each appeal.

By filing the review petition the appellant had sought modification of the orders dated 11.02.2015 passed by this Tribunal.

Held

Section 76(4) of the Act provides that no appeal against an assessment shall be entertained unless such appeal was accompanied by satisfactory proof of payment of the amount in dispute and any other amount assessed as due. The first proviso to this section however, confers powers on the tribunal to entertain an appeal without payment of some or entire amount in dispute if it thinks fit for the reasons to be recorded in writing. Considering the provisions as contained in section 43(5) of the Delhi Sales Tax Act which is similar to the provisions as contained in section 76(4) of the DVAT Act, Hon'ble High Court of Delhi in Chetna Polycots Pvt. Ltd. Vs Appellate Tribunal sales tax 95 STC 620 held that this provisions was mandatory. Thus a suitable condition needs to be imposed before these appeals were taken up for hearing on merit.

Keeping in view the totality of facts and circumstances of the case and the ratio of the cases cited, it would be just and fair under the facts and circumstances of these appeals to direct the appellant to deposit a consolidated amount of Rs 5000/- as a condition precedent for hearing of the appeal on merits. Accordingly, the orders passed by this Tribunal on 11.02.2015 were reviewed and the condition prescribed therein was modified to the extent that the appellant shall deposit an amount of Rs 5000/- as a condition precedent for hearing of the appeal on merits.

Cases Referred to:

- *Asian Hotels Ltd. vs. MCD and Anr. reported (l588) 171 ITR 116*
- *Vijay Prakash D Mehta Vs collector of Customs (Preventive) Bombay (1989) 72 STC 324 SC.*
- *Chetna Polycots Pvt Ltd Vs Appellate Tribunal sales tax 95 STC 620*

Present for the Appellant : Shri H.L. Taneja, Advocate

Present for the Respondent : Shri C.M. Sharma, Advocate

ORDER

1. This order shall dispose of the above-noted review petition filed by the appellant M/s Malkiat Singh & Sons, seeking review of the order dated

11.02.2015 passed by this Tribunal u/s 76 (4) of the DVAT Act in the above noted appeals.

2. Facts of the case briefly stated are that business premises of the appellant were audited by the audit team of the Department of Trade & Taxes and the audit team pointed out that as per section 50(2)(a) of the DVAT Act, the word "tax Invoice" should be printed at a prominent place to qualify as a valid tax invoice but in the case of invoices issued by one M/s Shri Mateshwari Automotives Pvt Ltd did not contain the word "tax Invoice" but contained only the word "Invoice" and thus rendering them as invalid tax invoice hence disallowed the ITC and created the below mentioned demands against the appellant as under:-

Sl. No.	A.Y. 2010-11	Tax & Interest	Penalty
1	Feb	68354	58381
2	March	27837	48773

3. Aggrieved with the orders of the Ld OHA upholding the default assessment of tax, interest and penalty appellant has filed appeal before the Tribunal alongwith applications under section 76(4) of the DVAT Act, 2004. Application filed u/s 76(4) of the Act was disposed of by this Tribunal vide order dated 11.02.2015 prescribing a condition of deposit of Rs 10,000/- of the amount in dispute of tax and interest and Rs 5000/- of the amount in dispute of penalty in each appeal.

4. By filing the review petition the appellant has sought modification of the orders dated 11.02.2015 passed by this Tribunal.

5. We have heard Sh. H. L. Taneja, Adv., Ld Counsel for the Appellant and Sh. C. M. Sharma, Adv., Ld Counsel for the Revenue, perused the grounds of review, record of the case and the cited judgments.

6. Ld. counsel for the appellant praying for review of the orders has submitted that business premises of the appellant were audited by the audit team of the Department of Trade & Taxes and the audit team pointed out that as per section 50(2)(a) of the DVAT Act, the word "tax Invoice" should be printed at a prominent place to qualify as a valid tax invoice but in the case of invoices issued by one M/s Shri Mateshwari Automotives Pvt Ltd did not contain the word "tax Invoice" but contained only the word "Invoice" and thus rendering them as invalid tax invoice hence disallowed the ITC and created the demands in question, that the appellant has a strong prima facie case as the appellant cured the irregularity in the invoices issued by the selling dealer and as such the appellant was entitled to the ITC admissible under the Act.

7. Further submission made is that at the time of hearing of the case the applicant argued at length that the basis adopted by the Ld. Objection

Hearing Authority that the word “Tax Invoice” were not printed on the invoice issued by the selling dealer, and, that, this addition of the word “printed” on the Invoice was contrary to the settled principle of interpretation in taxing statutes that nothing could be added in the language of the statute, and, the courts / tribunals have to follow what actually the statute says. This apart, the Ld. OHA. did not confront the applicant with this deficiency and to this extent, his order was in breach of natural justice. That the purpose of tax invoice, is that the selling dealer will pay the tax due to the Government on the transaction of sale, on which he has allowed input tax to the purchasing dealer. The applicant, had produced before the OHA, even the proof that the selling dealer had paid due tax on the transaction of sale made to the applicant, on which ITC was allowed. That the case of the applicant, supported as it is by a number of judgments already produced and placed on record, was not a frivolous one but an arguable case and that he has a prima facie case and inadvertently an error of law has crept in the order in view of the observations of the Tribunal that the appellant does not have a prima facie case. In support of his submissions appellant has placed reliance on the decisions of AIR 1964 SC 1312 and Asian Hotels Ltd. vs. MCD and Anr. reported (I588) 171 ITR 116, Hon’ble Allahabad High Court reported, (2005) 184 ELT 347.

8. Ld Counsel for the Revenue supporting the orders passed by the Tribunal opposed the review application.

9. We have carefully considered the record of the case and the submissions made for review of the order.

10. While the Ld Counsel for the Revenue relying upon the decision of the Hon’ble Apex Court in the Northern India Caterer case has opposed the review of the orders dated 11.02.2015, Ld Counsel for the appellant has forcefully argued that the only ground for creating the demand was that the word Tax invoice was not printed on invoice issued and that appellant had got the said deficiency rectified and that no opportunity was granted to him for rectification of the mistakes as has been held by this Tribunal in number of cases and in view of these decisions he had a prima facie case in his favour and to that extent by virtue of observations of the Tribunal in para 8 of the order that the appellant does not have a prima facie case , the error that has crept into the orders deserved to be rectified by way of review.

11. In support of his contention appellant petitioner has placed reliance on the decision of the Hon’ble Delhi High Court in the case of Asian Hotels Ltd. vs. MCD and Anr. reported (I588) 171 ITR 116, wherein elaborating the term “prima facie case” it was held as under :-

> "The term "prima facie case" does not imply that the plaintiff Petitioners should have a foolproof case and the court for that would not consider the ultimate merits of the case of the plaintiff to establish a prima facie case, the plaintiff would be required to show that he has raised certain triable issues and the claim of the plaintiff is neither frivolous nor untenable nor mala fide. There should be bona fide contentions between the parties which raise serious and substantial questions to be tried at the hearing. A prima facie case would exist where substantial questions are raised bona fide which need investigation and decision."

12. Considering the facts and circumstances of the case and the decision cited by the appellant, the view held by us in stating that the Appellant did not have prima facie case was not correct and to that extent the review petition moved by the appellant has merits.

13. Coming to the issue of prescribing of a pre-condition for entertainment and hearing of the appeal on merits, appellant has drawn our attention to a decision of the Hon'ble Allahabad High Court in case reported in , (2005) 184 ELT 347, wherein the Hon'ble court observed that the court should examine whether party has shown strong prima facie case on merits then deposit of any disputed amount of tax will cause undue hardship specially when the assessee is likely to be exonerated from the said liability.

14. On the issue of pre-deposit as a condition for hearing of the appeal on merits, reference can be made to the judgements reported as Vijay Prakash D Mehta Vs collector of Customs (Preventive) Bombay (1989) 72 STC 324 SC.

15. Section 76(4) of the Act provides that no appeal against an assessment shall be entertained unless such appeal is accompanied by satisfactory proof of payment of the amount in dispute and any other amount assessed as due. The first proviso to this section however, confers powers on the tribunal to entertain an appeal without payment of some or entire amount in dispute if it thinks fit for the reasons to be recorded in writing. Considering the provisions as contained in section 43(5) of the Delhi Sales Tax Act which is similar to the provisions as contained in section 76(4) of the DVAT Act, Hon'ble High Court of Delhi in Chetna Polycots Pvt Ltd Vs Appellate Tribunal sales tax 95 STC 620 held that this provisions is mandatory. Thus in our considered view a suitable condition needs to be imposed before these appeals are taken up for hearing on merit.

16. Keeping in view the totality of facts and circumstances of the case and the ratio of the cases cited , we are of the considered view that it

would be just and fair under the facts and circumstances of these appeals to direct the appellant to deposit a consolidated amount of Rs 5000/-. as a condition precedent for hearing of the appeal on merits. Accordingly, the orders passed by this Tribunal on 11.02.2015 are reviewed and the condition prescribed therein is modified to the extent that the appellant shall deposit an amount of Rs 5000/- as a condition precedent for hearing of the appeal on merits. Appellant is given three weeks time to comply with the Condition. On submission of the proof of compliance the appeals shall be listed for hearing on merits on 31.07.2016.

17. Order pronounced in the open court.

18. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 303 – (Delhi)

BEFORE SHRI S. S. YADAV, COMMISSIONER DVAT, DELHI

No. F. 385/CDVAT/2015/433

Grindwell Norton Ltd.
33/17, Opp. B.S. Chemicals
Main Bawana Road,
Delhi-110012

Date of Order : April 13, 2016

DETERMINATION – "WHETHER THE SALE OF ALL KINDS OF SCRUB PADS / SCRUBBERS USED BY THE HOUSEHOLD FOR CLEANING THE HOUSEHOLD ITEMS IS COVERED BY ENTRY 84 OF SCHEDULE-I OF DVAT ACT AND EXEMPTED FROM VAT"

Held That

Entry 84 of Schedule-1 of the DVAT Act 2004 reads as Juna. The word juna referred to a pad made up of hairs of coconut, used for washing utensils. It was normally made up of naturally occurring fibres of coconut. The product referred by the applicant was made up of synthetic fibres i.e. non-woven web of fibre, nylon and polyester fibres. The product was different from juna and hence was not covered under the meaning of the word juna. Further the product was also not covered under entry 162 of third schedule of the DVAT Act 2004, as coated abrasives or bonded abrasives. As abrasives were used to shape or finish a thing through rubbing which leads to a part of the work piece being worn away while in the instant case the product referred to by the applicant was just used for cleaning household items. Hence the product fallen under the unspecified category and was taxable u/s 4(1) e of the DVAT Act at 12.5%.

Present for the Applicant	:	Sh. Sunil Aggarwal, Advocate
Present for the Department	:	Sh.M.K.Aggarwal, Department Representative

ORDER

The applicant dealer has filed a determination application on 02.11.2015 under Section 84 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as the "said act") and the question put up for determination under the aforesaid provision of law is as under :-

"Whether the sale of all kinds of Scrub Pads / Scrubbers used by the household for cleaning the household items is covered by Entry 84 of Schedule-I of DVAT Act and exempted from VAT"

1. The application has been filed in prescribed format DVAT-42 and the requisite fee of Rs,1000/- paid through online. reference No. 420257593731015 dated 29.10.2015 of ICICI Bank Ltd.

2. Sh. Sunil Aggarwal, Counsel of the Company, appeared and reiterated the facts and grounds of the case and requested to determine "Whether the sale of all kinds of Scrub Pads / Scrubbers used by the household for cleaning the household items is covered by Entry 84 of Schedule-I of DVAT Act and exempt from VAT".

3. The dealer is registered in Ward-206 having TIN -07810024907.

4. The brief facts of the case, as explained_by the applicant are as under :

i) That, the petitioner company is a manufacturer of various kind of abrasive products i.e. bonded abrasives, coated abrasives, non-woven abrasives etc.

ii) That, after the goods manufactured at various manufacturing units of the petitioner, the goods are directly sold to business entities all over India. The goods are also sent by the petitioner company to its various branches in India for onward sales.

iii) That, the petitioner company is also dealing with one product known as "Scrub Pads/Scrubbers" which is used by the household for all household cleaning items and is also commonly known as "Juna" in Northern India which is covered by Entry-84 of Schedule-I of DVAT Act,2004. Currently the company is selling these products directly from Bangalore on CST Basis. However, they would start stock transfer these products to Delhi to market in Delhi.

iv) That, as per the submission and nature of product "Scrub Pads/ Scrubbers" and are coated abrasives-Non-woven abrasives sold as "Juna" are covered by Entry-84 of Schedule I of the DVAT Act,2004 and are exempt from levy of tax.

5. With these averments, the applicant requested to determine the rate of VAT on Scrub Pads/Scrubbers.

6. The DR appearing on behalf of the department stated that entry 84 of schedule -1 of the DVAT Act 2004 reads as Juna. The word juna refers to a pad made up of hairs of coconut, used for washing utensils. It is normally made up of naturally occurring fibres of coconut. The product referred by the applicant is made up of synthetic fibres i.e. non-woven web of fibre, nylon and polyester fibres. The product is different from juna and hence is not covered under the meaning of the word juna. Further the product is also not covered under entry 162 of third schedule of the DVAT Act 2004, as coated abrasives or bonded abrasives. As abrasives are used to shape or finish a thing through rubbing Which leads to a part of the work piece being worn away while in the instant case the product referred to by the applicant is just used for cleaning household items. Hence the product falls under the unspecified category and is taxable u/s 4(1)e of the DVAT Act at 12.5%.

7. I have heard both the sides and gone through the documents available. on record and of the view that the product under consideration scrub pads/scrubber used for cleaning household/kitchen items is not covered under the meaning of the word juna or abrasive and hence is taxable u/s 4(1)e of the DVAT Act 2004 at 12.5%.

8. Held accordingly.

[2015] 53 DSTC 307 – (Delhi)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
[Justice A.K. Sikri and Justice R.F. Nariman]

CIVIL APPEAL NO.4149 OF 2007

Smt. B. Narasamma ... Appellant

versus

Deputy Commissioner Commercial Taxes
Karnataka & Anr. ... Respondents

WITH

CIVIL APPEAL NO.4318 OF 2007

CIVIL APPEAL NO.4319 OF 2007

CIVIL APPEAL NO. 7400 OF 2016
(ARISING OUT OF SLP (CIVIL) NO.15253 OF 2015)

CIVIL APPEAL NOS. 7401-7872 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS.18646-19117 OF 2015)

CIVIL APPEAL NOS. 7873-7916 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS.10081-10124 OF 2015)

Judgement : August 11, 2016

SPECIAL LEAVE PETITION – DECLARED GOODS SPECIFIED UNDER SECTION 14 OF CENTRAL SALES TAX ACT, 1956 – WORKS CONTRACT UNDER KARNATAKA VALUE ADDED TAX ACT – IRON AND STEEL PRODUCTS WERE UTILIZED IN EXECUTION OF WORKS CONTRACT FOR REINFORCEMENT OF CEMENT – THE IRON AND STEEL PRODUCTS BECAME PART OF PILLARS, BEAMS ETC. WHICH WERE ALL PARTS OF IMMOVABLE STRUCTURE – APPELLANT CLAIMED EXEMPTION FOR IRON AND STEEL GOODS – REVENUE ARGUED THAT THE PRODUCTS DID NOT CONTINUE AS IRON AND STEEL BUT SOMEHOW BECAME DIFFERENT GOODS AT THE POINTS OF ACCRETION AND HIGHER RATE TO BE APPLICABLE – THE APPELLANT ARGUED BEFORE THE COURT THAT IRON AND STEEL PRODUCTS CONTINUED AS DECLARED GOODS EVEN THOUGH THEY WERE USED IN A WORKS CONTRACT – THE COURT HELD THAT THE ITEM WAS NOT EXEMPT FROM TAX AND TO BE TAXED @ 4% AS IRON AND STEEL.

Facts of the Case

The appellants were engaged in the business of works contracts of fabrication and creation of doors, window frames, grills, etc. in which they claimed exemption for iron and steel goods used into the creation of these items, after which they said doors, window frames, grills, etc. were fitted into buildings and other structures.

The Court delt with the impugned judgment dated 1.9.2006 in Civil Appeal No.4318 of 2007, and judgment dated 12.8.2004 in Civil Appeal No. 4149 of 2007 in favor of Revenue, and a detailed impugned judgment which was challenged by the State of Karnataka dated 10.12.2013 in State of Karnataka and etc. v. M/s. Reddy Structures Pvt. Ltd. and etc. in Civil Appeals arising out of SLP (Civil) Nos.18646-19117/2015.

The group of appeals concerned the rate of taxability of declared goods – i.e. goods declared to be of special importance under Section 14 of the Central Sales Tax Act, 1956. The question that had to be answered in these appeals was whether iron and steel reinforcements of cement concrete that were used in buildings lose their character as iron and steel at the point of taxability, i.e., at the point of accretion in a works contract. All these appeals came from the State of Karnataka and could be divided into two groups – one group relatable to the provisions of the Karnataka Sales Tax Act, 1957 and post 1.4.2005, appeals that were relatable to the Karnataka Value Added Tax Act, 2003. The facts in these appeals were more or less similar. Iron and Steel products were used in the execution of works contracts for reinforcement of cement, the iron and steel products becoming part of pillars, beams, roofs, etc. which were all parts of the ultimate immovable structure that was the building or other structure to be constructed.

Held

Various Judgments were cited before the Court which squarely covered the case against the State, where, commercial goods without change of their identity as such, were merely subject to some processing or finishing, or were merely joined together, and therefore remain commercially the same goods which could not be taxed again, given the rigor of Section 15 of the Central Sales Tax Act. The Court failed to see how the aforesaid judgment can further carry the case of the revenue.

The Court noted that in Civil Appeal No.4318 of 2007, Larsen & Toubro Ltd. v. State of Karnataka & Another, the Appellate Tribunal had passed an order dated 11.1.2002 in which it decided the case against the assessee on the ground that since the iron and steel products went into cement concrete, they changed form, and since they changed form, they were no longer declared goods and could be taxed without the constraints mentioned in Section 15 of the Central Sales Tax Act. A Sales Tax Revision Petition filed before the High Court yielded an order dated 14.6.2007 by which the assessee was sent back to the Appellate Tribunal for rectification. This rectification petition was dismissed by an order dated 30.11.2005. A Sales

Tax Revision Petition was thereafter filed against both orders, namely, 11.1.2002 and 30.11.2005. The High Court, in the impugned judgment dated 1.9.2006, unfortunately adverted only to the rectification order dated 30.11.2005 and not to the original order of 11.1.2002 and thus dismissed the revision petition stating that no question of law arose. Ordinarily, the Court would have set aside the judgment and remanded the matter back to the High Court to determine the matter on merits, but at this point of time we find this would not serve any purpose. Instead, it was enough to set aside both the judgments impugned by the assessees, dated 1.9.2006 and 12.8.2004, in light of the law laid down in Builders Association and M/s. Gannon Dunkerley, that the declared goods in question could only be taxed at the rate of 4%.

On facts, therefore, the Court found the High Court's judgment was correct and did not need to be interfered with inasmuch as the iron and steel goods, after being purchased, were used in the manufacture of other goods, namely, doors, window frames, grills, etc. which in turn were used in the execution of works contracts and were therefore not exempt from tax.

Cases Referred to:

- *R.K. Garg vs. Union of India [(1981) 4 SCC 675*

Present for Petitioner	:	N. Venkataraman, S.K. Bagaria, K.V. Vishwanthan, Advocates
Present for Respondent	:	K.N. Bhat, Sr. Advocate

JUDGEMENT

R.F. Nariman, J.

1. Leave granted in SLP(C) Nos.15253/2015, 18646-19117/2015, 10081-10124/2015.

2. This group of appeals concerns the rate of taxability of declared goods – i.e. goods declared to be of special importance under Section 14 of the Central Sales Tax Act, 1956. The question that has to be answered in these appeals is whether iron and steel reinforcements of cement concrete that are used in buildings lose their character as iron and steel at the point of taxability, that is, at the point of accretion in a works contract. All these appeals come from the State of Karnataka and can be divided into two groups – one group relatable to the provisions of the Karnataka Sales Tax Act, 1957 and post 1.4.2005, appeals that are relatable to the Karnataka Value Added Tax Act, 2003. The facts in these appeals are more or less

similar. Iron and Steel products are used in the execution of works contracts for reinforcement of cement, the iron and steel products becoming part of pillars, beams, roofs, etc. which are all parts of the ultimate immovable structure that is the building or other structure to be constructed.

3. Before coming to the submissions of learned counsel for the parties, it is necessary to first set out the relevant provisions of the Constitution, the Central Sales Tax Act and the two Karnataka Acts in question.

4. Article 286(3) of the Constitution reads as follows:-

"Article 286. Restrictions as to imposition of tax on the sale or purchase of goods

xx xx xx

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub clause (b), sub clause (c) or sub clause (d) of clause 29 A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

5. Section 14 of the Central Sales Tax Act, insofar as it is relevant to the present case reads as follows:

"Section-14

Certain goods to be of special importance in inter-State trade or commerce.- It is hereby declared that the following goods are of special importance in inter-State trade or commerce:-

(iv) iron and steel, that is to say,-

(i) [pig iron, sponge iron and] cast iron including [ingot moulds, bottom plates], iron scrap, cost iron scrap, runner scrap and iron skull scrap;

(ii) Steel semis (ingots, slabs, blooms and billets of all qualities, shapes and sizes);

(iii) Skelp bars, tin bars, sheet bars, hoe-bar and sleeper bars;

(iv) Steel bars, rounds, rods, squares, flat, octagons and hexagons, plain and ribbed or twisted, in coil form as well as straight lengths;

(v) steel structurals (angles, joists, channels, tees, sheet piling sections, Z-sections or any other rolled sections);

(vi) sheets, hoops, strips and skelp, both black and galvanized, hot and cold rolled plain and corrugated, in all qualities, in straight lengths and in coil form, as rolled and in riveted condition;

(vii) Plates both plain and chequered in all qualities;

(viii) Discs, rings, forgings and steel castings;

(ix) Tools, alloy and special steels of any of the above categories;

(x) Steel melting scrap in all forms including steel skull, turnings and borings;

(xi) Steel tubes, both welded and seamless, of all diameters and lengths including tube fittings;

(xii) Tin-plates, both hot dipped and electrolytic and tin free plates;

(xiii) Fist plate bars, bearing plate bars, crossing sleeper bars, fish plates, bearing plates, crossing sleepers and pressed steel sleepers--heavy and light crane rails;

(xiv) Wheels, tyres, axles and wheels sets;

(xv) Wire rods and wires—rolled, drawn, galvanized, aluminized, tinned or coated such as by copper;

(xvi) Defectives, rejects, cuttings, or end pieces of any of the above categories;]

Section 15

Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.

Every sales tax law of a State shall, in so far as it imposes or authorizes the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:

The tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed [five per cent.] of the sale or purchase price thereof [***];"

6. By the 46th Amendment of the Constitution, Article 366 (29A) was added, by which it became possible by a deeming fiction to tax sale of goods involved in a works contract. Declared goods were taxable under Section 5(4) of the Act, which is set out hereunder:

"Section 5(4)

Notwithstanding anything contained in sub-section (1) or Section 5-B or Section 5-C a tax under this Act shall be levied in respect of the sale or purchase of any of the declared goods mentioned in column (2) of the Fourth Schedule at the rate and only at the point specified in the corresponding entries of columns (4) and (3) of the said Schedule on the dealer liable to tax under this Act on his taxable turnover of sales or purchase in each year relating to such goods:"

The Karnataka Sales Tax Act was amended to tax goods involved in works contracts. Taking advantage of the constitutional amendment, Section 5-B was inserted in the Karnataka Sales Tax Act, 1957. This Section reads as follows:-

"Section 5-B: Levy of tax on transfer of property in goods (whether as goods or in some other forms) involved in the execution of works contracts. Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3-C) of Section 5, but subject to sub-section (4), (5) or (6) of the said Section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column

(2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule.”

7. The Fourth Schedule of the said Act, which deals with declared goods in respect of which a single point tax is leviable under Section 5(4) reads as follows:

“Act 3 of 1983 (From 1-11-1982)

Sl No	Description of the Goods	Point of levy	Period for which applicable	Rate of Tax
	2. “Iron and steel, that is to say,-” [(a)] (i) pig iron and cast iron including ingot moulds, bottom plates	-do-	From 1-11-82	4%
	(ii) steel semis (ingots, slabs, blooms and billets of all qualities, shapes and sizes)	-do-	From 15-7-75	4%
	(iii) skelp bars, tin bars, sheet bars, hoe-bars and sleeper bars;			
	(iv) steel bars (rounds, rods, squares, flats, octagon and hexagons, plain and ribbed or twisted, in coil form as well as straight lengths);			
	(v) steel structurals (angles, joists, channels, tees, sheet piling sections, Z sections or any other rolled sections);			
	(vi) sheets, hoops, strips and skelp, both black and galvanized, hot and cold rolled, plain and corrugated, in all qualities, in straight lengths and in coil form, as rolled and in riveted condition;			
	(vii) plates both plain and chequered in all qualities;			
	(viii) discs, rings, forgings and steel castings; sales by the first or the earliest of the successive dealers in the state liable to tax under this Act.			
	(ix) tool, alloy and special steels of any of the above categories;			

	Act 30 of 1975 (15-7-75 to 31-10-82)			
	(x) steel melting scrap in All forms including steel skull turnings and borings;	-do-	15.7.75 to 31.10.82	4%

8. Similarly, the Sixth Schedule, which is to be read with Section 5-B, insofar as it is relevant, reads as under:-

Sl. No.	Description of works Contact	period for which applicable	Rate of Tax
6.	Civil works like construction of building, bridges, roads, etc.	1-4-86 to 31-3-95 1-4-95 to 31-3-91	Five per cent Eight per cent

9. Post 1.4.2005, the Karnataka Value Added Tax Act, 2003, taxed declared goods and works contracts generally as follows:-

Section 4 - Liability to tax and rates thereof.

(1) Every dealer who is or is required to be registered as specified in Sections 22 and 24, shall be liable to pay tax, on his taxable turnover,

(a) in respect of goods mentioned in,-

(i) Second Schedule, at the rate of one per cent,

(ii) Third Schedule, at the rate of four per cent in respect of goods specified in serial number 30 and five per cent in respect of other goods, and

(iii) Fourth Schedule, at the rate of twenty per cent.

(b) in respect of.-

(i) cigarettes, cigars, gutkha and other manufactured tobacco at the rate of fifteen per cent;

(ii) other goods at the rate of thirteen and one half per cent.

(c) in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract specified in column (2) of the Sixth Schedule,

subject to Sections 14 and 15 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), at the rates specified in the corresponding entries in column (3) of the said Schedule.

Third Schedule:

30. Declared goods as specified in Section 14 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956)

Sixth Schedule:

23.	All other works contracts not specified in any of the above categories including composite contracts with one or more of The above categories Fourteen and one half per cent	Fourteen and one half per cent

10. We have in the main to deal with the impugned judgment dated 1.9.2006 in Civil Appeal No.4318 of 2007, and judgment dated 12.8.2004 in Civil Appeal No. 4149 of 2007 in favour of Revenue, and a detailed impugned judgment which is challenged by the State of Karnataka dated 10.12.2013 in State of Karnataka and etc. etc. v. M/s. Reddy Structures Pvt. Ltd. and etc. etc. in Civil Appeals arising out of SLP (Civil) Nos.18646-19117/2015.

11. Shri N. Venkatraman led the arguments on behalf of the assessees, after whom Shri S.K. Bagaria, Shri K.V. Viswanathan, and some others followed. According to learned counsel, the present matter is concluded by two judgments of this Court, namely, Builders' Assn. of India v. Union of India, (1989) 2 SCC 645, and Gannon Dunkerley and Co. v. State of Rajasthan, (1993) 1 SCC 364. The detailed judgment dated 10.12.2003 correctly extracts all the relevant passages from the aforesaid judgments to reach the conclusion that under the Karnataka Value Added Tax Act, 2003, the iron and steel products that are reinforced for cement concrete used in buildings and structures, remains exactly the same goods at the point of taxability – that is, the point of accretion, and that mere cutting into different shapes and bending does not make these items lose their identity as declared goods. Therefore, according to learned counsel, only tax at the rate of 4% can be levied, and not the higher rate levied in respect of civil construction works generally. Other learned counsel more or less argued along the same lines as Shri N. Venkatraman, only adding that it cannot be said that the identity of the iron and steel goods had changed at the point of taxability, and they cited several judgments to show that mere cutting and

shaping of these products would not amount to "manufacture" and hence the very goods that were declared goods alone were taxable at the rate of 4%, both under the Karnataka Sales Tax Act as well as the Karnataka Value Added Tax Act, 2003.

12. Shri K.N. Bhat, learned senior advocate appearing on behalf of the State, relied strongly on State of Tamil Nadu v. M/s. Pyare Lal Malhotra and Others, (1976) 1 SCC 834, in order to buttress his submission that the iron and steel products did not continue as iron and steel products but somehow became different goods at the point of accretion and that, therefore, they could be taxed at the higher rate applicable to civil constructions generally. He did not dispute the law laid down in the two Supreme Court judgments cited by Shri N. Venkatraman, and very fairly submitted that if the iron and steel products continued as declared goods then even though they were in a works contract they were subject to the drill of Section 15 of the Central Sales Tax Act, and would therefore be chargeable at 4% if it were found that the said products continue to remain the same.

13. Having heard learned counsel for the parties, we are of the opinion that Shri N. Venkatraman is right. The matter is no longer res integra. Two important propositions emerge on a conjoint reading of Builders Association and M/s. Gannon Dunkerley (supra). First, that works contracts that are liable to be taxed after the 46th Constitution Amendment are subject to the drill of Article 286(3) read with Section 15 of the Central Sales Tax Act, namely, that they are chargeable at a single point and at a rate not exceeding 4% at the relevant time. Further, the point at which these iron and steel products are taxable is the point of accretion, that is, the point of incorporation into the building or structure.

14. The relevant paragraphs from these two decisions, therefore, need to be set out. In Builders Association (supra), this Court held:

> "We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution. [para 32] In Benjamin's Sale of Goods (3rd Edn.) in para 43 at p. 36 it is stated thus:

"Chattel to be affixed to land or another chattel.— Where work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale. Sometimes, however, there may instead be a sale of an article with an additional and subsidiary agreement to affix it. The property then passes before the article is affixed, by virtue of the contract of sale itself or an appropriation made under it."

In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.

The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials.

We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366(29-A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of Article 366 is to be found only in entry 54 and not outside it. We may recapitulate here the observations of

the Constitution Bench in the case of Bengal Immunity Company Ltd. [AIR 1955 SC 661 : (1955) 2 SCR 603 : (1955) 6 STC 446] in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under entry 54 of the State List.

We, therefore, declare that sales tax laws passed by the legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of "works contracts". The case-book is full of the illustrations of the infinite variety of the manifestation of "works contracts". Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the State as are applicable to "works contracts" represented by "building contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366(29-A), would equally apply to other species of "works contracts" with the requisite situational modifications." (Paras 38-41)

In M/s. Gannon Dunkerley (supra), this Court held:

"Apart from the limitations referred to above which curtail the ambit of the legislative competence of the State Legislatures, there is clause (3) of Article 286 which enables Parliament to make a law placing restrictions and conditions on the exercise of the legislative power of the State under Entry 54 in State List in regard to the system of levy, rates and other incidents of tax. Such a law may be in relation to (a) goods declared by Parliament by law to be of special importance in inter-State trade or commerce, or (b) to taxes of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366. When such a law is enacted by Parliament the legislative power of the States under Entry 54 in State List has to be exercised subject to the restrictions and conditions specified in that law. In exercise of the power conferred by Article 286(3) (a) Parliament has enacted Sections 14 and 15 of the Central Sales

> Tax Act, 1956. No law has, however, been made by Parliament in exercise of its power under Article 286(3)(b).
>
> For the same reasons Sections 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under Entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in the said provisions in respect of goods that have been declared to be of special importance in inter-State trade or commerce.
>
> So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in Section 15 of the Central Sales Tax Act.
>
> Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b)." [paras 31, 37, 41 and 45]

15. At this juncture, it is important to note the fact situation in a typical case before us. The Karnataka Appellate Tribunal in an order dated 18.10.2010 in Civil Appeals arising out of SLP(C) Nos. 18646-19117 of 2015 narrates the factual position thus:

> "Different types of steel bars/ rods of different diameters are used as reinforcement (like TMT bars, CTD bars etc). The reinforcement bars/ rods need to be bent at the ends in a particular fashion to withstand the bending moments and flexural shear. The main

reinforcement bars/ rods have to be placed parallely along the direction of the longer span. The diameters of such main reinforcement rods/bars and the distance between any two main reinforcement bars/rods is calculated depending on the required loads to be carried by the reinforced cement concrete structure to be built based on various engineering parameters. At right angles to the main reinforcement bas/rods, distribution bars/rods of appropriate lesser diameters are placed and the intersections between the distribution bars/rods and main reinforcement bars/ rods are tied together with binding wire. The tying is not for the purposes of fabrication but is to see that the iron bars or rods are not displaced during the course of concreting from the assigned positions as per the drawings. Welding of longitudinal main bars and transverse distribution bars is not done. In fact, welding is contra-indicated because it imparts too much rigidity to the reinforcement which hampers the capacity of the roof structure to oscillate or bend to compensate varying loads on the structure besides welding reduces the cross section of the bars/ rods weakening their tensile strength. The reinforcements are placed and tied together in appropriate locations in accordance with the detailed principles and drawings found in standard bar bending schedules which lay down the exact parameters of interspaces between bars/ rods, the required diameters of the steel reinforcement bars/ rods and contain the required engineering drawings for placement of bars in a particular manner. The placement of reinforcement bars/ rods for different structures is done under the supervision of qualified bar tenders and site engineers who are well versed with the engineering aspects related to steel reinforcement for creating reinforced cement concrete of desired load bearing capacities.

The appellant company has submitted general photographs showing the progress of the work of placement and binding of reinforcement bars/ rods at its work sites. The said photographs also establish the correctness of the aforesaid findings relating to placement and binding together of steel reinforcement bars/ rods before such bars/ rods are embedded in cement concrete mixtures. In another case in STA No.1328/2008 decided by this Tribunal on 10.2.2009 (in the case of Sri J. Bhaskar Rao) which is relied on by the appellant, in the agreement between the Government of Karnataka, Minor Irrigation Department and the said appellant (who was a civil contractor engaged in the civil construction activity), specification for placement and binding together of reinforcement bars/ rods were stipulated by the Government of Karnataka as follows:

> "Reinforcing steel shall conform accurately to the dimensions given in the bar bending schedules shown on the relevant drawings. Bars shall be bent cold to the specific shape and dimensions or as directed by the Engineer in-charge using a proper bar bender, operated by hand or power to attain proper radii of bends."
>
> **"PLACING OF REINFORCEMENTS:**
>
> All reinforcement bars shall be accurately placed in exact position shown on the drawings and shall be securely held in position during placing of concrete by annealed binding wire not less than 1mm. in size and conforming to IS;280, and by using stays, blocks or metal chairs, spacers, metal hangers, supporting wires or other approved devices at sufficiently close intervals. Bars will not be allowed to end between supports not displaced during concreting or any other operation over the work …. As far as possible, bars of full length shall be used. In case this is not possible, overlapping bars shall not touch each other, but be kept apart by 25mm, or 1 (1/4) times the maximum size of the coarse aggregate whichever is greater, by concrete between them. Where not feasible, overlapping bars shall be bound with annealed steel wire, not less than, 1mm. thickness twisted tight. The overlaps shall be staggered for different bars and located at points along the span where neither shear nor bending moment is maximum."

The above specification which are standard for all civil construction works also confirms the correctness of the findings recorded by us supra. Welding of bars/ rods reduces their cross section and to that extent decreases the tensile strength of the reinforcement bars/ rods defeating the very purpose of steel reinforcement in cement concrete. When bars/ rods are just joined together loosely by the use of binding wires, the elasticity of the steel bar/ rod is in no way hampered and each reinforcement bar/ rod acts independently. By the combined action of the main reinforcement bars/ rods and the distribution bars/ rods, the reinforced cement structures like roofs act as a rigid diaphragm whose elements displace equally in the direction of the applied in-plane loads.

From the above discussion it is clear that largely in building construction works, no pre-fabrication of any steel structure is

> done before embedding them in cement concrete mixture to form reinforced cement concrete structures. The findings of the lower authorities to the contrary effect in the cases on hand are entirely opposed to facts.
>
> The only process to which the steel reinforcement rods/ bars are subjected to before being embedded with cement concrete mixture is bending at its ends after cutting of steel rods/ bars to the required size and tying them at the intersections with binding wire. None of these processes constitute a manufacturing process and no new commodity is produced before incorporation into the works."

16. Given this factual scenario, Shri K.N. Bhat referred to the judgment in State of Tamil Nadu v. M/s. Pyare Lal Malhotra and Others, (1976) 1 SCC 834, and relied on paragraphs 9 and 10 of this judgment which read as follows:

> "If the object was to make iron and steel taxable as a substance, the entry could have been: "Goods of Iron and Steel". Perhaps even this would not have been clear enough. The entry, to clearly have that meaning, would have to be: "Iron and Steel irrespective of change of form or shape or character of goods made out of them". This is the very unusual meaning which the respondents would like us to adopt. If that was the meaning, sales tax law itself would undergo a change from being a law which normally taxes sales of "goods" to a law which taxes sales of substances, out of which goods are made. We, however, prefer the more natural and normal interpretation which follows plainly from the fact of separate specification and numbering of each item. This means that each item so specified forms a separate species for each series of sales although they may all belong to the genus: "Iron and Steel". Hence, if iron and steel "plates" are melted and converted into "wire" and then sold in the market, such wire would only be taxable once so long as it retains its identity as a commercial goods belonging to the category "wire" made of either iron or steel. The mere fact that the substance or raw material out of which it is made has also been taxed in some other form, when it was sold as a separate commercial commodity, would make no difference for purposes of the law of sales tax. The object appears to us to be to tax sales of goods of each variety and not the sale of the substance out of which they are made.
>
> As we all know, sales tax law is intended to tax sales of different commercial commodities and not to tax the production or manufacture

of particular substances out of which these commodities may have been made. As soon as separate commercial commodities emerge or come into existence, they become separately taxable goods or entities for purposes of sales tax. Where commercial goods, without change of their identity as such goods, are merely subjected to some processing or finishing or are merely joined together, they may remain commercially the goods which cannot be taxed again, in a series of sales, so long as they retain their identity as goods of a particular type." [paras 9 and 10]

17. Given the fact situation in these appeals, it is obvious that paragraph 10 of this judgment squarely covers the case against the State, where, commercial goods without change of their identity as such, are merely subject to some processing or finishing, or are merely joined together, and therefore remain commercially the same goods which cannot be taxed again, given the rigor of Section 15 of the Central Sales Tax Act. We fail to see how the aforesaid judgment can further carry the case of the revenue.

18. We may note that in Civil Appeal No.4318 of 2007, Larsen & Toubro Ltd. v. State of Karnataka & Another, the Appellate Tribunal had passed an order dated 11.1.2002 in which it decided the case against the assessee on the ground that since the iron and steel products went into cement concrete, they changed form, and since they changed form, they were no longer declared goods and could be taxed without the constraints mentioned in Section 15 of the Central Sales Tax Act. A Sales Tax Revision Petition filed before the High Court yielded an order dated 14.6.2007 by which the assessee was sent back to the Appellate Tribunal for rectification. This rectification petition was dismissed by an order dated 30.11.2005. A Sales Tax Revision Petition was thereafter filed against both orders, namely, 11.1.2002 and 30.11.2005. The High Court, in the impugned judgment dated 1.9.2006, unfortunately adverted only to the rectification order dated 30.11.2005 and not to the original order of 11.1.2002 and thus dismissed the revision petition stating that no question of law arose. Ordinarily, we would have set aside the judgment and remanded the matter back to the High Court to determine the matter on merits, but at this point of time we find this would not serve any purpose. Instead, it is enough to set aside both the judgments impugned by the assessees, dated 1.9.2006 and 12.8.2004, in light of the law laid down in Builders Association and M/s. Gannon Dunkerley (supra), and declare that the declared goods in question can only be taxed at the rate of 4%.

19. In the State Appeals, we find that the lead impugned judgment in Civil Appeals arising out of SLP(C) Nos.18646-19117 of 2015 dated 10.12.2013

is an exhaustive judgment which has considered not only the facts in great detail but also the law laid down by the Supreme Court. We affirm the said judgment and dismiss the appeals of the State of Karnataka.

Civil Appeal No.4319 of 2007

M/s. Ananth Engineering Works v. State of Karnataka

20. This appeal is by the assessee from a judgment dated 26.10.2006 allowing a revision against the Appellate Tribunal's order dated 19.1.2006. In this appeal, we are concerned with Rule 6(4)(m) of the Karnataka Sales Tax Rules, 1957.

"Rule 6(4):

6. DETERMINATION OF TOTAL AND TAXABLE TURNOVER:

(1)…….

…….

(4) In determining the table turnover, the amount specified in clause (a) to (p) shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer as determined under clauses (a) to (e) of sub-Rule (1).

(a)…..

(b)….

…..

(m) In the case of works contract specified in Serial Numbers 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 17, 26, 27, 35, 36, 40 and 42 of the Sixth Schedule;

(i) all amounts received or receivable in respect of goods other than the goods taxable under sub-section (1-A) or (1-B) or Section 5 which are purchased form registered dealers liable to pay tax under the Act and used in the execution of works contract in the same form in which such goods are purchased.

(ii) ……

……. EXPLANATION-III For the purpose of sub-rule

(4), the expression ‘in the same form’ used in sub-clause (i) of clause (m) shall not include such goods which, after being purchased, are either consumed or used in the manufacture of other goods which in turn are used in the execution of works contract.”

21. On facts in this case, it has been found that the appellant is engaged in works contracts of fabrication and creation of doors, window frames, grills, etc. in which they claimed exemption for iron and steel goods that went into the creation of these items, after which the said doors, window frames, grills, etc. were fitted into buildings and other structures. On facts, therefore, we find that the High Court’s judgment is correct and does not need to be interfered with inasmuch as the iron and steel goods, after being purchased, are used in the manufacture of other goods, namely, doors, window frames, grills, etc. which in turn are used in the execution of works contracts and are therefore not exempt from tax.

22. The appeal of the assessee is therefore dismissed.

[2015] 53 DSTC 326 – (Delhi)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
[Justice A.K. Sikri and Justice R.F. Nariman]

CIVIL APPEAL NOS. 8070-8073 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 34023-34026/2013)

Jayam & Co. Appellant(S)

Versus

Assistant Comnmissioner & Anr. Respondent(S)

With

CIVIL APPEAL NOS. 8074-8075 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 34960-34961/2013)

CIVIL APPEAL NOS. 8076 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 34964/2013)

CIVIL APPEAL NOS. 8077-8078 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 34966-34967/2013)

CIVIL APPEAL NOS. 8079-8082 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 35499-35502/2013)

CIVIL APPEAL NOS. 8083-8086 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 35563-35566/2013)

CIVIL APPEAL NOS. 8087-8089 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 35824-35826/2013)

CIVIL APPEAL NOS. 8090-8093 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 36075-36078/2013)

CIVIL APPEAL NOS. 8094-8099 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 36670-36675/2013)

CIVIL APPEAL NO. 8100 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 259/2014)

CIVIL APPEAL NOS. 8105-8114 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 830-839/2014)

CIVIL APPEAL NOS. 8115-8116 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 1576-1577/2014)

CIVIL APPEAL NO. 8117 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 3958/2014)

CIVIL APPEAL NO. 8118 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 4044/2014)

CIVIL APPEAL NOS. 8119-8122 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 13234-13237/2014)

CIVIL APPEAL NOS. 8123 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 22464/2014)

CIVIL APPEAL NOS. 8124 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 22465/2014)

CIVIL APPEAL NOS. 8125-8126 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 24275-24276/2014)

CIVIL APPEAL NOS. 8127-8131 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 24270-24274/2014)

CIVIL APPEAL NOS. 8132-8134 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 19860-19862/2014)

CIVIL APPEAL NOS. 8135-8138 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 1728-1731/2015)

CIVIL APPEAL NOS. 8139-8141 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 1683-1685/2015)

CIVIL APPEAL NO. 8142 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 28989/2014)

CIVIL APPEAL NO. 8143 OF 2016
(ARISING OUT OF SLP (CIVIL) NO. 27134/2014)

CIVIL APPEAL NOS. 8144-8146 OF 2016
(ARISING OUT OF SLP (CIVIL) NOS. 28986-28988/2014)

Date of Judgement : 5 August, 2016

SPECIAL LEAVE PETITION – CONSTITUTIONAL VALIDITY OF AMENDMENT MADE UNDER SECTION 19(20) OF TAMIL NADU VAT ACT WITH RETROSPECTIVELY EFFECT– QUESTION OF RETROSPECTIVITY – THE PETITIONER ARGUED THAT NEWLY INSERTED PROVISION WAS CONFISCATORY IN NATURE AS WELL AS UNREASONABLE AND ARBITRARY THEREFORE VIOLATIVE OF ARTICLE 14 AND 19(1)(G) OF THE CONSTITUTION – HIGH COURT BY A WELL REASONED AND DETAILED JUDGMENT RIGHTLY REJECTED THE CONTENTION OF THE PETITIONER RELATING TO VIRES OF SECTION 19(20) – LEAVE IN THE SPECIAL LEAVE PETITION WAS GRANTED ONLY TO LIMITED EXTENT FOR THE QUESTION OF RETROSPECTIVITY – THE HIGH COURT HAD PRIMARILY GONE BY THE FACT THERE WAS NO UNFORESEEN OR UNFORESEEABLE FINANCIAL BURDEN IMPOSED FOR THE PAST PERIODS ON THE DEALERS – OBSERVATION OF HIGH COURT WAS NOT CORRECT – THIS WAS CLEARLY A PROVISION WHICH WAS MADE FOR THE FIRST TIME TO THE DETRIMENT OF THE DEALERS – SUCH A PROVISION THEREFORE, CANNOT HAVE RETROSPECTIVE EFFECT. THE COURT SET ASIDE AND STRUCK DOWN AMENDMENT ACT 22 OF 2010 RELATING TO RETROSPECTIVE EFFECT FROM 01.01.07.

Facts

The appellants were 'dealers' and registered as such under the provisions of Tamil Nadu VAT Act dealt in electronic home appliances. They purchased appliances from local registered dealer on payment of VAT under the VAT invoice issued by the vendors. Thereafter, the appellant re-sold to consumers under VAT invoice charging appropriate VAT on their selling price. It had purchased LCD Televisions from M/s. LG Electronics Private Limited for re-sale. The vendors, i.e., M/s. LG Electronics had charged VAT on the selling price, as per the VAT invoice issued by M/S. LG Electronics to the dealers. Based on the price shown in the invoice, VAT was paid. Under the scheme of VAT was paid by the dealer, the dealer was entitled to avail Input Tax Credit, i.e., he was entitled to get the credit of the VAT which was paid by the dealer to M/s. LG Electronics on purchase of these T.V. sets from the said vendors.

It so happened that after the original tax invoice and availing ITC, the vendor had given discount and purchase credit note was issued for a lesser price. The dealer took into account the price it paid to M/s. LG Electronics after adjusting the discount that was subsequently given to the dealer to arrive at net cost and adding VAT which was limited to the vendors by the dealer, the goods were re-sold at a lesser price. This was illustrated before us in the following manner:

PURCHASE DETAILS

S. No.	Description	Price (Rs.)	VAT (10%) Rs.)
1.	As per Tax Invoice of the Seller	100	10
2.	Less: Discount actually allowed by seller under its applicable incentive/ discount scheme by issuing credit note.	10	
	Net purchase price after discount	90	

SALE DETAILS

S. No.	Description	Amount (Rs.)
1.	Sale Price	95
2.	VAT actually on the sale price @ 10%	9.50

From the aforesaid, it was clear that the dealer had paid to the vendor VAT OF Rs. 10/-. However, at the time of re-sale VAT actually allowed was Rs. 9.50. That was the effect of sub-section (20) of Section 19, which reads as under:

> "S.19 (20) Notwithstanding anything contained in this section, Where any registered dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed."

Held

Certain parameters laid down by the Court in testing validity of retrospective operation of fiscal laws, the Court found that the amendment in-question failed to meet these tests. The High Court had primarily gone by the fact that there was no unforeseen or unforeseeable financial burden imposed for the last period. That was not correct. Moreover, as can be seen, sub-section (20) of Section 19 was altogether new provision introduced for determining the input tax in specified situation, i.e., where goods were sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was entirely different before this amendment. In this example, which had been given by the Court in the earlier part of the judgment, 'dealer' was entitled to ITC of Rs. 10/- on re-sale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of Section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs. 9.50. This was clearly a provision which was made for the first time to the detriment of the dealers. Such a provision, therefore, could not have retrospective effect, more so, when vested right had accrued in favor of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, set aside and struck down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from January 01, 2007.

JUDGMENT

A.K. SIKRI, J.

Leave granted.

2. We have heard the matter in detail finally at this stage on all issues that are raised. We are of the opinion that special leave petitions need to

be granted only on the issue as to whether sub-section (20) of Section 19 of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as 'VAT Act') could be given retrospective effect.

3. All these appeals arise out of common judgment dated July 17, 2013 rendered in batch of writ petitions. In the writ petitions filed by the appellants (hereinafter referred to as 'dealers'), vires of newly inserted sub-section (20) of Section 19 of the VAT Act, vide amendment brought by Amendment Act 22 of 2013 were challenged. This provision though came into force on August 19, 2010, by the aforesaid Amendment Act, was given retrospective effect from January 01, 2007 by Tamil Nadu Value Added Tax (Special Provision) Act, 2010 (hereinafter referred to as 'Act, 2010'). The retrospectivity of the provision was also questioned by the dealers. The dealers had argued that this provision is confiscatory in nature as well as unreasonable and arbitrary and is, therefore, violative of Article 14 and 19(1)(g) of the Constitution and repugnant to the general scheme of the charging provisions of Section 3(2) and 3(3) of the VAT Act. On both the counts, the dealers' challenge has been repelled by the High Court vide impugned judgment July 17, 2013.

4. We have heard learned counsel for the parties at length. Before us, Mr. Bagaria, learned senior counsel appearing for the dealers in some of these appeals had also argued that even if the aforesaid provision was valid, it was not properly interpreted by the High Court. We have considered this additional submission as well. We may record, at the outset, that insofar as this submission based on interpretation of this provision as well as challenge laid to the constitutional validity of the said provision are concerned, we do not find any merit therein and are of the opinion that the High Court by a well-reasoned and detailed judgment rightly rejected these contentions. It is because of this reason that leave in the special leave petitions is granted only to limited extent as indicated in the beginning of this order. However, before coming to the issue of retrospectivity, we would delve into these two aspects briefly as that discussion would be required in order to understand the question of retrospectivity.

5. The appellants are 'dealers' and registered as such under the provisions of VAT Act. For example, the appellant in Civil Appeal No. 24023-26 of 2013 deals in electronic home appliances. It purchases appliances from local registered dealers on payment of VAT under the VAT invoice issued by the vendors. Thereafter, the appellant re-sells to consumers under VAT invoice charging appropriate VAT on their selling price. It had purchased LCD Televisions from M/s. LG Electronics Private Limited for re-sale. The vendors, i.e., M/s. LG Electronics had charged VAT on the

selling price, as per the VAT invoice issued by M/s. LG Electronics to the dealers. Based on the price shown in the invoice, VAT was paid. Under the scheme of VAT Act, as would be seen hereinafter, on re-sale when the VAT is paid by the dealer, the dealer is entitled to avail Input Tax Credit (for short, 'ITC'), i.e., he is entitled to get the credit of the VAT which was paid by the dealer to M/s. LG Electronics on purchase of these T.V. sets from the said vendors.

6. It so happened that after the original tax invoice and availing ITC, the vendor had given discount and purchase credit note was issued for a lesser price. The dealer took into account the price it paid to M/s. LG Electronics after adjusting the discount that was subsequently given to the dealer to arrive at net cost and adding VAT which was limited to the vendors by the dealer, the goods were re-sold at a lesser price. This is illustrated before us in the following manner:

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7. From the aforesaid, it is clear that the dealer had paid to the vendor VAT of Rs. 10/-. However, at the time of re-sale VAT actually allowed was Rs. 9.50. That is the effect of sub-section (20) of Section 19, which reads as under:

> "S. 19(20) Notwithstanding anything contained in this section, where any registered dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed."

8. First submission of the dealer was that the price could not have been taken as per the tax invoice but net price at which it was ultimately purchased after discount should have been taken. In the given illustration, it was Rs. 90/-. On this basis, argument raised on interpretation was that since the goods were purchased at Rs. 90/- and sold at Rs. 95/-, sub-section (20) of Section 19 had no application at all. Detail submissions were made with reference to the provisions of Sale of Goods Act to buttress the submission that net purchase price would be the “price” of goods. However, according to the Revenue, purchase price had to be taken as Rs. 100/-, as mentioned in the original tax invoice, without deducting the discount of Rs. 10/- allowed by the issuing of credit note. On this basis, the Revenue took the decision that since the goods were purchased at Rs. 100/- but sold at Rs. 95/- (Section 19(20) became applicable). The High Court has accepted the contention of the Revenue. As mentioned above, detailed reasons in this behalf are given. Suffice it to state that as per the scheme of the VAT Act itself, it is the price as per the tax invoice which has to be taken into consideration. In view of this Specific Statutory Scheme, general principles laid down in the Sale of Goods Act would not be applicable.

9. We may mention that Section 19 deals with ITC and this Section is to be understood keeping in view the entire scheme of the VAT Act. VAT Act, obviously, deals with payment of value added tax on the goods sold by the dealers. It is not necessary to go into definitions of various expressions like ‘business’, ‘dealer’, ‘goods’, ‘sale’, ‘turnover’ etc. Since we are concerned with grant of ITC, we would reproduce the definitions of those expressions which are relevant for this purpose. These are:

> “S. 2(24) “input tax” means the tax paid or payable under this Act by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business.
>
> S. 2(36) “tax invoice” means an invoice issued by a registered dealer who sells taxable goods to another registered dealer in the State showing the tax charged separately and containing such details as may be prescribed.
>
> S. 2(41) “turnover” means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (33), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea and rubber (natural rubber latex and all varieties and grades of raw rubber)

grown within the State by himself or on any land in which he has an interest whether as owner, unsufructuary mortgage, tenant or otherwise, shall be excluded from his turnover.

Explanation I: "Agricultural or horticultural produce" shall not include such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading, sorting or dying;

Explanation II: Subject to such conditions and restrictions, if any, as may be prescribed in this behalf-

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time or,or before the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover;

Explanation III: Any amount, realised by a dealer by way of sale of his business as a whole, shall not be included in the turnover;

Explanation IV: Any amount, charged by a dealer by way of tax separately without including the same in the price of the goods sold, shall not be included in the turnover"

10. After giving the definitions of various terms under Section 2, Sections 3 to 12 deal with levy of taxes on various kinds of transactions. For example, Section 3 deals with levy of taxes on sale of goods; Section 4 talks about levy of taxes on transfer of right to make use of any goods for any purpose and Section 5 prescribes the levy of tax on transfer of goods involved in works contract. From Section 13 onward, some concessions/ deductions are allowed. Section 13 deals with deduction of tax at source in works contract. Section 14 is about the reversal of tax credit. Likewise, Section 15 deals with those sales which are exempted from tax. In this scheme of deductions and concessions comes Section 19 which allows grant of ITC. Pertinently, however, scrutiny of this provision reveals that ITC is not allowed on all kinds of transactions. On certain types of sales, no ITC is admissible at all. Nature of those sales where ITC is inadmissible is stipulated in sub-sections (5) to (9) of Section 19. For understanding this pertinent aspect of the scheme, at this juncture, we reproduce Section 19 in its entirety as under:

"Input tax credit

(1) There shall be input tax credit of the amount of tax paid or payable under this Act, by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule:

PROVIDED that the registered dealer, who claims input tax credit, shall establish that the tax due on such purchases has been paid by him in the manner prescribed.

(2) Input tax credit shall be allowed for the purchase of goods made within the State from a registered dealer and which are for the purpose of-

(i) re-sale by him within the State; or

(ii) use as input in manufacturing or processing of goods in the State; or

(iii) use as containers, labels and other materials for packing of goods in the State; or

(iv) use as capital goods in the manufacture of taxable goods;

(v) sale in the course of inter-State Tax Act, 1956 (Central Act 74 of 1956);

(vi) agency transactions by the principal within the State in the manner as may be prescribed.

3(a) Every registered dealer, in respect of purchases of capital goods, for use in the manufacture of taxable goods, shall be allowed input tax credit in the manner prescribed.

(b) Deduction of such input tax credit shall be allowed only after the commencement of commercial production and over a period of three years in the manner as may be prescribed. After the expiry of three years, the unavailed input tax credit shall lapse to Government.

(c) Input tax credit shall be allowed for the tax paid under section 12 of the Act, subject to clauses (a) and (b) of this sub-section.

(4) Input tax credit shall be allowed on tax paid or payable in the State on the purchase of goods, in excess of three percent of tax relating to such purchases subject to such conditions as may be prescribed,—

(i) for transfer to a place outside the State otherwise than by way of sale; or

(ii) for use in manufacture of other goods and transfer to a place outside the State, otherwise than by way of sale:

PROVIDED that if a dealer has already availed input tax credit there shall be reversal of credit against such transfer.

(5) (a) No input tax credit shall be allowed in respect of sale of goods exempted under section 15

(b) No input tax credit shall be allowed on tax paid or payable in other States or Union Territories on goods brought into this State from outside the State.

(c) No input tax credit shall be allowed on the purchase of goods sold as such or used in the manufacture of other goods and sold in the course of inter-State trade or commerce falling under sub-section (2) of section 8 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956).

(6) No input tax credit shall be allowed on purchase of capital goods, which are used exclusively in the manufacture of goods exempted under section 15.

Provided that on the purchase of capital goods which are used in the manufacture of exempted goods and taxable goods, in put tax credit shall be allowed to the extent of its usage in the manufacture of taxable goods in the manner prescribed.

(7) No registered dealer shall be entitled to input tax credit in respect of—

(a) goods purchased and accounted for in business but utilised for the purpose of providing facility to the proprietor or partner or director including employees and in any residential accommodation; or

(b) purchase of all automobiles including commercial vehicles, two wheelers and three wheelers and spare parts for repair and maintenance thereof, unless the registered dealer is in the business of dealing in such automobiles or spare parts; or

(c) purchase of air-conditioning units unless the registered dealer is in the business of dealing in such units.

(8) No input tax credit shall be allowed to any registered dealer in respect of any goods purchased by him for sale but given away by him by way of free sample or gift or goods consumed for personal use.

(9) No input tax credit shall be available to a registered dealer for tax paid or payable at the time of purchase of goods, if such-

(i) goods are not sold because of any theft, loss or destruction, for any reason, including natural calamity. If a dealer has already availed input tax credit against purchase of such goods, there shall be reversal of tax credit; or

(ii) inputs destroyed in fire accident or lost while in storage even before use in the manufacture of final products; or

(iii) inputs damaged in transit or destroyed at some intermediary stage of manufacture.

(10) (a) The registered dealer shall not claim input tax credit until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from whom the goods are purchased, containing such particulars, as may be prescribed, of the sale evidencing the amount of input tax.

(b) If the original tax invoice is lost, input tax credit shall be allowed only on the basis of duplicate or carbon copy of such tax invoice obtained from the selling dealer subject to such conditions as may be prescribed.

(11) In case any registered dealer fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year

or before ninety days from the date of purchase, whichever is later.

(12) Where a dealer has availed credit on inputs and when the finished goods become exempt, credit availed on inputs used therein, shall be reversed.

(13) Where a registered dealer without entering into a transaction of sale, issues an invoice, bill or cash memorandum to another registered dealer, with the intention to defraud the Government revenue, the assessing authority shall, after making such enquiry as it thinks fit and giving a reasonable opportunity of being heard, deny the benefit of input tax credit to such registered dealer who has claimed input tax credit based on such invoice, bill or cash memorandum from such date.

(14) Where the business of a registered dealer is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the registered dealer shall be entitled to transfer the input tax credit lying unutilized in his accounts to such sold, merged, amalgamated, leased or transferred concern. The transfer of input tax credit shall be allowed only if the stock of inputs, as such, or in process, or the capital goods is also transferred to the new ownership on which credit has been availed of are duly accounted for, subject to the satisfaction of the assessing authority.

(15) Where a registered dealer has purchased any taxable goods from another dealer and has availed input tax credit in respect of the said goods and if the registration certificate of the selling dealer is cancelled by the appropriate registering authority, such registered dealer, who has availed by way of input tax credit, shall pay the amount availed on the date from which the order of cancellation of the registration certificate takes effect. Such dealer shall be liable to pay, in addition to the amount due, interest at the rate of two per cent, per month, on the amount of tax so payable, for the period commencing from the date of claim of input tax credit by the dealer to the date of its payment.

(16) The input tax credit availed by any registered dealer shall be only provisional and the assessing authority is empowered to revoke the same if it appears to the assessing authority to be incorrect, incomplete or otherwise not in order.

(17) If the input tax credit determined by the assessing authority for a year exceeds tax liability for that year, the excess may be adjusted against any outstanding tax due from the dealer.

(18) The excess input tax credit, if any, after adjustment under sub-section (17), shall be carried forward to the next year or refunded, in the manner, as may be prescribed.

(19) Where any registered dealer has availed input tax credit and has goods remaining unsold at the time of stoppage or closure of business, the amount of tax availed shall be reversed on the date of stoppage or closure of such business and recovered.

(20) Not withstanding any thing contained in this section, where any registered dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed. "

11. From sub-section (10) onwards, provisions are made to follow the procedure and fulfill the requisite conditions for availing ITC. For the purposes of this particular issue, sub-section (10) is the material provision. This provision, which is couched in negative terms, categorically stipulates that such ITC would be admissible to the registered dealer and he would not be entitled to claim this credit 'until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from where the goods are purchased Further, such original tax invoice should evidence the amount of input tax. So much so, even if the original tax invoice is lost, the obligation cast on the registered dealer is to obtain duplicate or carbon copy of such tax invoice from the selling dealer and only then input tax is allowed.

From the aforesaid scheme of Section 19 following significant aspects emerge:-

(a) ITC is a form of concession provided by the Legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned in this Section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax.

12. It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the 'dealers' to get the benefit of ITC but its a concession granted by virtue of Section 19. As a fortiorari, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect do hors the issue of ITC as per the Section 19 of the VAT Act, possibly the arguments of Mr. Bagaria would have assumed some relevance. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the plain language of sections of the VAT Act, read along with other provisions of the said Act as referred to above.

13. For the same reasons given above, challenge to constitutional validity of sub-section (20) of Section 19 of VAT Act has to fail. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act. That apart, we find that there were valid and cogent reasons for inserting Section 19(20). Main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax. High Court has discussed this aspect in detail and our task would be accomplished in reproducing those paras as we are concurring with the discussion:

"64. Let us now point out the background/reasons for inserting Section 19(20) by Amendment Act 22 of 2010, by referring to the Chart, the sample instance is detailed in the Chart in paragraph (34). Let us recapitulate the entries in the Chart. Based on the sale price, i.e., Rs. 36,780/- in the tax invoice, an amount of Input Tax Credit, i.e., Input Tax Credit of Rs. 4m597.50 was available to the petitioner when he re-sells goods. Based on the Credit Note, the same goods are re-sold within the State at a lesser price than what was purchased, i.e., Rs. 33,777.78 (taking into account discount price, there is a profit margin for the dealer) and thereby the output

tax payable to the Government is reduced, leaving excess Input Tax Credit at the hands of the dealer. The said excess credit in the hands of the dealer might be adjusted to their other liabilities or might claim refund of the said excess Input Tax Credit. Taking excess Input Tax Credit and later in the guise of credit note giving discount and reducing the price of the goods which reduces the Output tax payable to the Government dwindles State revenue.

65. Learned Advocate General contended that seller and buyer coalition is issuing purchase invoice at an escalated price thereby taking benefit of excess Input Tax Credit and later in the guise of credit notes giving discount, reduced the price of the same goods and thereby reducing the output tax payable to the Government creates a dent of the State revenue. Learned Advocate General further submitted that excess Input Tax Credit available in the hands of the dealer is being adjusted to their other liabilities and the dealer might also make a claim of refund of Input Tax Credit as per Section 19(18) of the Act which were ultimately resulted in creating dent on the State revenue.

66. To contend as to how the so called discount and reduction of sale price caused revenue loss to the Government, the learned Advocate General has drawn our attention to the illustration stated in paragraph (6) of the counter which reads as under:-

Purchase price of 10 Washing Machines	: Rs. 1,00,000/-
Tax paid on purchase at 12.5% (ITC allowed)	: Rs. 12,500/-
Sale price after discount	: Rs. 75,000/-
tax payable on sales at 12.5%	: Rs. 9,375/-
Excess ITC available (Difference between ITC and Output Tax)	: Rs. 3,125/- (Rs. 12,500-Rs. 9,375/-
Excess ITC Adjusted	: Rs. 3,125/-

67. As rightly contended by the learned Advocate General, the "Input Tax Credit" adjusted in the above illustration comes to Rs. 3,125/- in a single transaction and that it would run to several lakhs and crores for a year for a single dealer. The excess Input

Tax Credit earned by the petitioners is being adjusted against the outstanding tax due or carried forward to next year or refunded. If this trend is allowed to continue, the concept of VAT that meant for payment of tax on every value addition gets defeated.

68. In order to protect the revenue and with a vie to curb the clandestine transactions resulting in evasion of tax, in respect of second and subsequent sales, Section 19(20)was introduced, where any dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of "Input Tax Credit" over and above the output tax of those goods, shall be reversed.

69. Constitutional Validity of fiscal legislation:- When there is a challenge to the constitutional validity of the provisions of a Statute, Court exercising power of judicial review must be conscious of the limitation of judicial review must be conscious of the limitation of judicial intervention, particularly, in matters relating to the legitimacy of the economic or fiscal legislation. While enacting fiscal legislation, the Legislature is entitled to a great deal of latitude. The Court would interfere only where a clear infraction of a constitutional provision is established. The burden is on the person, who attacks the constitutional validity of a statute, to establish clear transgression of constitutional principle. Observing that the law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc., in R.K. Garg vs. Union of India [(1981) 4 SCC 675, this Court held as under:

xxx xxx xxx xxx xxx"

14. With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the Legislature has power to make the provision retrospectively. In R.C. Tobacco Pvt. Ltd. V. Union of India', this Court stated broad legal principles while testing a retrospective statute, in the following manner:

"(i) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it

can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, Courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforseen or unforseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectively."

15. At the same time, this Court has also held that retrospective legislation would be admissible in cases of validation laws, i.e., where the laws as initially passed was held to be inoperative by the court and when there is a new provision inserted, it should normally be prospective. We may refer to the judgment of this Court in Tata Motors Ltd. v. State of Maharashtra and others'. In that case, the appellant — assessee company, manufactured motor vehicle chassis and spare parts. It procured steel in primary form covered by Entry 6 of Schedule B to the Bombay Sales Tax Act, 1959 for use in the manufacturing process which resulted also in iron and steel scrap which was covered by the said entry. Therefore, in Assessment Year 1982-83, the appellant therein claimed set-off of a certain amount in terms of Rule 41-E for the quantum of iron and steel purchased which was converted into iron and steel scrap. The claim was allowed. Subsequently, Maharashtra Act 9 of 1989 was enacted and by Sections 26 and 27, the benefit of Rule 41-E was denied altogether for the period 1-7-1981 to 31-3-1988 where the manufactured goods falling under Schedule B were in the nature of waste goods/scrap goods/by-products. The validity of such retrospective amendment to Rule 41-E was unsuccessfully challenged before the High Court. The High Court took the view that the impugned amendment of Rule 41-E was clarificatory to remove the doubts in interpretation. However, by the Bombay Sales Tax (Amendment) Rules, 1992 Rule 41-E was amended. That amendment removed the exclusionary clause of goods manufactured out of waste or scrap goods or products and restored the position as it stood prior to 1981. The appellant's appeal and another connected appeal were heard simultaneously.

The appellant — assessee contended that retrospective operation of a provision depriving the assessee of the vested statutory right and covering

a long period (eight years in that case) imposed a prima facie unreasonable restriction and was, therefore, unconstitutional. More so, when the original provision was subsequently reintroduced deleting the amendments and there was no material to justify the special treatment given for the said eight years. The respondent State could not meet the said contention. The assessee company further contended that since the CST Act had not been extended to Dadra and Nagar Haveli, where the assessee's branch office was located, the requirement under Rule 41-D for registration of the assessee under the CST Act in that place was impossible of performance and should, therefore, be ignored.

16. Though the latter contention was rejected, the first contention noted above, touching upon the retrospectivity of the amendment, was accepted and while allowing the appeal the matter was dealt with in the following manner:

> "15. It is no doubt true that the legislature has the powers to make laws retrospectively including tax laws. Levies can be imposed or withdrawn but if a particular levy is sought to be imposed only for a particular period and not prior or subsequently it is open to debate whether the statute passes the test of reasonableness at all. In the present case, the High Court sustained the enactment by adverting to Rai Ramkrishna case when the benefit of the rule had been withdrawn for a specific period. The learned counsel for the State contended that the amendments had been made to overcome certain defects arising on account of the decision of the Tribunal in regard to the modalities of working out the relief. But, the impugned amendment brought about by Section 26 is not for that purpose. Assuming that it was the legislative policy not to grant set-off in respect of waste or scrap material generated, it becomes difficult to appreciate the stand of the State in the light of the fact that the original rule continued to be in operation (with certain modifications) subsequent to 1-4-1988. The reason for withdrawal of the benefit retrospectively for a limited period is not forthcoming. It is no doubt true that the State has enormous powers in the matter of legislation and in enacting fiscal laws. Great leverage is allowed in the matter of taxation laws because several fiscal adjustments have to be made by the Government depending upon the needs of the Revenue and the economic circumstances prevailing in the State. Even so an action taken by the State cannot be so irrational and so arbitrary so as to introduce one set of rules for one period and another set of rules for another period by amending the laws in such a manner as to withdraw the benefit that had been given earlier resulting in

> higher burdens so far as the assessee is concerned, without any reason. Retrospective withdrawal of the benefit of set-off only for a particular period should be justified on some tangible and rational ground, when challenged on the ground of unconstitutionality. Unfortunately, the State could not succeed in doing so. The view of the High Court that the impugned amendment of Rule 41-E was of clarificatory nature to remove the doubts in interpretation cannot be upheld. In fact, the High Court did not elaborate as to how the impugned legislation is merely clarificatory. In that view of the matter, although we recognise the fact that the State has enormous powers in the matter of legislation, both prospectively and retrospectively, and can evolve its own policy, we do not think that in the present cases any material has been placed before the Court as to why the amendments were confined only to a period of eight years and not either before or subsequently and, therefore, we are of the view that the impugned provision, namely, Section 26 deserves to be quashed by striking down the words "not being waste goods or scrap goods or by-products" occurring in the said Section 26 of Maharashtra Act 9 of 1989 and the authorities concerned shall rework assessments as if that law had not been passed and give appropriate benefits according to law to the parties concerned."

17. The entire gamut of retrospective operation of fiscal statues was revisited by this Court in a Constitution Bench judgment in Commissioner of Income Tax (Central) — I, New Delhi v. Vatika Township Private Limited in the following manner:

> "33. A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas [AIR 1968 SC 1336 : (1968) 3 SCR 623] , while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)
>
> > "8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See CED v. M.A. Merchant [1989 Supp (1) SCC 499: 1989 SCC (Tax) 404] .)

35. We would also like to reproduce hereunder the following observations made by this Court in Govind Das v. /TO [(1976) 1 SCC 906 : 1976 SCC (Tax) 133] , while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

> "11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that
>
> 'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." (emphasis supplied)

18. When we keep in mind the aforesaid parameters laid down by this Court in testing validity of retrospective operation of fiscal laws, we find that the amendment in-question fails to meet these tests. The High Court has primarily gone by the fact that there was no unforseen or unforeseeable financial burden imposed for the past period. That is not correct. Moreover, as can be seen, sub-section (20) of Section 19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was entirely different before this amendment. In the example, which has been given by us in the earlier part of the judgment,

'dealer' was entitled to ITC of Rs. 10/- on re-sale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of Section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs. 9.50. This is clearly a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so, when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, we set aside and strike down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from January 01, 2007.

19. Appeals are partially allowed to the aforesaid extent. No orders as to costs.

[2015] 53 DSTC 347 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Justice S. Muralidhar And Justice Najmi Waziri]

W.P. (C) 6746/2016 & CM Nos. 27712 and 27713/2016
W.P. (C) 6747/2016 & CM Nos. 27714 and 27715/2016
W.P. (C) 5584/2016

Teleworld Mobiles Pvt. Ltd. ... Petitioner

Versus

Commissioner Of Trade & Taxes ... Respondent

Date of Order: 03.082016

DELHI VALUE ADDED TAX ACT, 2004 – REFUND – WRIT UNDER CONSTITUTION – INTERIM ORDER PASSED TO ISSUE REFUND WITH INTEREST – NOTICE U/S 59(2) TO FRAME ASSESSMENT – POWER NOT PROPER DELEGATED AS PER SECTION 68(2) – NON ISSUANCE OF DVAT 50 IN THE NAME OF OFFICER TO PASS ASSESSMENT ORDER – NOTICE OF DEFAULT ASSESSMENT OF TAX AND INTEREST AND PENALTY ISSUED CREATING DEMAND IN EXCESS TO REFUND – VIOLATION OF PRINCIPLES OF NATURAL JUSTICE – ILLEGAL ORDERS – NOTICES OF DEFAULT ASSESSMENT AND INTEREST AND PENALTY QUASHED – COST IMPOSED ON REVENUE ALSO GIVEN DIRECTION TO VAT COMMISSIONER TO TAKE ACTION ON AVATO AND JOINT COMMISSIONER TO RECOVER THE COST FROM THE OFFICERS AND ADVERSE ENTRY MAY BE MADE IN THEIR ANNUAL CONFIDENTIAL REPORTS.

Facts of the Case

The Petitioner was engaged in the business of sale and purchase of mobile phones of brands like Samsung, Apple, HTC etc. The Petitioner, a registered dealer under the DVAT Act, stated that it had been paying taxes at the time of purchase of the phones and claims the tax paid as input tax credit in terms of Section 9(1) of the DVAT Act.

It was stated that in the first three quarters of 2013-14 in the return filed by the Petitioner, the excess tax credit, which stood accrued was carried forward to the next tax period in terms of Section 11 (2) (b) of the DVAT Act. After the amendment to Section 11(2) of the DVAT Act with effect from 12th September 2013, the credit earned for the fourth quarter of 2013-14 could not be carried forward to the next tax period. Therefore, in the return filed for the fourth quarter of 2013-14 on 25th April 2014 a refund of Rs. 68,83,331/- was claimed, which on a revised return filed by the Petitioner got reduced to Rs. 53,81,316/-.

Held

The notices of default assessments of tax and interest and penalty bristle with numerous illegalities. First, as already noticed instead of processing refunds within the time granted under Section 38 of the DVAT Act, the AVATO compounded the problem by seeking to re-open the assessments for the earlier years including the period for which the refund was claimed using the order passed by the Court recording the assurance of the counsel for the respondent on 3rd June, 2016 in W.P.(C) 5584/2016 as a trigger. This was totally contrary to the law explained in several judgments which had been referred to hereinabove.

Secondly, with the AVATO himself acknowledged that the authority in DVAT-50 was not available, there was no question of his proceeding further in the matter and issuing notices of default assessments of tax, interest and penalty in the manner that he had done.

Thirdly, in an obvious violation of the principles of natural justice, with the AVATO by not informing the Petitioner of the adjourned date of hearing when he failed to attend office on 5th July 2016, which was the date fixed. Took up the matters in his chamber on 9th July 2016 which, being a Second Saturday was a holiday and then reserved the matter for orders on 12th July 2016. The notices of default assessment of tax and interest and penalty were undoubtedly in violation of the principles of natural justice and patently illegal.

The Court did not consider it necessary to do say anything more to demonstrate the patent illegality attached to the actions of the AVATO, triggered as they were by the order dated 3rd June 2016 passed by the Court. The Court, therefore, had no hesitation in setting aside the notices of default assessment of tax and interest and penalty dated 12th July 2016 issued by the AVATO which were the subject matter of challenge in W.P.(C) Nos. 6746/2016 and 6747/2016.

The matter, however, could not end there. The Court was concerned about the conduct of the several officials of the DT&T, who seemed to be acting not only in contravention of the various provisions of the DVAT Act, but also in willful disobedience of the law explained by the Court in several of its decisions. Although, circulars and orders might have been issued by the Commissioner VAT from time to time, they appear to have no impact on the behaviour of the officials of the DT&T. On a daily basis, the Court had been faced with several petitions where instances of blatant and willful disobedience of the statutory provisions by the officials of the DT&T had

come to light and time and again the Court has had to intervene to set right the violations.

Considering the inexcusable conduct of the AVATO of Ward-64 in the case, which appears to had the endorsement of the Joint Commissioner, who filed the reply affidavit in W.P.(C) No. 5584/2016, clearly supporting the actions of the AVATO, the Court considered it necessary to impose exemplary costs on the DT&T for unnecessarily increasing litigation and forcing the Petitioner to come back to the Court for relief. W.P.(C) Nos. 6746/2016 and 6747/2016 was accordingly allowed and the applications filed therein were disposed of with costs of Rs. 20,000 in each petition which will be paid by the DT&T to the Petitioner within one week.

Further, a direction was issued to the Commissioner (VAT) to issue notices on the administrative side of the DT&T to both the concerned AVATO as well as the Joint Commissioner who endorsed the illegal actions of AVATO to explain why the costs imposed should not be recovered from their respective salaries and an adverse entry not be made in their Annual Confidential Reports. The Commissioner (VAT) shall, after hearing the said officers and considering their replies, passed appropriate orders in accordance with law.

As far as W.P.(C) No. 5584 of 2016 was concerned, it was directed that the refund due to the Petitioner for the fourth quarter of 2013-14 together with interest due thereon up to the date of issue of refund shall be credited to the account of the Petitioner through RTGS not later than 8th August, 2016. The Commissioner (VAT) will personally ensure the compliance of the above direction and himself file an affidavit of compliance in the Registry within two days thereafter i.e. on or before 10th August 2016. If there was non-compliance with this direction it will be open to the Petitioner to apply to the Court for directions. W.P.(C) 5584 of 2016 was allowed in the above terms.

Cases Referred:

- *Prime Papers and Packers vs. Commissioner of VAT*
- *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*
- *Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del)*
- *Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del)*
- *Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015]*

Present for Petitioner : Rajesh Jain and Virag Tiwari, Advocates

Present for Respondent : Gautam Narayan, Additional Standing Counsel with R.P. Iyer, Advocate

Order

Dr. S. Muralidhar, J.

1. Issue notice to the Respondent in WP (C) Nos. 6746/2016 & 6747/2016. Mr. Gautam Narayan, learned Additional Standing Counsel accepts notice on behalf of the Respondent.

2. This is yet another instance of the Department of Trade & Taxes (‘DT&T’), Government of NCT of Delhi acting in blatant violation of the statutory provisions of the Delhi Value Added Tax Act, 2004 (‘DVAT Act’) and the decisions of the Courts.

3. The background facts are that the Petitioner is engaged in the sale and purchase of mobile phones of brands like Samsung, Apple, HTC etc. The Petitioner, a registered dealer under the DVAT Act, states that it has been paying taxes at the time of purchase of the phones and claims the tax paid as input tax credit in terms of Section 9(1) of the DVAT Act.

4. It is stated that in the first three quarters of 2013-14 in the return filed by the Petitioner, the excess tax credit, which stood accrued was carried forward to the next tax period in terms of Section 11 (2) (b) of the DVAT Act. After the amendment to Section 11(2) of the DVAT Act with effect from 12th September 2013, the credit earned for the fourth quarter of 2013-14 could not be carried forward to the next tax period. Therefore, in the return filed for the fourth quarter of 2013-14 on 25th April 2014 a refund of Rs. 68,83,331/- was claimed, which on a revised return filed by the Petitioner got reduced to Rs. 53,81,316/-.

5. The Petitioner states that it was pursuing its refund claim. On 27th May 2016 a survey operation was undertaken by the officials of the DT&T in the premises of the Petitioner which, according to the Petitioner, was in contravention of Sections 59 and 60 of the DVAT Act. Meanwhile, on account of the failure of the DT&T to issue the refund, due to the Petitioner for the fourth quarter of 2013-14, WP(C) No. 5584/2016 was filed in this Court.

6. WP(C) No. 5584/2016 was heard on 3rd June, 2016. While directing issuance of notice, the Court recorded the assurance of Mr. Gautam Narayan, learned Additional Standing Counsel for the Respondent that

"the Petitioner's application will be examined and necessary orders would be passed and the admissible amount of refund together with interest will be released before the next date of hearing". The case was then directed to be listed on 19th July, 2016. The Court did not assemble on that date and the petition was adjourned for today.

7. The above order became necessary as there was an obvious failure by the Respondent to grant refund due to the Petitioner for the fourth quarter of 2013-14 together with interest due thereon in terms of Section 38 of the DVAT Act. The Court has, in numerous judgments delivered on the issue, emphasized that while it is open to the DT&T to take appropriate action to recover what it perceives to be turnover that may have escaped assessment, such action cannot result in postponement of the refund beyond the mandatory time frame set out under Section 38 of the DVAT Act. The legal position has been summarized by this Court in its recent order dated 28th July 2016 in WP (C) No. 6013/2016 (Prime Papers and Packers vs. Commissioner of VAT) where the Court has discussed the earlier decisions in *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del), Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del), Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del) and Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015]*. The principles summarized in the said decision reads as under:

> "9. ...(1) the mandatory nature of the time limits under Section 38 of the Act for the processing and issuing of refunds have to be scrupulously adhered to by the Department;
>
> (2) where the Department seeks to invoke Section 59 of the DVAT Act to seek more information from the dealer after picking up the return in which the refund has been claimed for scrutiny, those steps are to be taken within the time frame envisaged under Section 38 of the DVAT Act;
>
> (3) even where the Department seeks to invoke Section 39 of the Act, that action again has to be taken within the time frame in Section 38(3) of the DVAT act."

8. Further in para 18 of the decision in Prime Papers and Packers vs. Commissioner of VAT (supra), this Court noted as under:

> "18. The Court is constrained to observe that there have been a large number of petitions filed in this Court by dealers awaiting the

> processing of their refund claims. Despite numerous judgments of this Court and circulars issued by the Commissioner VAT, including Circular No. 6 of 2005 and recently the Order dated 21st July 2016, the problem of delayed refunds persists. The frequent transfers of VATOs and the lack of any orientation and training as regards their statutory responsibilities cannot constitute a valid justification for delaying the refunds due to the dealers. The Court would urge the Commissioner VAT to review the issue of grant of refunds on priority basis so that the process is streamlined and his instructions regarding speedy disposal of refunds is strictly followed. He must initiate disciplinary action against those officers of the DT&T who are found disobeying the instructions issued by the Commissioner from time to time in this regard. The Commissioner should undertake a periodic review, at least once in two weeks, as to how many refund applications have been processed and within what time. Responsibility should be fixed on derelict officers and disciplinary proceedings initiated where there is a clear breach of the statutory duties. The collective failure of such officers is imposing a huge interest burden on the exchequer which is clearly avoidable."

9. Reverting to the case on hand, it appears that instead of processing the Petitioner's refund due for the fourth quarter of 2013-14, five notices were issued under Section 59(2) of the DVAT Act by the Assistant Value Added Tax Officer ('AVATO'), Ward-64 on 8th June, 2016 requiring the Petitioner to produce documents pertaining to the period 1st April 2012 to 31st March 2013, 1st April 2013 to 31st March 2014, 1st April 2014 to 31st March 2015, 1st April 2015 to 31st March 2016, 1st April 2016 to 27th May 2016 and directing the Petitioner to attend the office of the AVATO on 16th June 2016 at 11 am. On 14th June 2016 another set of notices were issued under Section 59(2) of the DVAT Act for the same period as the notices dated 8th June 2016, directing the Petitioner to attend the office of the AVATO on 22nd June, 2016 at 11 am.

10. In the meanwhile, the Petitioner had requested the Enforcement Branch of the DT&T to hand over to it the documents, paper book etc. which were taken from its premises during the survey. Another reminder was sent on 16th June 2016, but no reply was received. On 22nd June, 2016 the Petitioner filed a reply to all the notices issued on 14th June 2016 which had been served on the Petitioner on 21st June, 2016.

11. On 27th June, 2016 the AVATO issued another notice under Section 59(2) of the DVAT Act in connection with refund claimed for the fourth quarter of 2013-14 i.e. 1st January 2014 to 31st March, 2014. On 1st July,

2016 the Petitioner appeared and sought an adjournment. At this hearing, the Petitioner requested the AVATO to show the Petitioner the order issued in form DVAT-50, which authorized the AVATO to initiate the proceedings under Section 59(2) of the DVAT Act.

12. It may be noted at this stage that under Section 68(2) of the DVAT Act where the Commissioner delegates his powers under Chapter X "the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers". Therefore, there had to be a DVAT-50 in the name of the AVATO, Ward-64 which permitted him to exercise powers under Section 59 of the DVAT Act and to proceed to make any assessment thereafter.

13. The Petitioner states that the Petitioner was not shown DVAT-50 despite request. Mr. Rajesh Jain, learned counsel for the Petitioner, drew the attention of the Court to the order sheet penned by the AVATO on 1st July 2016, where he states "the counsel has requested to provide the DVAT-50 but the same is not available". This itself should have been a sufficient reason for the AVATO not to have further proceeded in the matter as he should have been aware of the legal requirement spelt out in Section 68 (2) of the DVAT Act. Unfortunately, it appears that the AVATO persisted with the matter.

14. On 2nd July, 2016 the AVATO recorded the following order:

> "Sh. Virag Tiwari, Counsel of M/s Teleworld Mobiles Pvt. Ltd. was (sic) appeared on 01.7.2016 in Assessment case for the year 2012-13 to 2016-17 (till 27.5.2016). He has requested for adjournment of the case sine a die till documents received from visiting Enforcement Team. It is clarified that all the documents to be considered for assessment are available on records and copies of the same was provided to M/s Teleworld Mobiles Pvt. Ltd. through the counsel. Hence the request of Counsel cannot be accepted and no adjournment can be allowed further. It seems that M/s Teleworld Mobiles Pvt. Ltd. has nothing to say on the discrepancies mentioned on available records. However, if the dealer want to say anything more, last opportunity is allowed to submit the same by 05.7.2016, before keeping the case for orders. Accordingly notice issued."

15. What transpired next is not in dispute. The Petitioner did go to the office of the AVATO on 5th July 2016 with two written replies in its possession. The AVATO was on leave on 5th July 2016. Therefore, no

hearing could take place on that date. What transpired thereafter is, to say the least, inexplicable. The AVATO decided to take up the matter sitting in chambers on Saturday 9th July 2016, which was an official holiday, without issuing any further notice to the Petitioner. On that day, he simply reserved the matter for orders. This conduct of the AVATO is not understandable.

16. The AVATO's failure to inform the Petitioner that he was going to take up the matter on 9th July 2016 is simply unacceptable from the point of a statutory authority exercising judicial powers. The AVATO then proceeded on 12th July 2016 to pass the notices of default assessment of tax and interest for each of the four quarters of 2013-14 and March 2013 under Section 32 of the DVAT Act creating demands in excess of the refund due. On the same day, the AVATO also passed a notice of default assessment of penalty under Section 33 of the DVAT Act for the fourth quarter of 2013-14. The default notices of assessment of tax, interest and penalty issued by the AVATO on 12th July 2016 for the four quarters of 2013-14 have been challenged in WP (C) Nos. 6746/2016. The challenge in WP(C) No. 6747/2016 is to the default assessment dated 12th July, 2016 for tax and interest for the month of March, 2013.

17. In W.P. (C) No. 5584/2016 a reply has been filed by Mr. Pravesh Ranjan Jha, Joint Commissioner, confirming that the above demands have been created by the AVATO by passing the aforementioned notices of default assessments of tax, interest and penalty on 12th July, 2016. It is simply asserted that in view of the demands created and the penalties imposed, no refund is due to the Petitioner.

18. The notices of default assessments of tax and interest and penalty bristle with numerous illegalities. First, as already noticed instead of processing refunds within the time granted under Section 38 of the DVAT Act, the AVATO compounded the problem by seeking to re-open the assessments for the earlier years including the period for which the refund was claimed using the order passed by this Court recording the assurance of the learned counsel for the respondent on 3rd June, 2016 in WP(C) 5584/2016 as a trigger. This is totally contrary to the law explained in several judgments which have been referred to hereinabove.

19. Secondly, with the AVATO himself acknowledging that the authority in DVAT-50 was not available, there was no question of him proceeding further in the matter and issuing notices of default assessments of tax, interest and penalty in the manner that he has done.

20. Thirdly, in an obvious violation of the principles of natural justice, with the AVATO by not informing the Petitioner of the adjourned date of

hearing when he failed to attend office on 5th July 2016, which was the date fixed. took up the matters in his chamber on 9th July 2016 which, being a second Saturday, was a holiday and then reserved the matter for orders on 12th July 2016. The notices of default assessment of tax and interest and penalty are undoubtedly in violation of the principles of natural justice and patently illegal.

21. The Court does not consider it necessary to do say anything more to demonstrate the patent illegality attached to the actions of the AVATO, triggered as they were by the order dated 3rd June 2016 passed by this Court. The Court, therefore, has no hesitation in setting aside the notices of default assessment of tax and interest and penalty dated 12th July 2016 issued by the AVATO which are the subject matter of challenge in WP (C) Nos. 6746/2016 and 6747/2016.

22. The matter, however, cannot end there. The Court is concerned about the conduct of the several officials of the DT&T, who seem to be acting not only in contravention of the various provisions of the DVAT Act, but also in wilful disobedience of the law explained by this Court in several of its decisions. Although, circulars and orders may have been issued by the Commissioner VAT from time to time, they appear to have no impact on the behaviour of the officials of the DT&T. On a daily basis, this Court has been faced with several petitions where instances of blatant and wilful disobedience of the statutory provisions by the officials of the DT&T have come to light and time and again the Court has had to intervene to set right the violations.

23. Considering the inexcusable conduct of Mr. O. P. Singh, the AVATO of Ward-64 in the present case, which appears to have the endorsement of Mr. Pravesh Ranjan Jha, the Joint Commissioner, who filed the reply affidavit in WP (C) No. 5584/2016, clearly supporting the actions of the AVATO, the Court considers it necessary to impose exemplary costs on the DT&T for unnecessarily increasing litigation and forcing the Petitioner to come back to the Court for relief. WP (C) Nos. 6746/2016 and 6747/2016 are accordingly allowed and the applications filed therein are disposed of with costs of Rs. 20,000 in each petition which will be paid by the DT&T to the Petitioner within one week from today.

24. Further, a direction is issued to the Commissioner (VAT) to issue notices on the administrative side of the DT&T to both Mr. O. P. Singh the concerned AVATO as well as Mr. Pravesh Ranjan Jha, the Joint Commissioner who endorsed the illegal actions of Mr. O. P. Singh to explain why the costs imposed should not be recovered from their respective

salaries and an adverse entry not be made in their Annual Confidential Reports. The Commissioner (VAT) shall, after hearing the said officers and considering their replies, pass appropriate orders in accordance with law.

25. As far as W. P. (C) No. 5584 of 2016 is concerned, it is directed that the refund due to the Petitioner for the fourth quarter of 2013-14 together with interest due thereon up to the date of issue of refund shall be credited to the account of the Petitioner through RTGS not later than 8th August, 2016. The Commissioner (VAT) will personally ensure the compliance of the above direction and himself file an affidavit of compliance in the Registry within two days thereafter i.e. on or before 10th August 2016. If there is non-compliance with this direction it will be open to the Petitioner to apply to this Court for directions. W.P. (C) 5584 of 2016 is allowed in the above terms.

26. A certified copy of this order be delivered forthwith to the Commissioner (VAT) by the Registry through a Special Messenger for compliance with the directions issued in paras 23 to 25 of this order.

27. A copy of this order be given *dasti* under the signature of Court Master.

[2015] 53 DSTC 357 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal No. 01/ATVAT/16-17

Ish Kumar & Company,
H-17/35, Rohini, Sector-7,
Rohini, Delhi. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 24.08.2016

NOTICE OF ASSESSMENT OF PENALTY U/S 86(14) OF DVAT ACT, 2004 FOR NON-FILING OF DS-2 – SHOW CAUSE NOTICE ISSUED MANUALLY – VATO ENFORCEMENT REPORTED WRONG VEHICLE NUMBER WHEREAS VEHICLE NUMBER MENTIONED IN DS-2 WAS CORRECT – THE APPELLANT FILED DS-2 ONLINE WITHIN TIME PRESCRIBED – VATO DID NOT CONSIDER THAT DS-2 WAS ALREADY FILED – MAXIMUM PENALTY IMPOSED U/S 86(14) FOR RS.50,000/-.

THE TRIBUNAL HELD THAT PENALTY IMPOSED U/S 86(14) WAS AGAINST THE PROVISION OF LAW – FURTHER HELD THAT PENALTY WAS TO BE LEVIABLE U/S 86(9) FOR VIOLATION OF NOTIFICATION ISSUED BY THE COMMISSIONER OF VAT U/S 70 OF DVAT ACT EVEN FOR NON-FILING OR LATE FILING OF DS-2 THE APPELLANT HAD ALREADY FILED DS-2 WITHIN TIME AND THERE WAS NO VIOLATION OF SECTION 86(9) OF DVAT ACT – PENALTY DELETED.

Facts

The appellant was a registered dealer of Ward-63 having TIN No.07110240729. A penalty of Rs.50,000/- was imposed by VATO vide order dated 11.01.2016 u/s 86 (14) of the DVAT Act for allegedly non-filing of DS-2. Earlier to imposing penalty, VATO had issued a Show Cause Notice dated 02.01.2016 manually and thereafter penalty of Rs.50,000/- was imposed without verifying the fact that DS-2 had already been submitted on 30.1.2015, much before the date of entering goods vehicle in Delhi on 02.01.2016. That the VATO failed to appreciate the legal position and facts of the case that penalty order passed by VATO was not as per law.

Against the penalty order of VATO, appellant filed objections before OHA and prayed that penalty order be set aside as appellant had already submitted DS-2 before the goods entered in Delhi. It was also submitted that there was no loss of revenue to the department due to non-filing of

DS-2 by the appellant because DS-2 was just informative in nature. It was also submitted that VATO had no authority to impose penalty u/s 86 (14) of the DVAT Act and no default assessment u/s 32 had been passed before the order of penalty u/s 33 of DVAT Act. Even then, OHA rejected the objections on the ground that number of vehicle mentioned in order of penalty was different from the number of vehicle mentioned in DS-2 dated 30.12.2015 submitted by the appellant.

Against the impugned order dated 08.03.2016 passed by OHA, the present appeal had been filed on various grounds.

Held

It was clear from the perusal of above provision that notification u/s 70 was issued according to which dealers were supposed to file DS-2 regarding vehicle entering Delhi from 10.09.2015. It was also mentioned in the Show Cause Notice that Department of Trade & Taxes, Govt. of NCT of Delhi vide notification dated 10.09.2015 had notified and made it mandatory to file form Sugam with effect from 15.09.2015 in respect of goods purchased/received as stock transfer received on consignment agreement from outside Delhi by the registered dealers. Even then penalty was imposed u/s 86 (14) of the DVAT Act, which was against the provisions of law. Apart from this, there was no violation of section 86 (9) of the DVAT Act because DS-2 was already filed on 30.12.2015 by the appellant.

Appellant had also assailed the impugned order on the ground that as no assessment of tax u/s 32 was made, penalty was wrongly imposed and in support of this argument he referred to the orders passed by this Tribunal in M/s. Garg Electronics Vs. Commissioner of Trade & Taxes decided on 09.04.2013 and the decision of Hon'ble High Court of Delhi in Commissioner, VAT Vs. A.K. Woolen Industries decided on 19.02.2015.

Considered view of Tribunal was about ratio of the above cases did not apply to the facts of the present case because it was not necessary that before imposing penalty, default assessment of tax should be framed in every case. There were certain sections under the DVAT Act on violation of which only penalty may be imposed and the one clear example of this class was violation of notification issued by the Commissioner u/s 70 of DVAT Act. In this case penalty u/s 86 (9) could only be imposed. It was not necessary that order of default assessment of tax also be framed because there was no default by appellant in payment of tax.

Order by OHA hereby set aside and the appeal allowed.

Present for Appellant : Shri R.K. Aggarwal, Advocate

Present for Respondent : Shri S.B. Jain, Advocate

Order

1. The present appeal has been filed challenging the impugned order dated 08.03.2016 passed by Ld. Objection Hearing Authority (in short OHA) who vide this order upheld the assessment order dated 11.01.2016 passed by AVATO, Ward-63.

2. The brief facts of the present appeal are that appellant is engaged in the business of trading of raw rubber. Appellant submitted all its returns within time as prescribed under the DVAT Act and never made any default in compliance of the department order.

3. The appellant is a registered dealer of Ward-63 having TIN No.07110240729. A penalty of Rs.50,000/- was imposed by Ld. VATO vide order dated 11.01.2016 u/s 86 (14) of the DVAT Act for allegedly non-filing of DS-2. Earlier to imposing penalty, Ld. VATO had issued a Show Cause Notice dated 02.01.2016 manually and thereafter penalty of Rs.50,000/- was imposed without verifying the fact that DS-2 has already been submitted on 30.1.2015, much before the date of entering goods vehicle in Delhi on 02.01.2016. That the Ld. VATO failed to appreciate the legal position and facts of the case that penalty order passed by Ld. VATO was not as per law.

4. Against the penalty order of Ld. VATO, appellant filed objections before Ld. OHA and prayed that penalty order be set aside as appellant has already submitted DS-2 before the goods entered in Delhi. It was also submitted that there is no loss of revenue to the department due to non-filing of DS-2 by the appellant because DS-2 is just informative in nature. It was also submitted that Ld. VATO had no authority to impose penalty u/s 86 (14) of the DVAT Act and no default assessment u/s 32 has been passed before the order of penalty u/s 33 of DVAT Act. Even then, Ld. OHA rejected the objections on the ground that number of vehicle mentioned in order of penalty is different from the number of vehicle mentioned in DS-2 dated 30.12.2015 submitted by the appellant.

5. Against the impugned order dated 08.03.2016 passed by Ld. OHA, the present appeal has been filed on various grounds which are as follows:

(i) That the impugned order has been passed without proper application of law and the facts of the present case, hence present impugned order is not sustainable under the law.

(ii) Because the Ld. VATO has not considered the facts and law before passing the impugned order. Ld. OHA has not considered that DS-2 has already been submitted much prior to the date of entering of goods in Delhi.

(iii) Because the objection of appellant has been dismissed on the ground that vehicle number in the impugned order is HR-55Q-5719 whereas vehicle number mentioned in DS-2 dated 30.12.2015 is HR-55G-5719. Therefore, it is evident that vehicle for which DS-2 was filed on 30.12.2015 is different from the one found checked by Enforcement-II Team on 02.01.2016. The reason for rejecting objection is immaterial. It is not appreciated that whole number of vehicle is same except one alphabetic number which has been wrongly mentioned by Enforcement Team in the notice.

(iv) Because Ld. VATO has no jurisdiction to impose penalty u/s 86 (14) of the DVAT Act for non-filing of DS-2. The Ld. VATO failed to appreciate the legal position that DS-2 has been issued u/s 70 of the DVAT Act and if any penalty can be imposed, that can only be imposed u/s 86 (9) for not complying with the notification issued by Commissioner.

(v) Because Ld. OHA has also not appreciated that there is no revenue loss to the department due to non-filing of DS-2 because DS-2 is just informative in nature.

(vi) Because Ld. OHA has also not appreciated that Ld. VATO has no authority to impose penalty u/s 86 (14) of the DVAT Act as no default assessment u/s 32 of the DVAT Act has been passed before the order of penalty u/s 33 of the DVAT Act.

(vii) Because Ld. VATO has not provided any opportunity to the appellant before passing the impugned order.

On the basis of above facts and ground of appeal it has been submitted that impugned order dated 08.03.2016 passed by Ld. OHA upholding the VATO's order dated 11.01.2016 imposing penalty u/s 33 read with section 86 (14) of the DVAT Act be set aside and present appeal be allowed.

6. Heard to appellant's Ld. Counsel Shri R.K. Aggarwal and Shri S.B. Jain on behalf of Revenue and perused the record on the basis of which this appeal is being disposed off as follows -

7. Perusal of Ld. VATO's order dated 11.01.2016 shows that while he was performing Enforcement-II Border duty, he checked vehicle number HR-55Q-5719 carrying goods and found that driver was not carrying copy

of DS-2, so he imposed penalty u/s 33 read with section 86 (14) of the DVAT Act to the tune of Rs.50,000/-. This penalty order was assailed before the Ld. OHA who vide order dated 08.03.2016 affirmed Ld. VATO's order on the ground that impugned assessment order of penalty mentioned vehicle No.HR-55Q-5719 whereas vehicle No. mentioned in DS-2 dated 30.12.2015 is HR-55G-5719.

8. Aggrieved with the impugned order of Ld. OHA appellant has filed present appeal before this Tribunal firstly on the ground that DS-2 dated 30.12.2015 was already submitted before the goods entered in Delhi jurisdiction on 02.01.2016. According to appellant same vehicle entered in Delhi on 02.01.2016 regarding whichDS-2 was filed on 30.12.2015. Ld. VATO has wrongly mentioned the vehicle No. as HR-55G-5719 while in fact, the vehicle number was HR-55Q-5719. There is only difference of one alphabet. He has mentioned letter 'G' instead of 'Q'. Secondly, DS-2 is simply informative in nature and there is no loss of revenue to the government.

9. According to appellant vehicle was same of which DS-2 was filed on 30.12.2015. In our considered view, it was a clerical mistake on the part of the LD. VATO that he wrongly mentioned number of checked vehicle in his penalty order. Revenue has not filed any supporting document to prove that vehicle regarding which DS-2 was filed on 30.12.2015 also entered Delhi and it was a different vehicle from one which entered Delhi on 02.01.2016. Appellant has also filed commercial invoice of the goods natural raw rubber which was being carried by this truck. We agree with the arguments of the appellant's Ld. Counsel that DS-2 is simply informative in nature and that there is no revenue loss to the department in this case.

10. The impugned order has also been assailed on the ground that notice was issued manually on 02.01.2016 which is violation of Ld. Commissioner's order dated 17.01.2014 passed under Rule 62 of the DVAT Rules, 2005. According to appellant, revenue was supposed to issue notices according to this notification. It provides that all VAT authorities shall issue notices/summons/orders to the dealer by electronic means by pasting the same on web page of individual dealer but appellant's Ld. Counsel has failed to note that it is also provided in this notification that this manner of service shall be deemed to be a service of document for the purpose of Rule 62 of the DVAT Rules at par with other manners prescribed under the said Rule. So on this ground only imposing of penalty cannot be set aside.

11. The impugned order has also been assailed on the ground that penalty u/s 86 (14) was wrongly imposed. It would be proper to reproduce section 86 (14) before proceedings further, which is as follows:

> "*Any person who fails to comply with the requirement under sub-section (2) or sub-section (3) of section 59 of this Act shall be liable to pay, by way of penalty, a sum of fifty thousand rupees*".

12. According to appellant penalty u/s 86 (14) was wrongly imposed because there was no failure on the part of the appellant to comply with the provisions of section 59. He further submitted that if there is violation of any notification issued u/s 70, then penalty u/s 86 (9) can be imposed. So it would be just appropriate to reproduce section 86 (9) of the DVAT Act, which is as follows:

> "*If a person required to furnish a return under Chapter V of this Act-*
>
> (a) fails to furnish any return by the due date; or
>
> (b) fails to furnish with a return any other document that is required to be furnished with the return; or
>
> (c) being required to revise a return already furnished, fails to furnish the revised return by the due date;
>
> the person shall be liable to pay, by way of penalty, a sum of one hundred rupees per day from the day immediately following the due date until the failure is rectified:
>
> PROVIDED that the amount of penalty payable under this sub-section shall not exceed ten thousand rupees".

13. It is clear from the perusal of above provision that notification u/s 70 was issued according to which dealers were supposed to file DS-2 regarding vehicle entering Delhi from 10.09.2015. It is also mentioned in the Show Cause Notice that Department of Trade & Taxes, Govt. of NCT of Delhi vide notification dated 10.09.2015 had notified and made it mandatory to file form Sugam with effect from 15.09.2015 in respect of goods purchased/received as stock transfer received on consignment agreement from outside Delhi by the registered dealers. Even then penalty was imposed u/s 86 (14) of the DVAT Act, which is against the provisions of law. Apart from this, as discussed above, there was no violation of section 86 (9) of the DVAT Act because DS-2 was already filed on 30.12.2015 by the appellant.

14. Appellant has also assailed the impugned order on the ground that as no assessment of tax u/s 32 was made, penalty was wrongly imposed

and in support of this argument he referred to the orders passed by this Tribunal in M/s. Garg Electronics Vs. Commissioner of Trade & Taxes decided on 09.04.2013 and the decision of Hon'ble High Court of Delhi in Commissioner, VAT Vs. A.K. Woolen Industries decided on 19.02.2015.

15. In our considered view ratio of the above cases does not apply to the facts of the present case because it is not necessary that before imposing penalty, default assessment of tax should be framed in every case. There are certain sections under the DVAT Act on violation of which only penalty may be imposed and the one clear example of this class is violation of notification issued by the Ld. Commissioner u/s 70 of DVAT Act. In this case penalty u/s 86 (9) can only be imposed. It is not necessary that order of default assessment of tax also be framed because there was no default by appellant in payment of tax.

16. On the basis of above discussion the impugned order dated 08.03.2016 passed by Ld. OHA is hereby set aside and present appeal is allowed.

17. Order pronounced in the open court

18. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 363 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal No. 280/ATVAT/15-16
Assessment Period : 3rd Quarter 2013
Default Assessment of Tax, Interest & Penalty

RKG International Pvt. Ltd.,
Z-262, Loha Mandi, Naraina,
New Delhi-110 028. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 26.08.2016

NOTICE OF ASSESSMENT OF PENALTY U/S 86(10) OF DVAT ACT, 2004 – SURVEY OF ENFORCEMENT BRANCH WAS CONDUCTED – CASH AND STOCK VARIATION FOUND – THE APPELLANT ADMITTED TAX LIABILITY AND HE

WAS ASKED TO GIVE A CHEQUE OF RS. 5,00,000/- - THE APPELLANT WAS ASSURED TO GIVE THE BENEFIT OF 80% OF TOTAL PENALTY AMOUNT U/S 87(6) OF DVAT ACT – THE DEPARTMENT DID NOT DEPOSIT THE CHEQUE AND FRAMED ASSESSMENT OF TAX & INTEREST AND ALSO IMPOSED PENALTY U/S 86(10).

WHETHER THE APPELLANT WAS LIABLE TO GET THE BENEFIT OF SECTION 87(6). EVEN THERE WAS LAPSE OF PROCEDURE IN MAKING THE PAYMENT BUT INTENTION OF THE APPELLANT WAS TO PAY THE TAX. HELD – YES.

Facts of the Case

Appellant was registered with Department of Trade & Taxes vide TIN No.07450075060. The dealer had been duly filing its DVAT returns periodically. The premises of the dealer was surveyed by the officials of Enforcement Branch on 25.11.2013 and on survey cash and stock variation was found on the basis of which, VATO passed default assessment of tax and interest passed u/s 32 of the DVAT Act vide which a demand of Rs.2,80,953/- was raised (which includes interest amounting to Rs.31,293/-). Based on the default assessment order passed u/s 32 of the DVAT Act, notice for assessment of penalty was also passed u/s 33 read with section 86 (10) of the DVAT Act levying a penalty of Rs.2,49,660/-.

During the course of survey, the appellant was asked to give a Cheque of Rs.5,00,000/- out of which Rs.2,50,000/- was on account of tax and remaining Rs.2,50,000/- was on account of penalty. A Cheque No.019642 date 25.11.2013 for Rs.5,00,000/- drawn on Oriental Bank of Commerce, M-Block, Connaught Place, New Delhi was given to Enforcement team. After examination of bank account, the appellant found that the said Cheque was never deposited by the department. This Cheque amount was even more than the tax amount finally determined. While the tax determined was Rs.2,49,660/-, the Cheque taken was of Rs.2,50,000/- each.

Where the appellant was required to deposit tax as well as penalty in a survey and if the dealer in turn deposited within three days from the date of survey, he was entitled to the benefit of section 87 (6) of the DVAT Act under which a dealer is entitle for a relief of 80% of the amount of penalty. In view of the above facts, VATO was contacted many times. However, the Cheque was never deposited by the department.

Being aggrieved by the assessment order passed by VATO, appellant filed objections before the OHA and the above facts were brought to his knowledge, even then he held that the appellant ought to have paid the tax himself within three days and simply giving of Cheque to the department did not result in satisfaction of condition laid down in section 87 (6) of the

DVAT and rejecting the objections he passed the impugned order dated 30.10.2015 against which the appeal had been filed on various grounds.

Held

No doubt in the present case proper procedure for depositing of tax amount was not followed verbatim but in letter and spirit it was complied with as a Cheque was handed over to the survey team on the date of survey only. On the basis of procedural lapses, substantive right given u/s 87 (6) could not be denied to the appellant. As submitted by appellant's Counsel during the course of arguments, it was constructive discharge of tax liability by the appellant the moment he handed over the Cheque to the Enforcement Team. Revenue side had failed to reply when the Cheque amount could not be deemed to be a proper discharge of tax liability, then on what ground it was accepted by the Enforcement Team.

On the basis of above discussion, the Tribunal quashed the impugned order dated 30.10.2015 passed by OHA and accepted the appeal. The case was remanded back to the concerned VATO with direction to reframe the assessment in the light of the order after giving the appellant an opportunity of hearing. Appellant was directed to appeared before the concerned VATO on 26.09.2016.

Cases Referred to:

- *M/s. Garg Electronics Vs. Commissioner of Trade & Taxes*
- *Commissioner, VAT Vs. A.K. Woolen Industries*
- *Capri Bathaid Pvt. Ltd. Vs. Commissioner, Trade & Taxes in W.P.(C) No.8913/2014*
- *M/s Gullus vs Commissioner, Trade & Taxes in W.P.(C) 1566/2016*

Present for Appellant : Shri P.K. Bansal, Advocate

Present for Respondent : Shri M.L. Garg, Advocate

Order

1. The present appeal has been filed against the impugned order dated 30.10.2015 passed by Ld. Additional Commissioner, hereinafter called Objection Hearing Authority (in short OHA) who vide this order upheld the penalty order dated 26.09.2014 passed u/s 33 read with section 86 (10) of the Delhi Value Added Tax Act (in short DVAT Act) passed by Ld. VATO.

2. The brief facts of the present appeal are that the dealer is registered with Department of Trade & Taxes vide TIN No.07450075060. The dealer has been duly filing its DVAT returns periodically. The premises of the dealer was surveyed by the officials of Enforcement Branch on 25.11.2013 and on survey cash and stock variation was found on the basis of which, Ld. VATO passed default assessment of tax and interest passed u/s 32 of the DVAT Act vide which a demand of Rs.2,80,953/- was raised (which includes interest amounting to Rs.31,293/-). Based on the default assessment order passed u/s 32 of the DVAT Act, notice for assessment of penalty was also passed u/s 33 read with section 86 (10) of the DVAT Act levying a penalty of Rs.2,49,660/-.

3. During the course of survey, the dealer was asked to give a cheque of Rs.5,00,000/- out of which Rs.2,50,000/- was on account of tax and remaining Rs.2,50,000/- was on account of penalty. A cheque No.019642 date 25.11.2013 for Rs.5,00,000/- drawn on Oriental Bank of Commerce, M-Block, Connaught Place, New Delhi was given to Enforcement team. After examination of bank account, the appellant found that the said cheque was never deposited by the department. This cheque amount was even more than the tax amount finally determined. While the tax determined was Rs.2,49,660/-, the cheque taken was of Rs.2,50,000/- each.

4. Where the dealer was required to deposit tax as well as penalty in a survey and if the dealer in turn deposited within three days from the date of survey, he was entitled to the benefit of section 87 (6) of the DVAT Act under which a dealer is entitle for a relief of 80% of the amount of penalty. In view of the above facts, Ld. VATO was contacted many times. However, the cheque was never deposited by the department.

5. Having aggrieved by the assessment order passed by Ld. VATO, appellant filed objections before the Ld. OHA and the above facts were brought to his knowledge, even then he held that the dealer ought to have paid the tax himself within three days and simply giving of cheque to the department does not result in satisfaction of condition laid down in section 87 (6) of the DVAT and rejecting the objections he passed the impugned order dated 30.10.2015 against which present appeal has been filed on various grounds as given below:-

(i) That the impugned order dated 30.10.2015 passed by Ld. OHA disposing off the objections of the objector and confirming assessment of penalty demand as created by Ld. VATO is bad in law and on facts of the case as the Ld. VATO has not appreciated the fact that the handing over of the cheque to the survey team is

constructive discharge of the tax liability when, in fact, there were sufficient funds available in the bank and no attempt was made by the dealer to divert the fund or stop the cheque payment.

(ii) That the Ld. OHA has not appreciated the fact that no reference was even made in the order by the Ld. VATO that cheque was taken by the department and not deposited with the bank along with reasons thereof which clearly shows malafide intention of the department.

(iii) That Ld. OHA has not appreciated the fact that dealer could have deposited the cheque amount but given the fact that even department was holding the cheque and could have deposited anytime would have resulted in double deposit of the same tax amount.

(iv) That the Ld. OHA has not appreciated the fact that regislative intent was to reduce the penalty amount where the dealer immediately admits his demand and pay the tax. To that extent, penalty can be reduced, this is to give benefit to the dealer so that he does not initiate any proceedings by filing objections.

(v) That the Ld. OHA has not appreciated the fact that three reminders were sent to the department asking them to deposit the cheque given by the dealer immediately or if the same is not deposited by the department, the dealer be made known of the said fact so that he himself can deposit the tax amount. These letters were duly acknowledged by the department. However, no attempt was made by the department to even tell the dealer as to what is the status of the cheque issued by him.

(vi) That the Ld. OHA has not appreciated the fact that the cheque was taken by the department on the date of survey itself but the liability was determined after almost a year.

(vii) That the Ld. OHA has not appreciated the fact that even later when the dealer appeared before the Ld. VATO, he was told to deposit the amount itself. Finally it was deposited with the request made to the VATO for returning the cheque. Till today the cheque has not been returned by the department.

On the basis of above facts and grounds of appeal, it has been submitted that impugned order dated 30.10.2015 passed by Ld. OHA be

set aside and present appeal be allowed.

6. The appeal was fixed for hearing on merit after compliance of condition imposed u/s 76 (4) of the DVAT Act vide Tribunal's order dated 13.01.2016.

7. Heard appellant's Ld. Counsel Shri P.K. Bansal and Shri M.L. Garg on behalf of Revenue and perused the file and case law cited in support of the arguments by appellant's Ld. Counsel on the basis of which this appeal is being disposed off as follows -

8. As is clear from the above facts that a survey of business premises of appellant was conducted on 25.11.2013 by the team of Enforcement Branch. During the course of survey it was found that cash as per Books of Account was Rs.2,72,428/- while during the course of survey no physical cash was found. Similarly, as per Trading Account stock to the tune of Rs.1,04,33,794/- was found while physically at the time of survey stock of Rs.57,13,028/- was found. So on the basis of this survey tax, interest and penalty was imposed by Ld. VATO vide order dated 26.09.2014. According to appellant at the time of survey appellant handed over a cheque of Rs.5,00,000/- out of which amount Rs.2,50,000/- was on account of tax and Rs.2,50,000/- was on account of penalty but on enquiry it was found that department has not deposited this cheque for encashment. Appellant many times enquired about it and he also sent written letter dated 5th, 7th, 17th and 28th January, 2014 to department but Ld. VATO on the basis of default assessment imposed tax to the tune of Rs.2,49,660/- and also imposed penalty of equal amount u/s 86 (10) of the DVAT Act and benefit of section 87 (6) was not given to the appellant which provide for 80% rebate in penalty if a dealer deposits tax within three days of proceedings u/s 60 of the DVAT Act. So he filed objections before the OHA who also rejected the objections vide impugned order dated 30.10.2015. So appellant had come in appeal before this Tribunal challenging the impugned order dated 30.10.2015 passed by Ld. OHA.

9. The short controversy which we have to decide is whether on delivery of cheque of Rs.5,00,000/- to the department at the time of survey, appellant was entitled to the benefit of section 87 (6) of the DVAT Act? Before proceeding further, it would be appropriate to reproduce relevant portion of section 87 of the DVAT Act, which is as follows:-

"87 – Automatic mitigation and increase of penalties

(1) ....

(2) ………

(3) ……..

(4) ……..

(5) ……..

(6) If –

(a) a person liable to pay penalty under section 86 of this Act; and

(b) the person volunatarily discloses to the Commissioner, in writing, the existence of the tax deficiency, during the course of proceedings under section 60; and

(c) makes payment of such tax deficiency within three working days of the conclusion of the said proceedings;

the amount of the penalty otherwise due, against the admitted and paid tax, shall be reduced by eighty per cent."

10. Now the question arises whether in the light of above provision appellant is entitled for mitigation of penalty to the extent of 80%? Appellant has submitted that cheque given by him to Enforcement Team on 25.11.2013 i.e. the date of survey of Rs.5,00,000/- was not presented by the department for encashment within 3 days and further submitted that for fault of the department, appellant should not suffer. Appellant many times contacted the concerned VATO and written letters dated 5th, 7th, 17th and 28th January, 2014 even then neither cheque was presented for encashment nor returned to the appellant by the department. Ultimately, he deposited the tax of Rs.2,50,000/- and Rs.50,000/- towards penalty on 08.01.2014.

11. For the disposal of this appeal section 36 of the DVAT Act and Rule 31 of the DVAT Rules are also important, which are as follows:-

"Section 36 – Manner of payment of tax, penalties and interest

Every person liable to pay tax, interest, penalty or any other amount under this Act shall pay a the amount to the Government Treasury of Delhi, the Reserve Bank of India or a branch in Delhi of a bank prescribed under the rules, or at such other place or in such other manner as may be prescribed."

12. While Rule 31 (2) provides as follows:-

> "A payment of tax, interest or any other amount due under the Act may be made either in cash or by means of a crossed cheque, or bank draft drawn in favour of the appropriate Government treasury drawn on an authorized bank, and shall be tendered along with a duly completed Form DVAT-20".

13. It is clear from the above rule that payment by means of a cheque can be made provided it is tendered along with a duly completed Form DVAT-20. Secondly, as per section 36 amount to be deposited either in Government Treasury or Reserve Bank of India or any of bank branch which is prescribed under the rules or at such place or in any other manner as may be prescribed. In the present case cheque of Rs.5,00,000/- was handed over to the Enforcement Team at the time of survey. Revenue side has not controverted any of the facts given in the appeal. Revenue has also not denied that cheque was not received at the time of survey. Ld. OHA in his impugned order dated 30.10.2015 has accepted this fact that appellant handed over a cheque of Rs.5,00,000/- to the survey team at the time of survey. Now the question arises when this payment is not as per rules and provisions of section 36, why it was accepted by the department? This is a common practice which is being followed by the department in survey cases and by coercion they compel the dealer to hand over the cheque which practice has been deprecated by Hon'ble Delhi High Court in many cases. Recently in Capri Bathaid Pvt. Ltd. Vs. Commissioner, Trade & Taxes in W.P.(C) No.8913/2014, decided on 2nd March, 2016 and M/s Gullus vs Commissioner, Trade & Taxes in W.P.(C) 1566/2016, decided on 14th March, 2016 this practice has been condemned by Hon'ble High Court. In M/s. Gullus Vs. CTT case, Hon'ble High Court made following observations:-

> "The Court notes that despite its order dated 3rd February, 2016 in WP(C) No.1820/2013 (Larsen And Toubro Ltd. v. Govt. of NCT of Delhi) and judgment of 2nd March, 2016 in WP(C) No.8913/2014 (Capri Bathaid Private Limited v. Commissioner of Trade & Taxes) (both of which have been noted in the above Circular), clear and categorical instructions have not been issued that no dealer would be coerced by the officers of the DT&T to make payment of any amount either towards alleged tax dues or otherwise either by cheque or cash at the time of a survey or inspection or any other proceeding including proceedings under section 60 of the DVAT Act. The Court expected a categorical instruction to be issued by the Commissioner, Trade & Taxes (CTT). It is disappointing to note that that has not been done."

14. No doubt in the present case proper procedure for depositing of tax amount was not followed verbatim but in letter and spirit it was complied with as a cheque was handed over to the survey team on the date of survey only. On the basis of procedural lapses, in our view, substantive right given u/s 87 (6) cannot be denied to the appellant. As submitted by appellant's Ld. Counsel during the course of arguments, it was constructive discharge of tax liability by the appellant the moment he handed over the cheque to the Enforcement Team. Revenue side has failed to reply when the cheque amount cannot be deemed to be a proper discharge of tax liability, then on what ground it was accepted by the Enforcement Team.

15. On the basis of above discussion, we quash the impugned order dated 30.10.2015 passed by Ld. OHA and accept the present appeal. The case is remanded back to the concerned VATO with direction to reframe the assessment in the light of the order after giving the appellant an opportunity of hearing. Appellant is directed to appear before the concerned VATO on 26.09.2016.

16. Order pronounced in the open court

17. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

18. File be consigned to record room.

[2015] 53 DSTC 371 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal No. 189/ATVAT/14-15
Assessment Period: 2011-12

Prime Optics,
2365, Chandni Chowk, Ballimaran, Delhi-110006 ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi ... Respondent

Date of Order: 08.10.2015

REFUND UNDER DVAT ACT, 2004 – TECHNICAL DEFAULT – MISTAKE OCCURRED IN FILING REVISED RETURN ON THE PART OF COUNSEL – REFUND AMOUNT AS SHOWED IN ORIGINAL RETURN WAS NOT FILLED

UNDER PROPER COLUMN – ASSESSING AUTHORITY DENIED TO ISSUE REFUND. WHETHER JUSTIFIED HELD – NO.

THE APPELLANT CLAIMED REFUND IN ORIGINAL RETURN – REVISED RETURN WAS FILED SUBSEQUENTLY TO ENHANCE INPUT TAX CREDIT OF UNCLAIMED INVOICES – THE APPELLANT ERRED IN FILLING REVISED RETURN AND MENTIONED REFUND AMOUNT OF ORIGINAL RETURN UNDER THE HEAD OTHER ADJUSTMENT – BASIS OF CLAIMING THE REFUND WAS NOT DISPUTED – APPEAL ACCEPTED AND DIRECTION ISSUED TO GRANT REFUND WITH IN A PERIOD OF TWO MONTHS.

Facts of the Case

Appellant M/s Prime Optics was registered with the Department of Trade and Taxes, Delhi vide TIN No. 07830253234 and was engaged in the business of trading of opticals. The appellant had been duly filing its DVAT returns periodically. The appellant had filed the original return for the period from 1.4.2011 to 30.6.2011 on 27.7.2011 claiming a refund of Rs 5, 14,700/-. Later on, the appellant realized that certain invoices, on which an Input tax credit of Rs 41,165/- was available, were missed to be considered at the time of filing the original return. The appellant on realizing the said mistake filed a revised return on 6.10.2012, wherein, as stated by him, out of the said excess credit, Rs 38,342/- was taken as carry forward in subsequent period and balance Rs 2,823/- was again adjusted against the CST liability (even when the same had been adjusted in the original return). With respect to the earlier refund claimed, the appellant ought to have shown it under the refund column. However, the said amount was rather taken in the input / output tax credit adjustment column under the head “other adjustments”. The appellant was under the impression that the refund claimed earlier, need not be claimed again at the time of filing the revised return and thus, made a technical default by considering wrong column in the return. The said error was not detected till the time; the file went for processing of refund. Since, the amount of refund was more than Rs 2, 50,000/-, the file also went to the Additional Commissioner for approval. As submitted by the Appellant the said refund was even duly approved by said Additional Commissioner. It was only at the time of generating the refund order, the said fault was ascertained. But till that time, considerable delay had happened and the appellant couldn’t file the revised return of VAT for the said period as the due date of filing the revised return had expired. The appellant asked the VATO to unblock the period, as the same was just mistake apparent from record, and he himself could suo-motu rectify it. However, the VATO didn’t consider the request of the appellant and didn’t pass the refund order.

Held

Input tax credit of Rs 5,14,700/- refund of which appellant was claiming was not disputed, it had been denied as appellant failed to reflect it against the correct column in the revised return. In view of the settled legal position as observed by the Tribunal in the foregoing discussion Tribunal could not sustain the impugned orders which were accordingly set aside. Consequently the appeal was allowed and the appellant was held entitled to have refund of the said amount which shall be granted to him within a period of two months of this order.

Cases Referred:

- *Girdhari Lal Parasmal Vs. State of Mysore (1967) STC Pg 54.*
- *Sheo Nath Prasad Sharma Vs. CIT (1967) 66 ITR 647 (All)*
- *United Bank of India Vs. Naresh Kumar AIR 1997 SC 3*
- *General Instruments Company Vs. UOI (2008) ELT 642 (SC)*

Present for the Appellant : Sh. P. K. Bansal, Adv.,

Present for the Respondent : Sh. C. M. Sharma, Adv.,

Order

1. This order shall dispose off the above noted appeal filed by the appellant challenging the impugned orders dated 19.06.2014 passed by the Additional Commissioner (HR&FM) hereinafter called the Objection Hearing Authority (in short OHA) whereby the objection filed by the appellant seeking permission for filing the revised return was rejected.

2. Appellant M/s Prime Optics is registered with the Department of Trade and Taxes, Delhi vide TIN No. 07830253234 and is engaged in the business of trading of opticals. The dealer has been duly filing its DVAT returns periodically. The dealer had filed the original return for the period from 1.4.2011 to 30.6.2011 on 27.7.2011 claiming a refund of Rs 514,700. Later on, the dealer realized that certain invoices, on which an Input tax credit of Rs 41,165 was available, were missed to be considered at the time of filing the original return. The dealer on realizing the said mistake filed a revised return on 6.10.2012, wherein, as stated by him, out of the said excess credit, Rs 38,342 was taken as carry forward in subsequent period and balance Rs 2,823 was again adjusted against the CST liability (even when the same had been adjusted in the original return). With respect to the earlier refund claimed, the dealer ought to have shown it under the refund column. However, the said amount was rather taken in the input /

output tax credit adjustment column under the head "other adjustments" The dealer was under the impression that the refund claimed earlier, need not be claimed again at the time of filing the revised return and thus, made a technical default by considering wrong column in the return. The said error was not detected till the time; the file went for processing of refund. Since, the amount of refund was more than Rs 2,50,000, the file also went to the Additional Commissioner for approval. As submitted by the Appellant the said refund was even duly approved by said Additional Commissioner. It was only at the time of generating the refund order, the said fault was ascertained. But till that time, considerable delay had happened and the dealer couldn't file the revised return of VAT for the said period as the due date of filing the revised return had expired. The dealer asked the VATO to unblock the period, as the same was just mistake apparent from record, and he himself can suo-motu rectify it. However, the VATO didn't consider the request of the dealer and didn't pass the refund order.

3. Counsel for the appellant has submitted that he is registered with the department vide TIN no. 07830253234 and has been duly filing periodical DVAT returns. Appellant had filed the original return for the period 01.04.2011 to 30.06.2011 on 27.07.2011 claiming a refund of Rs 5,14,700/-. Later on the appellant filed a revised return on 06.10.2012 wherein certain excess credit of Rs 38,342/- was taken/ considered (by revising the returns for earlier period) as 'carry forward' in subsequent period. Instead of claiming a refund of Rs 5,14,700/- and carrying forward the amount of Rs 38,342/- the appellant only carried forward Rs 38,342/- and placed the figure of Rs 5,14,700/- in Adjustment to tax credit by describing as refund already claimed in the original return. The error was detected by the appellant when he went for processing the refund in the department. Appellant was informed that now, the return could not be revised as the same can only be done if 2A and 2B are filed**.** The appellant requested that the period be unblocked so that he could file a revised return for claiming a refund of Rs. 5,14,700/-. Appellant filed objection before the Ld. OHA who rejected the same vide impugned orders dated 19.06.2014.

4. Appellant has assailed the impugned orders on the following grounds:-

(i) That the impugned orders passed by Additional Commissioner –Zone (HR&FM) disposing of the objection is bad in law and on facts of the case.

(ii) That the OHA has not appreciated the fact that section 28 of the DVAT Act states that where any discrepancy is discovered during the prescribed period, only then the revised return can be

filed. Without taking the matter in objection. That no distinction have been made by section 74 so far as the word assessment is concerned which means that it covers both type of assessments i.e. self assessment and default assessment

(iii) That the mistake is on the part of the counsel and the appellant should not be made to suffer, there are various judicial pronouncements on the issue that the dealer should not be made to suffer on account of the lapses on the part of the counsel.

5. We have heard Sh PK Bansal, Adv., Ld. Counsel for the appellant and Sh CM Sharma, Ld Counsel for the Revenue.

6. It is not disputed that the appellant had excess input tax credit of Rs 5,53,042/-of which he claimed refund of Rs 5,14,700/- in the original return and Rs 38,342/-carried forward in the revised return. On detection of this error when he again wanted to revise the return he was told that now he could not revise the return on line due to technical reasons for which he filed objection before the Ld OHA which was rejected.

7. Ld OHA rejected the objection observing that

> "Therefore as seen and evidenced from above, the law does not provide for filing of an objection under the aforesaid provision of section 74(1) of the DVAT Act, 2004 for condoning delay and granting the permission to file the revised return in respect of any tax period, the time limit for which as provided for the purpose in the relevant section 28 of the Act has elapsed or expired.

Resultantly, in the facts and circumstances of the case, detailed narration made above and the law i.e. the DVAT Act 2004 as it stood on date, the objection filed by the objector under the aforesaid provisions of the Act is found to be not maintainable. Accordingly, the same is dismissed as such and the objection stands disposed of in these terms."

8. It is very much relevant here to refer to the decision in the case of Girdhari lal Parasmal vs. State of Mysore (1967) STC page-54 in which Hon'ble High Court observed as follows :

> "The duty of the assessing officers is not merely to impose tax that is lawfully exigible but also to give to the assesses the benefit of any reduction or exemption that may become due to them upon facts actually found to be true by the assessing authorities, whether or not the assesses, out of ignorance or by mistake, make a claim thereto. When the mistake is obvious and the matter is taken up

on appeal, it is the duty of the appellate authorities to correct the mistake."

9. In Sheo Nath Prasad Sharma (Pt.) v. CIT (1967) 66 ITR 647 (All) the petitioner applied in revision under section 33A(2) under the Indian Income Tax Act, 1922 (equivalent of section 264 of the Income-tax Act 1961), to the Commissioner of Income-tax against the assessments for the three assessment years 1944-45, 1945-46 and 1946-47. Those applications were dismissed on the ground:-

"As the assessee has himself shown the incomes on which he has been assessed, there is no force in the present petition filed by the assessee."

Rejecting the contention of the Commissioner, the High Court held, -

The order of the Commissioner rejecting the previous applications, on the mere ground that the petitioner had shown the income in his return, is erroneous. The Commissioner was bound to apply his mind to the question whether the petitioner was taxable on that income. The Income-tax Officer is entitled under section 23(1) to make an assessment on the basis of the return if he is satisfied, without requiring the presence of the assessee or the production of evidence in support of the return that the return is correct and complete. But it may be that the assessee may have committed a mistake in treating a certain receipt as taxable. The mere circumstance that he has shown that receipt as income in his return does not make him liable to tax thereon. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. The law empowers the Income-tax Officer to assess the income of an assessee and determine the tax payable thereon. In doing so, he may proceed on the basis that where an assessee discloses that a certain sum of money has been received by him, the fact of that receipt may be accepted without anything more as constituting an admission on the part of the assessee. That would be an admission as to a state of fact. But whether the receipt can be considered as taxable income is quite another matter, and consideration of that question leads into the realm of law. If the Income-tax Officer assesses an assessee upon a receipt which is not taxable in law, it is always open to the assessee to take the case in appeal or in revision thereafter. It is then for the Appellate Assistant Commissioner or the Commissioner

> of Income-tax, as the case may be to examine the matter and determine whether, although the money has been received by the assessee, it is taxable in law. The assessee is then within his rights in requiring the appellate or the Revisional authority to examine the validity of the assessment to tax of a receipt which, though admitted by him, is not taxable in law.

10. In Yusuf (C.P.A.) v. Agricultural Income-tax Officer, (1970) 77 ITR 237 (Ker), the assessee, by mistake had offered the income derived by him by sale of rubber obtained by slaughter-tapping of rubber trees, which he has purchased for being cut and removed , for tax. Later, realising that it does not fall within the definition of “agricultural income”, he applied for refund. The Assessing Officer rejected the refund application on the ground that the assessee himself has shown it as income, which stood assessed as such. Repelling this stand, the High Court held, -

> “The next question for consideration is whether the petitioner is entitled to get refund from the second respondent of the tax collected by him in respect of the above income by including it as part of the petitioner’s total agricultural income. The learned Government Pleader submitted that the assessments were made on the basis of voluntary returns made by the petitioner, that he has not sought to quash the said assessment, and that so long as the assessments stand, he was not entitled to get the refunds claimed. This contention cannot be accepted. It was the duty of the second respondent to consider and determine whether the income from slaughter tapping of rubber included in the return of the assessee was agricultural income or not. He has got jurisdiction only to assess Agricultural income. This income happened to be included as agricultural income by the second respondent, either because he did not apply his mind to that matter, or because he was ignorant about it. It cannot be said that he knew that it was not agricultural income, and he still assessed it. It would be then a dishonest exercise of jurisdiction. At any rate, when he knew or he was informed that this was not agricultural income, or when he is convinced that it was not assessable, it is his duty to rectify the error and refund to the petitioner the amount of tax which he collected wrongly and without jurisdiction. It is, therefore, strange that the claim for refund of the amount thus collected is now opposed on behalf of the second respondent. This is apparently a case where both parties acted under a mistake, and the second respondent is bound to refund to the petitioner the amount collected by him under mistake and without jurisdiction.”

11. In General Instruments Co. Vs UOI (2008) 229 ELT 642 (SC), it was observed,

> "it is trite that no man should suffer a wrong by technical procedure of irregularities. The rules or procedures are handmaids of justice and not the mistress of the justice."

12. In United Bank of India v. Naresh Kumar AIR 1997 SC 3, it was observed –

> 'As far as possible, a substantive right should not be defeated on account of a procedural irregularity which is curable'

13. In Aurangabad Electricals (Pvt) Ltd Vs Commissioner of Central Excise and customs Aurangabad (2010) 29 STT 390 SC, Hon'ble Supreme Court observed:

> "……The appellant had produced the certificate alongwith the other papers filed before the Tribunal may be after the appeals were heard and reserved for judgment. In the normal course, we would not have accepted either the submission of the Ld. Senior Counsel or we would have taken note of the Certificate. Keeping in view the well-settled principles laid down by this Court that technicalities should not defeat rendering of complete justice to a litigant, we think it appropriate to remand the matter to the Tribunal to verify and consider whether the Certificate which is already placed on record by the appellant would assist them in support of their defence."

14. In Sanchit Software & Solutions (P) Ltd. Vs CIT (2012) 349 ITR404, Hon'ble Bombay High Court held as under:

> " Income Tax Department cannot take advantage of assessee's mistake in not claiming exemption in IT return and deny him exemption. The entire object of administration of tax is secure the revenue for the development of the country and not to charge assessee more tax than that which is due and payable by the assessee."

15. In Northern India Motor Company Vs. Commissioner of Value Added Tax, Department of Trade & Taxes, New Delhi 25 VST 466, the Delhi High court has observed that a pragmatic interpretation of the provision has to be made. The point that came up for consideration before Their Lordships in this case was whether the appellant who was holding stock of tax paid goods to the tune of Rs. 7,32,554/- as on 31.03.2005 and was entitled to tax credit of Rs. 49,424/- on this stock but did not mention the

details of the input tax credit on transitional stock in the return form DVAT-16 could claim refund/adjustment of the same by filing objection under section 28(2) of the Act. The Ld. Counsel for the appellant before Their Lordships submitted that the expression "mistake or error paid more tax than was due under the Act" appearing in section 28(2) of the Act should be taken to mean not only "actual payment" of tax paid but even a credit which is lying to the account of the assessee. Their Lordships held "we also feel that a pragmatic interpretation of the provision the intention of which is to give benefit to the assessee in tax which was not due and which he is entitled to refund of, then the expression in section 28(2) should include tax available as a credit and the expression appearing in section 28(2) should be interpreted to include a credit lying to the account of the assessee."

16. Settled position of law that emerges from the foregoing decisions is that an assessee is cannot be allowed to suffer and his legitimate right forfeited technical mistakes or procedural irregularities.

17. Coming to the facts of the case , Appellant filed original return on 27.07.2011 for the period 01.4.2011 to 30.6.2011 claiming a refund of Rs 5,14,700. Later on, realizing his mistake of not claiming the ITC on certain invoices he revised the return on 6.10.2012 wherein he took Rs 38,342 as carry forward in subsequent period and mentioned the amount of Rs.5,14,700/- in the input / output tax credit adjustment column under the head "other adjustments" instead of mentioning it under the relevant column of refund. It is just because of this technical error that the refund has been denied to him. While his input tax credit of Rs 5,14,700/- refund of which he is claiming is not disputed it has been denied as he failed to reflect it against the correct column in the revised return. In view of the settled legal position as observed by us in the foregoing discussion we cannot sustain the impugned orders which are accordingly set aside. Consequently the appeal is allowed and the appellant is held entitled to have refund of the said amount which shall be granted to him within a period of two months of this order. Ordered accordingly.

18. Order pronounced in the open court.

19. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2015] 53 DSTC 380 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M. S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.1534-1538/ATVAT/12-13

J.C. Decaux Advertising India Pvt. Ltd.,
231, Okhla Industrial Estate,
Phase- III, New Delhi-110020 ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order: 20 .05.2016

DISALLOWANCE OF INPUT TAX CREDIT – INPUT TAX CREDIT CLAIMED ON THE BASIS OF RETAIL INVOICES – VATO ISSUED NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST AND ISSUED NOTICE OF ASSESSMENT OF PENALTY.

APPELLANT RIGHTLY CLAIMED ITC ON FULFILLMENT OF SUBSTANTIAL CONDITIONS AS PROVIDED UNDER SECTION 9(1) OF DVAT ACT, 2004 – ITC WAS DENIED ON MERE TECHNICAL GROUND THAT INSTEAD OF ISSUING TAX INVOICE AND TIN NO. WAS NOT MENTIONED ON THE RETAIL INVOICES – DIRECTION ISSUED TO REVENUE TO GIVE BENEFIT OF ITC.

Facts of the Case

JC Decaux Advertising India Pvt. Ltd. (hereinafter referred to as (JCD / the appellant/ the company) was a company incorporated under the provisions of the Companies Act, 1956, in the year 2005. The Company was registered dealer under the Delhi Value Added Tax Act vide TIN No. 07610329500.

During the financial year 2008-09, the appellant in the course of its business purchased printed banners from Jumbo Digital Prints (JDP) for re-selling the same to its customers. In this regard, JDP charged and collected VAT on the sale of printed banners and issued retail invoices to the appellant. Consequentially, appellant availed the VAT credit on the basis of the retail invoices issued by the JDP and utilized the same to discharge its output VAT liability on sale of printed banners to its customers.

Later, an assessment order dated December 11, 2009 was passed by the VATO (SZ) for the financial year 2008-09. In the assessment order, VATO observed that the company erroneously claimed Input Tax Credit

of Rs. 3, 61,737/- in all four quarters of 2008-09 on the basis of retail invoices instead of tax invoices. Further it had also been mentioned in the assessment order that the TIN No. of the company was not mentioned on the said retail invoices. Consequentially, the VATO (SZ) disallowed input tax credit pertaining to all such invoices and levied applicable interest and penalty of equivalent amount on such tax credit.

Against the said assessment order appellant filed objections before the Additional Commissioner (Zone V), Objection Hearing Authority who vide order dated 19.11.2012 upheld the assessment order of the VATO (SZ) and the demand of tax, interest and penalty were confirmed.

Held

Appellant rightly claimed ITC on fulfillment of the substantial conditions as provided under Section 9(1) of the DVAT Act, hence, there was no default on the part of the appellant in payment of taxes and as there was no default in payment of taxes, interest and penalty were wrongly levied by VATO vide assessment orders, so they were not sustainable as per the provisions of law and liable to be set aside.

Revenue in support of his argument referred to the case of Mahadevi Stores, Vs. Additional Commissioner of Commercial Taxes Zone-1, Gandhi nagar, Bangalore & Ors.

Perusal of judgment of Hon’ble Karnataka High Court showed that it was not applicable to the facts of the present case so no benefit could be given to the revenue on the basis of this judgment because facts of this case were entirely different from the present appeals.

Tribunal was in considered view that impugned orders dated 19.11.2012 passed by OHA were liable to be set aside and the appeals were allowed accordingly because ITC during the financial year 2008-09 was wrongly denied to the appellant on mere technical ground, that instead of issuing tax invoice the selling dealer issued to the appellant retail invoice and TIN No. was not mentioned on the retail invoice which was in Tribunal view was only a technical error hence VATO was directed to give benefit of ITC to the appellant as per law in the light of these orders.

Cases Referred

- *Vodafone Essar Limited Vs. Dispute Resolution Panel II (2011) 96 Taxman 423*
- *C. Damani & Co. Vs. Commissioner of Trade & Taxes, Delhi (48 DSTC J-349)*

Present for the Appellant : Shri Upvan Gupta, Advocate

Present for the Respondent : Shri S.B. Jain, Govt. Counsels

Order

1. These five appeals have been filed against the impugned order dated 19.11.2012 passed by the Addl. Commissioner (Zone-V), Objection Hearing Authority (in short, OHA), who vide this order upheld the default assessment of tax, interest and penalty orders passed by Ld. VATO (Ward 107/Special Zone) under Section 32 and 33 r/w Section 86 (10) of DVAT Act. Details of the tax interest and penalty imposed by Ld. VATO are as under:

Tax period	Tax (Rs.)	Interest (Rs.)	Penalty u/s 33 (Rs.)	Total u/s 32 (Rs.)
1st Qtr. of 2008-09	81508	16849	-	98357
2nd Qtr. of 2008-09	68546	11634	-	80180
3rd Qtr. of 2008-09	92686	12303	-	104989
4th Qtr. of 2008-09	118997	11394	-	130391
2008-09	-	-	361737	361737

2. The brief facts of the present appeals are that JC Decaux Advertising India Pvt. Ltd. (hereinafter referred to as (JCD / the appellant/ the company) is a company incorporated under the provisions of the Companies Act, 1956, in the year 2005. The Company is registered dealer under the Delhi Value Added Tax Act vide TIN No. 07610329500.

3. During the financial year 2008-09, the appellant in the course of its business purchased printed banners from Jumbo Digital Prints (JDP) for re-selling the same to its customers. In this regard, JDP charged and collected VAT on the sale of printed banners and issued retail invoices to the appellant. Consequentially, appellant availed the VAT credit on the basis of the retail invoices issued by the JDP and utilized the same to discharge its output VAT liability on sale of printed banners to its customers.

4. Later, an assessment order dated December 11, 2009 was passed by the VATO (SZ) for the financial year 2008-09. In the assessment order, Ld. VATO observed that the company erroneously claimed Input Tax Credit of Rs. 3,61,737 in all four quarters of 2008-09 on the basis of retail invoices instead of tax invoices. Further it has also been mentioned in the assessment order that the TIN No. of the company was not mentioned on the said retail invoices. Consequentially, the VATO (SZ) disallowed input

tax credit pertaining to all such invoices and levied applicable interest and penalty of equivalent amount on such tax credit.

5. Against the said assessment order appellant filed objections before the Additional Commissioner (Zone V), Objection Hearing Authority who vide order dated 19.11.2012 upheld the assessment order of the VATO (SZ) and the demand of tax, interest and penalty were confirmed.

6. Aggrieved with the orders of Ld. OHA the appellant has filed these appeals on following among other grounds before this Tribunal which are as follows:-

(i) The impugned order has been assailed on the ground that the Ld. OHA has erred in law and in facts in not appreciating that the appellant has rightly availed the Input Tax Credit as all the substantive conditions prescribed under the DVAT Act have been satisfied.

(ii) Ld. OHA has erred in law and in facts in denying the Input Tax Credit to the appellant without appreciating that ITC should not be denied merely on the basis of inadvertent technical omission.

(iii) Impugned order passed by Ld. OHA has been assailed on the ground also that Ld. OHA has erred in law and facts that ITC cannot be denied to appellant on the basis of inadvertent mistake at the supplier's end.

(iv) Ld. OHA has erred in law and in facts in not appreciating that interest and penalty cannot be levied as the appellant is entitled to avail ITC.

7. On the basis of above facts and grounds of appeal, it has been prayed that present appeals be allowed and ITC denied by lower authorities be allowed.

8. These appeals were heard on merit after compliance of pre-condition of deposit passed under Section 76(4) of the DVAT Act by this Tribunal vide order dated 10.04.2013.

9. Heard to appellant Ld. Counsel, Sh. Upvan Gupta, Advocate and Sh. S.B. Jain, on behalf of the revenue and perused the file and the judicial precedents cited by appellant's Ld. Counsel in support of appeals.

9. Appellant's Ld. Counsel during the course of arguments reiterated the facts and grounds of appeal and supported his arguments with case laws.

10. While Ld. Counsel for the revenue submitted that ITC has rightly been denied by the Ld. OHA to the appellant because it is mandatory under Section 9(8) of DVAT Act that the tax credit may be claimed by a dealer only if he holds the tax invoices at the time of filling return for the relevant tax period. As appellant failed to produce tax invoices, so ITC was rightly denied to the appellant. Ld. OHA's findings suffer from no infirmity and illegality, hence it warrants no interference and appeals be dismissed.

11. Appellant JC Decaux India Pvt. Ltd. (JCD) during the financial year 2008-09, in the course of its business purchased printed banners from Jumbo Digital Prints (JDP) and paid VAT on the purchase of printed banners who issued retail invoices to the appellant JCD. On the basis of these retail invoices appellant claimed ITC which was denied by the Ld. VATO who vide assessment order 11.12.2009 not only denied the benefit of ITC but also imposed interest and penalty on the appellant and then it was assailed before the Ld. OHA who also vide order dated 19.11.2012 confirmed the assessment order regarding demand of tax, interest and penalty passed by Ld. VATO. The OHA order dated 19.11.2012 has been assailed before this Tribunal.

12. The first ground on which the impugned order has been assailed is that Ld. OHA erred in law and in facts in not appreciating that the appellant has rightly availed the input VAT credit as all the substantive conditions prescribed under the DVAT Act have been fulfilled. In this regard appellant's Ld. Counsel submitted that supplier JDP has charged and collected VAT from the appellant for selling printed poster and deposited the same in the Government exchequer. According to appellant he has rightly availed Input VAT Credit being a substantive benefit but Ld. VATO as well as Ld. OHA has disallowed the said benefit without considering the submissions made by the appellant.

13. Now the question arises what are the substantive conditions for availing the benefits of the VAT credit and whether in the present case those conditions have been fulfilled by the appellant.

14. In this regard it would be appropriate to refer Section 9 (1) of DVAT Act under which a dealer is entitled to claim VAT credit on fulfillment of the following conditions:-

a. A dealer must be either a registered dealer or required to be registered under the DVAT Act;

b. Such purchases must have been made in the course of his activities as a dealer;

c. The goods which are purchased by him must be used by him directly or indirectly for the purpose of making sales which are liable to tax under section 3 of the DVAT Act;

d. The purchases made by him must be from registered dealers only; and

e. VAT has been paid on such goods as supplied by the purchasing dealer to the selling dealer.

15. Applying the above conditions to the facts and circumstances of the present case, we find that appellant has complied with the conditions prescribed under Section 9(1) of the DVAT Act as appellant is a registered dealer, he made purchases of printed banners from the JDP on payment of VAT in the course of business. These banners were later on sold by appellant which were liable to pay tax under DVAT Act and he made purchases from the JDP who is a registered dealer and who deposited the tax in the Government exchequer but JDP instead of issuing tax invoice, inadvertently issued retail invoice on the basis of which VAT credit was denied to the appellant in the purchases made by him from the JDP.

16. The impugned order has also been assailed on the ground that it is a non speaking order. The submissions made by the appellant has not been given due regard while passing the impugned order. It has not been mentioned that why the case law cited by the appellant in support of submissions has not been followed. No reason has been given for not agreeing to submissions and rulings cited by the appellant. On this ground it has been prayed that the impugned order is liable to be set aside. To support these argument appellant's Ld. Counsel referred to the judgement of Hon'ble Delhi High Court in the case of Vodafone Essar Ltd. Vs. Dispute Resolution Panel-II (2011) 196 Taxman 423 in which Hon'ble High Court observed as follows:-

> "*Be it noted, when a quasi judicial authority deals with a lis, it is obligatory on its part to ascribe cogent and germane reasons as the same is the heart and soul of the matter. And further, the same also facilitates appreciation when the order is called in question before the superior forum….*"

17. Perusal of impugned order shows that submissions and rulings which have been submitted by the appellant have not been given due weightage. The Ld. OHA was supposed to give the reasons why objections filed by the appellant have not been allowed and case law cited followed.

So on this ground only the impugned order is liable to be set aside as appellant had also complied with the conditions as prescribed under Section 9 (1) of the DVAT Act.

18. Ld. Counsel for revenue has argued that the mandatory conditions prescribed under Section 9 (8) has not been fulfilled hence the ITC was rightly denied to the appellant. Section 9(8) of the DVAT Act provides that the tax credit may be claimed by a dealer if he holds a tax invoice at the time of prescribed return for the tax period is furnished.

19. So far as the present case is concerned, there is no iota of doubt that appellant made purchases of printed posters from the registered dealer for which appellant paid VAT to the selling dealer. Appellant made these purchases during the course of his business activty and he sold that on receiving VAT and then he claimed ITC. It would not be out of place to mention that original selling dealer JDP deposited the VAT recovered from the appellant in the Government exchequer. The only mistake which was made that selling dealer instead of issuing tax invoice inadvertently issued retail invoices but appellant bonafidely claimed ITC on the basis of these retail invoices which was refused to him on two grounds. First ground was that in support of ITC he should have filed tax invoices and secondly TIN No. of the purchasing dealer was not mentioned on these retail invoices.

20. In the above backdrop of facts, now question arise whether it would be appropriate to deny the ITC to the appellant merely on the technical grounds. At the same time question also arises what is the purpose of issuing tax invoice on the purchase of any item from the selling dealer. The purpose in our considered view is that purchases have been made by the purchaser on payment of the VAT tax as given under the DVAT Act and secondly it has been deposited in the Government exchequer. Now, in present case, as is clear from the fact, appellant has paid VAT on purchase of printed posters to the selling dealer and the same has been deposited by the selling dealer in the Government exchequer. Now, whether it would be appropriate for the Tribunal to deny the ITC to the appellant and direct the appellant to again make payment and unjustly enrich the Government exchequer merely on the technical ground when material information is provided in the retail invoice also. Law provides for the format of tax/retail invoice under Section 50 only for the sake of administrative convenience. On violation of any condition in our view, substantive right cannot be denied to any person. In the present facts and circumstances, it was a bonafide transaction. Appellant submitted before the OHA, the copy of challan of tax deducted at source from the amount of selling dealer. Not only this he also filed copy of certificate issued to the selling dealer in which amount of income-tax deducted at source was mentioned.

21. In support of his argument appellant's Ld. Counsel referred to judgement passed by this Tribunal in the case of C. Damani & Co. Vs. Commissioner of Trade & Taxes, Delhi (48-DSTC-J-349). The ratio of this decision applies to the case in hand in which this Tribunal observed as follows:

> "Settled law is that no person can be denied the benefit on technical grounds. Here it is useful to refer to a judgment reported as Northern India Motor Company Vs. Commissioner of Value Added Tax, Department of Trade and Taxes, New Delhi 25 VST 466. Although facts of this case before Their Lordships are distinguishable because the question for consideration before Their Lordships was for grant of the relief of ITC on transitional stock when statement under DVAT18 had been filed beyond limitation yet the Principle of Law laid down by Their Lordships in this judgment, in our considered view, is applicable to the fact of the present case. The Principle of law laid down by Their Lordship in this judgment is that a pragmatic interpretation of the provision has to be made. Here it is useful to refer to a judgment in Remfry & Sons Vs. CIT (Delhi) 2005 (276) ITRI. In this judgment Their Lordships distinguished between the phrases "illegality" and "Irregularity". Their Lordships held that expression "illegality" is distinguishable from the expression "irregularity" which is defined as a want of adherence to some prescribed rule or mode of proceedings and primarily consists of omitting to do what is necessary for due and orderly conduct of the proceeding. Their Lordships held that the irregularity was curable and could be rectified even subsequently. In our considered view, this judgment is squarely applicable to the facts of the present case."

22. In the light of above observations the benefit of ITC cannot be denied to the appellant because it was irregularity on the part of the selling dealer and not illegality. To cure this irregularity selling dealer issued certificate to the effect that he charged VAT on these transactions and deposited the same in the Government exchequer and by inadvertent mistake instead of issuing tax invoice retail invoice was issued and it was due to error in using pre-printed stationary.

23. In the present case ITC was also denied on the ground that the impugned invoices did not specify the TIN No. of the appellant. In this regard appellant's Ld. Counsel submitted that as per Section 50 (5) of DVAT Act it is not mandatory to mention TIN No. of the purchasing dealer because it was a intra-state sale and according to Section 50(5) of DVAT

Act TIN No. of the purchasing dealer and type of statutory forms against which the sale has been made is required to be mentioned in case of inter-state sale but as in present case it was intra-state sale so it was not necessary to mention TIN No. of the purchasing dealer. In this regard it would be appropriate to reproduce **Section 50 Clause 5** to settle down the controversy which is as follows:-

"5*) The retail invoice issued under sub-section (4) of this section shall contain the following particulars on the original as well as copies thereof:-*

a. *the words 'retail invoice' or 'cash memorandum' or 'bill' in a prominent place;*

b. *the name, address and registration number of the selling dealer, if registered;*

c. *in case the sale is in the course of inter-state trade or commerce, the name, registration number and address of the purchasing dealer and type of statutory form, if any, against which the sale has been made:*

d. *an individual pre-printed serialized number and the date on which the retail invoice is issued:"*

24. A bare perusal of above provisions make it crystal clear that during the course of inter-state trade or Commerce, the name registration number and the address of the purchasing dealer is required to be mentioned. In present case, it was not required as firstly it was not a inter-state sale secondly though selling dealer issued retail invoice to the purchasing dealer but he was supposed to issue tax invoice instead.

25. In support of the arguments appellant's Ld. Counsel also referred to the orders passed by this Tribunal in the case of Ishwar Furniture Case (2011) 10 VSTI C-196. In this case Tribunal held that claim of ITC can be irregular due to wrong TIN No., however it is not illegal.

26. Appellant's Ld. Counsel has also assailed the impugned orders on the ground Input Vat Credit cannot be denied to appellant on the basis of inadvertent mistake of the supplier. In this regard appellant's Ld. Counsel submitted that when all the substantial conditions for availing of tax credit by a purchasing dealer under the DVAT Act have been complied with, it cannot be disallowed to the appellant due to an error on the part of the seller's end. We agree with the arguments of the appellant's Ld. Counsel that on this ground ITC cannot be denied to the appellant when he has paid

due taxes and in turn selling dealer has deposited it in the Governement exchequer. The mistake in using pre-printed stationery was on the part of the selling dealer. So on the basis of procedural lapses on the part of the selling dealer substantial benefit of ITC cannot be denied to the appellant.

27. Appellant has also assailed the impugned orders on the ground that not only tax, interest and penalty were also levied by the Assessing Authority and which were affirmed by the Ld. OHA vide order dated 19.11.2012. As is clear from the aforesaid discussion that in the facts and circumstances of the present case, appellant rightly claimed ITC on fulfillment of the substantial conditions as provided under Section 9(1) of the DVAT Act, hence, there was no default on the part of the appellant in payment of taxes and as there was no default in payment of taxes, interest and penalty were wrongly levied by Ld. VATO vide assessment orders, so they are not sustainable as per the provisions of law and liable to be set aside.

28. Ld. Counsel for the Revenue in support of his argument referred to the case of Mahadevi Stores, Vs. Additional Commissioner of Commercial Taxes Zone-1, Gandhinagar, Bangalore & Ors.

29. Perusal of judgement of Hon'ble Karnataka High Court shows that it is not applicable to the facts of the present case so no benefit can be given to the revenue on the basis of this judgement because facts of this case are entirely different from the present appeals.

30. On the basis of above discussion we are of the considered view that impugned orders dated 19.11.2012 passed by Ld. OHA are liable to be set aside and present appeals are allowed accordingly because ITC during the financial year 2008-09 was wrongly denied to the appellant on mere technical ground, that instead of issuing tax invoice the selling dealer issued to the appellant retail invoice and TIN No. was not mentioned on the retail invoice which is in our view is only a technical error hence VATO is directed to give benefit of ITC to the appellant as per law in the light of these orders. Appellant is directed to appear before the concerned VATO on 9th May, 2016.

31. Order pronounced in the open court.

32. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

33. File be consigned to record room.

WORKS CONTRACT IN THE COURSE OF INTER-STATE TRADE & COMMERCE

by
H.C. Bhatia, Advocate

About the Author:

Mr. H.C. Bhatia is practising exclusively in the field of Sales Tax/VAT for the last about 40 years. He is the author of the book Delhi Value Added Tax – A Law Book and Delhi Sales Tax – A Subjectwise Treatment with Mr. Raj K. Batra as the co-author. He was a part-time teacher in Law Centre-I, University of Delhi. He has delivered lectures on various subjects of law mainly on Sales Tax and VAT in Seminars all over India. He is regularly invited by the VAT Department to deliver lectures in the training programme for its officers. Has been the President of the Sales Tax Bar Association (Regd.), Delhi in the year 1998-99, 2005-06, 2006-07 and again in 2011-12 to 2012-13. Was a Member of Bar Council of Delhi. Was a member of Governing Council & Executive Council of National Law School, Delhi. He was the Chairman of All India Federation of Tax Practitioners (NZ) in the year 2007-08 and 2008-09 and was the Vice-President (NZ) of All India Federation of Tax Practitioners for the year 2009-10 & 2010-11. He was the Senior Govt. Counsel for Union of India in the High Court of Delhi. He has also been the Standing Counsel for the Trade & Taxes Department, Delhi in the High Court of Delhi. Presently, is the Special Counsel for the Trade & Taxes Department, Delhi in the High Court of Delhi.

Historical Background – Is inter-State sale possible in the case of Works Contract? – Yes, there can be an inter-State sale in the case of works contract also – In which State the Property Passes is not material – Covenant regarding movement of goods need not be specified in the contract – Even interposition of goods by the agent or branch does not alter inter-State character of the sale – CST Act not amended soon after the 46th Amendment but only w.e.f. 11-5-2002 – Definition of 'sale' in section 2(g) of the Central Sales Tax Act, 1956 Amended – Absence of Rules under the CST Act to work out the liability not material – State Rules would apply – No inter-State sale – No Tax to be Deducted at Source under the State Law for inter-State Works Contract – Section 6-A of the Central Sales Tax Act, 1956 and works contracts – Works contract and Section 8 of the CST Act – Refusal to Issue C-forms by the Authorities or by the buyer not justified.

Historical Background: "The expression "**sale of goods**" in Entry 48 of List-II of the Seventh Schedule of the Government of India Act, 1935, which was similar to the present **Entry 54 of List-II** of the Seventh Schedule of the Constitution being the source of the power of the States to enact the

law levying Sales Tax/VAT, **should receive the same meaning which it has under the Sales of Goods Act**, 1930 was observed by the *Supreme Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1958) 9 STC 353 (S.C.)*, The Supreme Court had held that:

> "In a building contract which is one, entire and indivisible-and that is its norm-**there is no sale of goods**, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale. **But** the **parties to the contract might enter into distinct and separate contracts**, one for the transfer of **materials** for money consideration **and the other** for payment of remuneration for **services** and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned."

The result was that so far as divisible contracts are concerned, they were always taxable. However, as far as indivisible contracts were concerned, the same could not be dissected by the State to tax the material portion of the contract.

The aforesaid decision of the Supreme Court coupled with other decisions relating to **supply of food or drinks** by a hotelier to a person lodged in the hotel or service of meals whether in a hotel or in a restaurant to the visitor [*State of Himachal Pradesh v. Associated Hotels of India Ltd.(1972) 29 STC 474 (S.C.) and Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (1978) 42 STC 386 (S.C.)*]; **transfer of controlled commodities** in pursuance of a direction under Control Order [*New India Sugar Mills Ltd. (1963) 14 STC 316 (SC), though overruled in Vishnu Agencies v. Commercial Tax Officer (A.I.R. 1978 S.C. 449)*]; **supply of goods by a co-operative society or a members' club** to its members [*Young Mens' Indian Association (1970) 26 STC 241(S.C.)*]; transfer of goods on **hire purchase** or other system of payment by **installments** [*Installment Supply (Private) Ltd. v. The Union of India (1961) 12 STC 489 (S.C.)*]; exploitation of films on leasing [*A.V. Meiyappan v. Commissioner of Commercial Taxes (1967) 20 STC 115 (Mad)*] **led to the Constitution 46th Amendment**.

As a result of the 46th Amendment, Clause (29A) has been **inserted in Article 366** of the Constitution which defines various terms used in the Constitution and reads as under:

> "**366**. **Definitions**.–**In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say**–
>
> …………………………………………………………………………
> **"(29A) "Tax on the sale or purchase of goods includes--**
> …………………………………………………………………………..............
> **b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;**
> …………………………………………………………………………..............
> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

Clause 29(A) provides that for the purposes of the Constitution "tax on sale or purchase of goods" shall be deemed to include, *inter alia*, "transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract". The **result** of this Constitutional amendment is that **by a legal fiction** a **contract** which is indivisible is **deemed to be a divisible** contract, one relating to supply of goods and other relating to supply of labour and services. This **amendment** was **an enabling provision** which, now, enabled the States to levy tax on the material portion of an indivisible contract.

46th Constitutional amendment was **challenged** before the Supreme Court **in three main cases**, namely, *Builders Association of India (1989) 73 STC 370; Ganon Dunkerly & Co. (1993) 88 STC 204 and Builders Association of India (1993) 88 STC 248*. The **validity** of the 46th Amendment was **upheld** by the Supreme Court. **However**, the Court observed that 46th Amendment does not confer on the States a power larger than the power the States have to levy tax on ordinary transaction of sale. The Court further **held** that the **power of the State** to levy tax on works contract in terms of clause (29A) of Article 366 **is subject to two limitations** – **one** which **flows** from **entry 54** of List-II of the Seventh Schedule itself **which is subject to entry 92A of List-I** with the result that the **State cannot levy tax** on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract **where** the works **contract takes place in the course of inter-State trade or commerce**. The **second limitation** on the power of the State to levy tax on deemed sale of works contract is contained in **Article 286** of the Constitution which

provides **that no law of a State shall impose** or authorize the imposition of **a tax where** such **sale or purchase** takes place (a) **outside the State** or (b) **in the course of import** of goods into or export of the goods out of the territory of India.

The Supreme Court had also held that unless there is a contract to the contrary, **ordinarily transfer of property in the material involved in the execution of works contacts takes place at the time of incorporation of the goods into the contract.**

Is inter-State sale possible in the case of Works Contract?

In view of the observations of the Supreme Court that in the case of works contract, transfer of property in the goods involved in the execution of works contract takes place at the time of incorporation of the goods into the contract, **a question arises** as to **how a works contract can take place in the course of inter-State trade** or commerce, **since**, in **every case transfer of property will take place when the goods are incorporated into the contract** and that would be in the State in which the contract is being executed.

In fact, in **one of the earlier** cases, *West Bengal Taxation Tribunal in the case of Bijoy Processing Industries v. Commercial Tax Officer (1994) 92 STC 503 (WBTT)* had expressed a doubt and observed that it is difficult to visualize that a sale can ever be in the course of inter-State trade or commerce in respect of goods which are involved in the execution of works contract since the deemed sale of such goods takes place only when the goods are incorporated in the work and this can only take place in the State in which the work is executed. **The Taxation Tribunal** had **held that since** the **transfer of property** in the course of works contract **takes place at the time of incorporation of the goods** into the contract **there can be no inter-State sale** of works contract .

Yes, there can be an inter-State sale in the case of works contract also:

In which State the Property Passes is not material:

However, the **aforesaid view** of the WBTT was **wrong**. The **reason** being the **settled law** that **if** the **goods move in pursuance of a contract** of sale from one State to another, **it will be** an **inter-State sale**, **irrespective of the State in which the property passes**. Similarly, in the case of works contracts also, even if the property in the goods involved in the execution

of contract passes when the material is incorporated into the contract, the deemed sale of the works contract would be in the course of inter-State trade or commerce if the material required moves in pursuance of the works contract.

The **question** as regards the nature of the sale, that is, whether it is an inter-State sale or an intra-State sale, **does not depend upon** the circumstance as to **in which State the property**, in the goods **passes**. **It may pass in either State** and yet the sale can be an inter-State sale. [*Union of India and another v. K.G. Khosla & Co. Ltd. (1979) 43 STC 457 (SC)*]

No matter in which State the property in the goods passes, **a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade"** The inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale.

The **movement of crude oil from the State of Assam** to the State of Bihar was an incident of the contract of sale and therefore the sales **to the refinery at Barauni were sales in the course of inter-State** trade. [*Oil India Ltd. v. The Superintendent of Taxes and Others (1975) 35 STC 445 (SC)*].

The **observation of the Supreme Court in the aforesaid** cases in which the 46th Amendment was challenged to the effect **that the power of the State to** levy tax on works contract under entry 54 of List-II of the Seventh Schedule is subject to *entry 92A of List I* of the Seventh Schedule i.e. the States cannot so enact a law as to levy tax on works contracts in the course of inter-State trade **itself suggests that there can be works contract in the course of inter-State trade** or commerce and that is why the State has no jurisdiction to tax such contracts.

Covenant regarding movement of goods need not be specified in the contract:

It is **also settled that** if a contract of a sale contains a stipulation for the movement of the goods from one State to another, the sale would

certainly be an inter-State sale. But for the purposes of section 3(a) of the Act it **is not necessary that the contract of sale must itself provide for and cause the movement** of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. A sale can be an inter-State sale, **even if the contract** of sale **does not itself provide for the movement** of goods from one State to another **but such movement is the result of a covenant in the** contract of sale or is an incident of that contract;" [*Union of India and another v. K.G. Khosla& Co. Ltd. (1979) 43 STC 457 (SC)*]

Even interposition of goods by the agent or branch does not alter inter-State character of the sale:

If **there is a conceivable link between a contract of sale and the movement of goods** from one State to another **in order to discharge the obligation under the contract** of sale, **the interposition of an agent of the seller** who may temporarily intercept the movement will not alter the inter-State character of the sale. [*South India Viscose Ltd. v. State of Tamil Nadu (981) 48 STC 232 (SC)*].

When **a branch** of a company **forwards a buyer's order** to the principal **factory of the** company **and instructs them to dispatch the goods direct to the buyer and the goods are sent to the buyer** under those instructions it would not be a sale between the factory and its branch. The steps taken from the beginning to the end by the Bombay branch in co-ordination with the Madras factory showed that the Bombay branch was merely acting as the intermediary between the Madras factory and the buyer and that it was the Madras factory which pursuant to the covenant in the contract of sale caused the movement of goods from Madras to Bombay. The inter-State movement of the goods from Madras to Bombay was the result of the contract of sale and the fact that the contract emanated from correspondence which passed between the Bombay branch and the company could not make any difference. The sale was therefore liable to be taxed under section 3(a) of the Central Act. [*English Electric Company of India Ltd. v. The Deputy Commercial Tax Officer and others. (1976) 38 STC 475 (SC)*]

A Simple Example of inter-State sale:

For example, where a dealer of Andhra Pradesh sends certain goods from Andhra Pradesh to Tamil Nadu for further processing like fabrics for bleaching and dying, in which certain material like dyes is also used by the contractor and after processing the goods

are sent back to Andhra, it will be a case of works contract in the course of inter-State trade or commerce, as the goods, after the execution of the works contract, shall be moving from Tamil Nadu to Andhra in pursuance to the contract of sale. Similarly, where a contractor in Tamil Nadu enters into a contract for execution of say civil construction work in Andhra Pradesh and the contract contemplates that the material required for the construction shall move from Tamil Nadu to Andhra, it will be a case of works contract in the course of inter-State trade or commerce.

CST Act not amended soon after the 46th Amendment but only w.e.f. 11-5-2002:

Although soon after the Constitution 46th Amendment, all the States had amended their Sales Tax enactments, Central Sales Tax Act was not amended. **The Central Sales Tax was amended w.e.f.11-5-2002** to levy tax on transactions which were deemed to be sales by virtue of the Constitution 46th Amendment Act by amending the definition of sale in section 2(g) thereof.

Definition of 'sale' in Section 2(g) of the Central Sales Tax Act, 1956 Amended.

Section 150 of the Finance Act, 2002 has substituted the definition of 'sale' in section 2(g) of the Central Sales Tax Act, 1956. The amended definition, *inter alia,* reads:

> (g) "**Sale**", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration and **includes**,-
>
> ………………………………………………………………
>
> (ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> ………………………………………………………………
>
> but does not include a mortgage or hypothecation of or a charge or pledge on goods;

The result of this amendment is that now the definition of "sale" in the Central Sales Tax Act includes indivisible works contracts also within its ambit. The principles for determining an inter-State sale apply to the deemed sales of works contracts also.

Prior to 11.5.2002, works contracts in the course of inter-State trade & commerce even if satisfied the tests of inter-State sales were not taxable because the CST Act levies tax on ‘sale’ in the course of inter-State trade and commerce and prior to 11.5.2002, definition of ‘sale’ under the CST Act did not include works contracts under its ambit. After 11.5.2002 these have become taxable under the CST Act.

By the Finance Act, 2005, the following proviso was added in the definition of ‘sale price’, in section 2(h) of the CST Act w.e.f. 13.5.2005:

> “**PROVIDED** that in the case of a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, the sale price of such goods shall be determined in the prescribed manner by making such deductions from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sale price for the purposes of this clause.”

Section 13 of the CST Act, 1956 empowering the Central Government to make rules was also amended w.e.f. 13.5.2005 by the Finance Act, 2005 and clause (aa) was added in the said section:

> **“13. Power to make rules.–**(1) The Central Government may, by notification in the Official Gazette, make rules providing for—
>
> ……………………………………………………………………..
>
> (aa) the manner of determination of the sale price and the deduction from the total consideration for a works contract under the proviso to clause (h) of section 2;”

<u>Absence of Rules under the CST Act to work out the liability not material – State Rules would apply:</u>

Although the Central Sales Tax Act has been amended in line with the 46th Amendment, there are no rules under the Central Sales Act to provide for the machinery to give effect to the various clauses in the definition of ‘sale’ to work out the liability, say, that of the contractor. But the Supreme Court in *Mahim Patram Pvt Ltd. v. UOI & Ors. (2007) 6 VST 248 (SC)* held that:

> “Section 9(2) of the Central Sales Tax Act, 1956, is of wide amplitude: it confers powers on the officers of the State to make assessment or reassessment which the officers of the State have under the general sales tax laws, to carry out assessment under the 1956

Act as if it is an assessment under the State Act. The expression "as if" is of some significance. **The powers conferred and the procedures laid down under the State sales tax laws would therefore, be applicable also for the purpose of carrying out assessment under the 1956 Act.** "Assessment" comprehends the power to even compute the amount chargeable to tax in terms of the procedure prescribed under State Act. Furthermore, section 13(1) of the Central Sales Tax Act, 1956, provides that the Central Government "may" by notification make rules for the computation of the turnover: it is an enabling provision. It is not obligatory for the Central Government to do so. The language of section 13(3) of the Central Sales Act, 1056, makes it clear that the State Government has also been given power to make rules, which are not inconsistent with the provisions of the Act and any rules which may have been made under section 13(1) by the Central Government."

"In view of section 13(3) of the Central Sales Tax Act, 1956, **so long as the Central Government does not make rules under the Central Sales Tax Act, 1956, for the determination of the turnover in relation to inter-State works contracts, determination of the turnover may be carried out by the assessing authority in a State in terms of the rules made by the State Government**."

Accordingly it was held that in imposing sales tax under the Central Sales Tax Act, 1956, on works contracts in the course of inter-State trade relating to printing question papers for examination boards, etc., the sales tax authorities of the State of Uttar Pradesh were entitled, in the absence of rules framed by the Central Government in that behalf, to compute the turnover by applying the rules made by the State Government."

Thus, even in the absence of amendment in the Central Sales Tax Rules, 1956 tax on works contract in the course of inter-State or commerce can be levied by having resort to the State Rules.

I. <u>Some other important case law on the subject</u>:

1. **Where** the machinery and equipment were supplied in the course of inter-State trade and **right from the stage of design**, **it was exclusively done according to the specifications of the customer**, **who** also **inspected** the **work in process at every stage**, and that merely because the equipment was installed and erected in the State of Andhra Pradesh, it could not be said to be a local sale. On a revision petition, it was held (i) that the finding that the transaction was an inter-State transaction and

therefore not liable to tax under the Andhra Pradesh General Sales Tax Act, 1957 was correct and there was no error in the orders of the Tribunal. **[***State of Andhra Pradesh Vs. Usha Breco Ltd., Calcutta (2001) 121 STC 621 (A.P.)***]**

2. Where the assessee in Karnataka, undertook a contract for retreading of tyres from Andhra Pradesh State Road Transport Corporation, it was held by the Karnataka High Court that t**he contract which had been entered into was for retreading the tyres and sending them to APSRTC, Andhra Pradesh from Karnataka after retreading. The movement of goods was so linked that it could not be disassociated except at the violation of the contract.** The Court also observed that there may be other stipulations in the contract like inspection of the goods, etc., but they cannot convert an inter-State sale into a local sale. The movement must be the incident of the contract. Fixing of rubber over the tyres of APSRTC though passes the property in goods on the theory of accretion to the movable property is only one part of the contract on the basis of which it has to be considered as works contract. But the other part of the contract stipulates movement of goods from one State to another and hence both being integral part of contract it has to be considered an inter-State sale of works contract which is not liable to tax under the Central Sales Tax Act.

In this case, inter-State sale of works contract was held not liable to tax under the Central Sales Tax Act, 1956 because by then the definition of 'sale' under the Central Sales Tax Act, 1956 had not been amended. *[Elgi Tyres& Tread Ltd. Vs. Deputy Commissioner of Commercial Taxes (Asstms) VII, Bangalore and Others (2000) 120 STC 261 (Kar)]*

3. **Similar view** has been taken by the Hon'ble Madras High Court in *Sundaram Industries Limited v. Commercial Tax Officer and Others (2002) 128 STC 358 (Mad.)***.**

4. In *State of Karnataka and Others v. ECE Industries Limited (2006) 144 STC 605 (Kar)* the respondent company engaged in the business of manufacture, supply and installation of lifts and elevators had its **branch office at Bangalore** which **procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory in Uttar Pradesh according to the design and specifications of the customers and the manufactured items after being tested were dismantled and dispatched to the customers' place in the State of Karnataka by way of stock transfer**. The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers' place. The Revenue contended, inter alia, that

the property in the **goods would become the property of the purchaser only after the lifts and elevators were installed and commissioned** at the premises of the customers, that the contract did not provide either expressly or by implication the movement of the goods from one State to another and that therefore the Tribunal was not justified in coming to the conclusion that the transaction was not exigible to levy under section 5-B of the Act providing for levy of tax on transfer of property in goods in execution of works contract.

The Court **held** that (i) **the principles for determining when a sale takes place in the course of inter-State trade or commerce laid down in section 3** of the Central Sales Tax Act, 1956, **would apply equally to transfer of property in goods involved in the execution of works contract**.

(ii) that **where the description of the goods is clear and the goods of that description are dispatched then the goods so dispatched can be taken as appropriated to the contract unconditionally and despatches from one State to another to an identified customer result in inter-State sale**. Merely, because the lifts and the elevators are installed and commissioned in the State, it cannot be said that it is a local sale exigible to levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore, the Tribunal was justified in coming to the conclusion that the transaction in question was not exigible to levy of tax undersection5-B of the Karnataka Sales Tax Act, 19567.

5. The aforesaid view has been **followed** by the Madras High Court in *ECE Industries Ltd. v. State of Tamil Nadu (2013) 66 VST 163 (Mad.)*:

6. In *State of Karnataka v. Murudeshwara Decor Ltd. (2013) 65 VST 414 (Kar)* it was held that the **material used by the dealer for painting and design of the glazed tiles** supplied by the customers outside the State **are consumables** used in execution of works contract. It **did not constitute sale of goods**. Therefore, section 5B was not attracted and therefore section 17(6) was not attracted. Even otherwise it would be a case of inter-State sale.

7. In *Projects and Services Centre and Another v. State of Tripura and Others (1991) 82 STC 89 (Gauh.)*, the petitioner, a **firm having its place of business at Calcutta**, **purchased materials in several States outside the State of Tripura and also placed orders for supply of materials** in Tripura for **use in the execution of a works contract in Tripura**. **The terms of the contract stipulated movement of the goods**

from such other States to the State of Tripura. The Superintendent of Taxes, on the ground that the actual transfer of property in the materials used in the contract took place in Tripura, served on the petitioner a notice of demand for tax on the said transfer accompanied by an order of assessment passed under section 11 of the Tripura Sales Tax Act, 1976. On a writ petition, it was held that since the Supreme Court had declared in BUILDERS ASSOCIATION OF INDIA'S case [1989] 73 STC 370 that sales tax laws passed by the Legislature of a State levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in execution of a woks contract were subject to the restrictions and conditions mentioned in each clause or sub-clause of article 286 of the Constitution, the principles for determining when a sale takes place in the course of inter-State trade or commerce laid down in section 3 of the Central Sales Tax Act would apply equally to transfer of property in goods involved in the execution of works contract. In the instant case **the sales in question were inter-State sales**. **The fact that the use of the materials was made in a works contract or the property in the materials passed in the State of Tripura did not in any way affect the inter-State nature of the transaction**. The order of assessment and the notice of demand were to be quashed.

8. In *ABB Limited v. Commissioner, Delhi Value Added Tax (2012) 55 VST 1 (Del)*;

The **dealer**, a public limited company, inter alia, engaged in the manufacture and sale of engineering goods including power distribution system and SCADA system, was a subsidiary of ABB, Switzerland. The dealer **responded to a notice inviting tenders issued by the Delhi Metro Rail Corporation (the DMRC) for supply, installation, testing and commissioning for traction electrification, power supply, power distribution and supervisory control and data acquisition systems for a section of the Delhi metro project.** As part of the scope of the contract, the dealer had to provide transformers, switch-gear, high voltage cables, supervisory control and data acquisition system and also provide complete electrical solution, including control room for operation of metro trains in the section. The DMRC accepted the bid submitted by the dealer and executed a contract with the dealer with special conditions of contract, general conditions of contract etc. The **dealer claimed** that the provisions of the contract in relation to sale amounted to **sale "in the course of import"** covered under section 5(2) of the Central Sales Tax Act,1956 read with section 7(c) of the Delhi Value Added Tax Act, 2004, **and** therefore **exempted** from payment of value added tax under the 2004 Act. The assessing officer denied the exemptions claimed by the dealer and

imposed value added tax, interest and penalty. The dealer's appeal was rejected as was its appeal before the **Tribunal**, which **held** that no specific orders for supply of goods were issued by the DMRC and that to attract section 3(a) of the 1956 Act, **there should be privity of contract** between the DMRC and the dealer and that specific instructions for inter-State movement of good should have been issued by the DMRC. On further appeal, it was held by the **Delhi High Court**, allowing the appeals,

(i) that the findings of the Tribunal were contrary to section 3(a) of the 1956 Act. The **inter-State movement of goods was within the knowledge of the DMRC**, **as there was a total ban on setting up/ operation of heavy industry in Delhi**, and the **goods could only be manufactured outside Delhi** and supplied in Delhi. More importantly, it approved **13 places from** within the **country where the equipment and goods were to be supplied**. These also included the dealer's premises and factories. **There was a live and conceivable link between the sale and movement of goods;** the **DMRC was aware that the goods were to be sourced from the dealer's factories, which were outside Delhi**. The **reference to specific locations, in the list issued by the DMRC, in respect of particular items of equipment, which were integral to the contract, established that the movement of those goods was clearly in the contemplation of the parties**. Moreover, **the goods** were **custom made**. The only conclusion that could reasonably have been drawn was that the character of the transaction was that of inter-State sale, necessitating movement. **Specific instructions, or allusions in the contract, or lack of such acts, could not be decisive**; the intention of the contract compelled the court to draw the conclusion that inter-State sales were involved as to attract section 3 of the 1956 Act. The Tribunal was in error in assuming that to attract section 3(a) of the 1956 Act, the agreement had to expressly stipulate for inter-State movement of goods, and the fact that in performance of the contract, the dealer would have to move the goods from other States to Delhi would not suffice.

(ii) That the various conditions in **the contract** and **other related covenants between the DMRC and the dealer amply bear out that :specifications were spelt out by the DMRC; supplies of the goods were approved by the DMRC; pre-inspection of goods was mandated**; the **goods** were **custom made**, for use by the DMRC in its project; **excise duty and customs duty exemptions were given**, specifically to the goods, **because of** a perceived **public interest**, and its need by DMRC; **in** the project authority **certificate issued by the DMRC the name of the sub-contractors as well as the equipment/goods** to be supplied by them **were expressly stipulated**; the **DMRC issued a certificate certifying its**

approval of foreign suppliers located in Italy, Germany, Korea, etc. from whom the goods were to be procured; and packed **goods were especially marked as meant for the DMRC's use** in its project. In view of these features, the Tribunal was in error in holding that the sale could not be deemed to have taken place in the course of the import of the goods into the territory of India, and that the import of the goods did not occasion it.

Also held that **to determine whether a sale was in the course** of import, the court has to see whether the movement of goods though was **integrally connected with the contract for their supply**. **Questions such as passing of title**, or whether the end user has a privity of contract with the supplier, or **where the consideration flows from**, are **not determinative** or decisive of the issue. Section 5 of the Central Sales Tax Act, 1956 does not prescribe any condition that before a sale could be said to have occasioned import, it is necessary that the sale should have preceded the import.

9. In *Ircon International Ltd. v. Commissioner, Trade Tax, UP, Lucknow (2013) 66 VST 432 (All):*

The **petitioner-dealer imported building and construction material under the terms of contract entered into with the National Highways Authority of India**. The Tribunal held that since the cement and other goods which were purchased from outside the State of U.P. and were brought directly to the site for the execution of the works contract did not bear any mark of identification, the value of such goods were liable to be included in the gross turnover. On a revision petition, it was **held**, allowing the petition, that the material on record clearly reflected that **it was a prior contract under which the dealer was bringing construction material within the State of UP including cement. The Tribunal** had simply recorded that cement was brought in within the State of U.P. **No other finding had been recorded by the Tribunal that the cement was not used in the works contract or that it was misused by the dealer**. The **dealer**, admittedly, **had no other business except** for road construction in the State of U.P. The cement and other goods were brought in for the purpose of use in works contract, which were being executed in pursuance of a prior agreement. In **the absence of any clear finding that there was misuse or some other use, the adverse inference drawn by the Tribunal was not justified**.

10. In *Indure Ltd. &Anr. v. Commercial Tax Officer and others (2010) 34 VST 509 (SC)*, the **National Thermal Power Corporation** (NTPC) **invited tenders for bids for ash handling plant** package at Farakka. The scope

of work involved in such package, known as "**on turnkey basis**", included **designing and engineering, manufacture, inspection and testing** at supplier's works, packing, transportation to site, unloading storage and handling at site, erection, testing and commissioning of complete ash handling plant for two 500 mw steam generating units. The appellant-company submitted its bid which was accepted. For the project, **MS pipes were imported from South Korea and were sold to NTPC**. After the MS Pipes were received at the Calcuttta port they were transported to Farakka. The company filed its return claiming the benefit of section 5(2) of the Central Sales Tax Act, 1956, in regard to the MS pipes. This claim was rejected by the Department, the Tribunal and the High Court.

On appeal to **the Supreme Court**, it was **held**, reversing the decisions of the Department, the Tribunal and the High Court, **that the appellant-company was entitled to claim the benefit of section 5(2) of the Act in relation to the import of MS pipes from** South Korea.

11. In *Commissioner of VAT, New Delhi v. State of Haryana (2009) 23 VST 10 (CSTAA)*, the **assessee undertook certain bituminous road works pursuant to contract relating to improvements/strengthening/ re-carpeting of roads and laying roads awarded to it by the Municipal Corporation of Delhi, PWD, CPWD, Delhi,** New Delhi Municipal Council and Airports Authority of India. The contracts were entered into by the assessee's Gurgaon office which was the main registered office. During the year 2003-04, the **bituminous mixture**, known as dense asphalt concrete consisting of bitumen, stone grit and stone dust/sand **was prepared at the hot-mix plant at Dhumaspur (near Gurgaon** in Haryana State) owned and operated by the assessee. The **hot-mixed bitumen could not be stored for long once** it **was brought to the site and** it **had to be consumed on the same day**. The **mixture had to conform to the specifications** laid down in the contracts. After the hot-mixed substance emerged, it was dispatched from the plant at Dhumaspur (Haryana State) to various sites in Delhi by trucks. In **some of the delivery notes**, *inter alia*, the **location of the works site in Delhi and the Department concerned were given**. The assessee had paid local sales tax on the turnover. Central sales tax on the turnover was also demanded in respect of the same transactions. The first appellate authority rejected the appeal by the assessee. On appeal, **the Central Sales Tax Appellate Authority, held that it was clear in this case, that the inter-State movement of the goods was clearly within the contemplation of the parties and the reasonable presumption that should be drawn was that the parties well knew that the fulfillment of the contract was not possible unless the goods in question were brought from outside Delhi because hot operations were not permitted**

to take place within the territory of Delhi inview of the directive of the Supreme Court.

No inter-State sale:

> Of course, **where there was no evidence** to show that the goods had moved as a result of contract, the Court applied the principle that the taxable event takes place when goods are appropriated to the contract i.e. after receipt of goods in the State and **the claim for deduction on the ground** of the sale being in the course of inter-State trade **was negatived**. [*J.D.P. Associates v. State of Tamil Nadu (2003) 131 STC 334 (TNTST)*]

No Tax to be Deducted at Source under the State Law for inter-State Works Contract:

> The person responsible for paying any sum to the contractor is required by section 13-AA(1) to deduct, towards the contactor's liability to State sales tax, 4 per cent of such amount as he credits or pays to the contract, regardless of the fact that the value of the works contract includes the value of goods transferred in the course of inter-State sale, or by way of outside sale or sale in the course of import. Therefore, the **provisions of section 13-AA are beyond the powers of the State Legislature, for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import**. [*Steel Authority of India Ltd. v. State of Orissa &Ors. (2000) 118 STC 297 (S.C.)*]

Section 6-A of the Central Sales Tax Act, 1956 and works contracts:

We all know that Section 6-A of the Central Sales Tax Act, 1956 deals with transfer of stock, otherwise than by way of sale, to the branch office or head office or the consignment agent of the dealer and provides that the burden of proving that the movement of goods in such a case was not by way of inter-State sale but by way of transfer of stock is on the dealer and the dealer can discharge such burden by furnishing a declaration in Form-F, furnishing of which has been made mandatory with effect from 11.5.2002.

In cases where the goods involved in the execution of works contract are moving from one State to another otherwise than in pursuance of the contract of sale, the **contractor shall have to obtain registration under**

the Central Sales Tax Act, 1956 also in the State of delivery of goods in order to be able to obtain and furnish F-forms to his office in the State from which the movement of such stocks commenced. Obviously, **in such cases** the **contractor would be liable to pay tax** on the execution of works contract **under the State law of the State where the works contract is being executed**.

A contractor **may be executing a number of contracts** in a State. For executing all such contracts, he **may be having a common stock** yard in such a State where it is possible that the goods are received by way of transfer of stock from the State where the contractor has its head office. **Such a stock would not be moving in pursuance of any particular contract** of sale but only by way of transfer of stock. In such a case **it will be a case of transfer of stock** otherwise than by way of inter-State sale but the contractor shall have to furnish form-F to its head office. **However, if stock transfers are taking place for fulfillment and execution of a particular contract**, the **State from which the goods are moving would be entitled to tax the transfer of stock as inter-State sales**.

Works contract and Section 8 of the CST Act:

Section 8(1) of the Central Sales Tax Act provides for concessional rate of tax where a sale is made in the course of inter-State trade or commerce to a registered dealer of goods of the description referred to in sub-section (3). Under sub-section (3) sale to the registered dealer must be of the goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or for use by him in the manufacture or processing of goods for sale or in mining or in generation and distribution of electricity or any other form of power or for use in telecommunication; or the containers required for packing of goods for sale or of goods specified in the certificate of registration of such dealer. Sub-section (4) provides that the provisions of sub-section (1) relating to concessional rate of tax shall not apply unless a declaration in form-C is furnished by the registered dealer. Hence, furnishing of form C is mandatory for claiming concessional rate of tax.

As far as the contr**actor who is executing the works contract requiring the material involved in the execution of works contract by way of purchases** in the **course of inter-state trade or commerce at concessional** rate is concerned, **since the definition of 'sale' in section 2(g) now includes transfer of property involved in the execution of works contract by a legal fiction, such contractor would be entitled**

to make inter-State purchases by availing the concessional rate of tax by furnishing the declaration in form-C. The material involved in the execution of works contract would be regarded as being required by him for purposes of resale. **The contractor is entitled to obtain C forms even for the period prior to 11.5.2002 when the definition of 'sale' in Section 2(g) of the CST Act was not yet amended.** The **reason being that** 'resale' contemplated under sub-section(3) of Section 8 need not be in the course of inter-State trade or commerce. **'Resale' can be within the State or outside the State or even in the course of export**.

So far as **registered dealer for whom works contact is to be executed is concerned, if the contract relates to supply, erection and commissioning of Plant & Machinery etc.** to be used in the process of manufacture or for mining or generation and distribution of electricity or power or use in telecommunication network, **the registered dealer can avail concessional rate of purchases** and issue C form to the contractor. However, in other cases, **I foresee some difficulty** in their getting the benefit of concessional rate of tax. **Firstly**, **in many cases** where the works contracts are executed, the **principal or the** person for whom the works contract is being executed **may not be a registered dealer**. **Secondly**, **where** the works **contract relates to civil work like construction** of a building, the **principal would not be in a position to enjoy concessional rate of tax** and contractor shall have to pay tax at full rate on the works contract which takes place in the course of inter-State trade or commerce.

Refusal to Issue C-forms by the Authorities or by the buyer not justified:

Refusal to issue C-forms by the Authorities:

(i) In *Salvicate (Bangalore) Private Limited) v. Sales Tax Officer, 4th Circle, Kochi and others (1998) 109 STC 543 (Ker.)*, the **respondent authorities refused to issue C forms** under the Central Sales Tax Act, 1956 and delivery notes in form 26 under the Kerala General Sales Tax Act, 1963, to the petitioner, a dealer registered under both Acts, **on the ground** that **the petitioner-company was engaged** in execution of **works contracts and it had not paid tax for** the previous years or even if there was payment it was nominal. On a writ petition, it was **held**, allowing the Petition:

(i) that **withholding forms may sometimes result in the complete** destruction of trade or business in which event it may amount to total restriction which is impermissible under the law.

(ii) that **non-payment of tax for any year is not a ground for withholding** or not issuing the delivery notes and C forms under the provisions of the relative Acts and Rules. The payment of tax and issue of delivery notes and C forms are different processes in the business adventure: the former is the duty of the dealer and the latter is the duly of the assessing authority. One is not dependent on the other though both operate in the field of business and trade.

Refusal to issue C-forms by the Contractee:

In *OMIS-JSC-JV v. Union of India (2013) 61 VST 370 (Gau.)*, the petitioner-dealer was awarded a contract by the North Eastern Electric Power Corporation for supply, design, fabrication and erection of pen stock steel liner and hydro mechanical work/equipment under a hydro electric project in Arunachal Pradesh. The Corporation being a registered dealer under the Central Sales Tax Act, 1956 as well as under the Arunachal Pradesh Goods Tax Act, 2005 also gave its Central Sales Tax and value added tax registration numbers to the dealer. The dealer, with due approval of the authorities of the Corporation, started sending pen stock steel liners from West Bengal charging in the invoices, Central Sales Tax at two per cent as maximum applicable benefit under section 8(1) of the Central Sales Tax Act, 1956. The dealer by letter dt. March 7, 2009 requested the Corporation to issue C-forms. The Corporation, however, ultimately by letter dated October 29, 2010 informed the dealer that the dealer's request for issue of C forms against the materials dispatched from Howrah was referred to the corporate taxation cell wherein it was decided that C forms could not be issued to such transfer since there was no provision in the contract agreement therefor. On a writ petition, it was held:

> **"that the Corporation was statutorily bound under the provisions of the Central Sales Tax Act, 1956 to issue C forms to the dealer as claimed. Merely because the contract agreement did not stipulate issue of C forms it could not refuse to issue the forms to the dealer which was entitled to the benefit under section 8(1) of the Act only on production of such forms.** Moreover, the Corporation, through its correspondence with the dealer, even prior to awarding the contract work, requested it to avail of concessional rates of taxes, gave assurances to the dealer

time and again that it would issue C forms and even communicated to the Commissioner of Commercial Taxes, West Bengal, in connection with issue of C form in order to avoid any disruption of the supply of the contract materials. On the facts, it could not be allowed to deny the claim of the dealer on the pretext of absence of any provision in the contract agreement to issue C form."

POWER OF REMAND

by
H.L.Taneja, M.A. LL.B. Advocate

About the Author

The author, while in the Sales Tax Department, worked for about 18 years at the Head-quarters of the department. In the year 1975, when the Delhi Sales Tax Bill, 1973, later passed as the Delhi Sales Tax Act, 1975, was before the Parliament, it was referred to the Select Committee of the Parliament. The author was the only officer who accompanied the then venerable Commissioner Sh.VarinderPrakash, IAS in the Select Committee for three months in the morning and afternoon sessions and assisted him to answer the queries made by the Hon'ble members of the Select Committee.After retirement in May, 1986, the author pursued the study of Sales Tax Law with more vigourwhich is evident from the following facts :-

(a) The Indian Law Institute, New Delhi, functioning under the aegis of the Ministry of Law, issues every year a book titled 'Annual Survey of Indian law'. This book contains articles on each branch of law which reflect the development of case law of that subject during the year. The author contributed the articles on Sales Tax Law right from the year 1986 till the year 2011 i.e. for 26 years, which were published in this book; (b) For 15 years i.e. from 1990 to 2005, the author was a member of the Faculty of The Indian Law Institute for teaching Sales Tax Law in the evening classes held by the Institute; (c) From the year 1999 to 2010, the author was Govt. counsel when he conducted cases in the High Court as well as the Appellate Tribunal; (d) After retirement, the author became a member of the Sales Tax Bar Association (Regd.), Delhi and wrote articles which were published in the Delhi Sales Tax cases.

1. **INTRODUCTION** : Remand means to send back (a case) to another court or agency for further action – Webster

Remand means the sending back of a case or proceeding to that authority which had dealt with or considered it at some prior stage for taking some further action thereon – Law Lexicon

2. **SOURCE OF REMAND POWER :**

(i) Supreme Court judgment reported in 1997 (10) SCC 223 :-

"Held, the words "To pass such orders as deemed fit" includes power of remand."

(ii) Supreme Court judgment in the case of CIT vs. Assam Travel Shipping Service reported (1993) 199 ITR 1 :-

Held, inter-alia, applying Hon'ble Supreme Court judgment in Hukumchand Mills Ltd. vs. CIT reported (1967) 63 ITR 232 that the expression "such orders thereon as it thinks fit" in section 254(1) was vide enough to include the power of remand to the authority competent to make the requisite order in accordance with law, ….."

(iii) Supreme Court judgment in Martin Burn Ltd. vs. CIT reported (1993) 199 ITR 606 :-

Followed Supreme Court judgments reported Hukumchand Mills Ltd. vs. CIT (1967) 63 ITR 232 (SC) and CIT vs. Assam Travel Shipping Service (1993) 199 ITR 1 (SC).

(iv) Mysore High Court judgment in C.Govindaswamy vs. State of Mysore (1963) 14 STC 65 :-

As above.

3. **WHETHER THE OBJECTION HEARING AUTHORITY FUNCTIONING UNDER THE DVAT ACT, 2004, HAS POWER TO REMAND A CASE :**

Reading sub-section (7) of section 74 of the Act, it transpires that the expression "such orders thereon as it thinks fit" is not there in this sub-section, hence, it can be inferred that the Objection Hearing Authority, who is not an Appellate Authority, has no power to remand the case. This view is confirmed by a judgment of the Hon'ble Appellate Tribunal, VAT, Delhi reported 49 DSTC 29.

What is then the purpose of creating this important post under the DVAT Act, 2004 ? The answer is available in the judgment of the Delhi High Courtdt. 07-12-2012 in W.P.(C) No. 4236/2012 filed by Sales Tax Bar Association (Regd.) with other Writ Petitions. It will be recalled that the main contention of the Bar Association in this Writ Petition was that the default assessment notices issued u/s. 32 & 33 of the Act are without any opportunity to the dealers, hence, they are violating the principle of natural justice. The Delhi High Court, vide para 14 of its judgment observed as under :-

"14. The Constitution Bench of the Supreme Court, in ***Maneka Gandhi Vs. Union of India*** *(1978) 1 SCC 248 which is considered*

as the Bible on the principles of natural justice, has held that what opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation; it may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal; it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing; the audialterampartem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."

4. **SCOPE OF AND GUIDELINES FOR PASSING A REMAND ORDER** :

(i) Supreme Court judgment in the case of M/s. M.G.Shahani& Co. (Delhi) Ltd. vs. Collector of Central Excise, New Delhi reported (1994) 34 DSTC J-1 = (1994) 73 ELT 3, held :-

"The complaint of the appellant before us, for which we find sufficient justification, is that the Tribunal should have itself gone through the evidence and rendered a finding because all the relevant materials were before the Tribunal. To our mind, it appears that the Tribunal has adopted an easy course in remanding the matter. The remand was superfluous when the parties have argued the matter at length. To characterise the order of the Collector as laconic is not correct since he has written a detailed order including reference to relevant case law."

(ii) Supreme Court judgment in the case of Vijay enterprises vs. Sales Tax Officer reported 1992 (62) ELT 681, held :-

"*Remand not the proper remedy if facts are not in dispute. The Ld.counsel for the State, however, submits that the matter may be remanded. We do not think it is necessary to do so in view of the cogent and clear material, which cannot be controverted."*

(iii) Allahabad High Court judgment in the case of Ghasi Ram Dayanand vs. CST, U.P. reported (1994) 92 STC 478, held :-

"No rigid rules can be fixed laying down the principles as to when the appellate authority can remand a matter. A remand cannot be made for purpose of trial de novo, for permitting the parties to adduce fresh evidence to fill up lacunae or to decide a point when the material is already on record. On the other hand, remand is permissible when the affected party has not been given an

opportunity of hearing or necessary questions of fact and law to be determined have not been determined by the authority concerned or the authority committed some procedural irregularity and illegality.

When in a case, an order of remand has been passed exercising judicial discretion, such order should not be normally interfered with in revision.”

(iv) Madras High Court judgment in the case of State of Tamilnadu vs. Jayaram Metal Rolling Mills reported (2014) 74 VST 470 :-

“*Held, that though non-furnishing of documents would be a ground to set-aside the assessment, the Tribunal should have taken up its reasoning to a logical end to remand the matter back to the assessing officer for a fresh proceeding by granting an opportunity to the assessee to place its objection, after supplying all the materials seized at the time of check of movement of goods. [The court set-aside the order by the Tribunal and restored the matter to the files of the assessing authority for a de novo hearing.”*

(v) Madras High Court judgment in the case of CholamandalamMS General Insurance Co.etc. vs. A.C. of Income-Tax and Ors. reported (2013) 357 ITR 597, held :-

“Remand is not a power to be exercised in a routine manner and should be used sparingly as an exception only when the facts warrant such course of action. When materials which are considered by the officer are there before the Tribunal on the issue raised, even assuming that in the course of tendency of the appeals, amendments are effected retrospectively, touching on the very same issue, it does not call for any remand, particularly for the reason that the Tribunal with all its wisdom is competent to go into the legal provision, which would govern the issue.”

(vi) Allahabad High Court judgment in the case of Kashi Ram Munish Kumar vs. CST, U.P. reported (1987) 67 STC 358, held :-

“A remand order can be justified only if something is very necessary for deciding the case but that has not been done and some further investigation is necessary in that behalf.

Held accordingly, there was no justification on remanding the case by the Tribunal for the reasons on which the assessing

authority had already recorded his findings. The Tribunal ought to have given its own judgment on the basis of the entire material available on record." Same view is taken in the judgment reported 1987 UPTC 587 that remand only when it is very necessary and in 1994 UPTC 407 that remand only for very strong reasons.

(vii) Allahabad High Court judgment in the case of Hind VastraBhandar vs. CST, U.P. reported (1969) 23 STC 311, held :-

"….. The appellate authority exercises quasi-judicial functions, and the power to remand must be exercised by it, not according to whim or humor, but in accordance with sound judicial principles. And it is a power which must be used with circumspection. The appellate authority functions as an impartial authority adjudicating upon rights and liabilities between the dealer and the revenue. That adjudication must be effected through a procedure informed by the interests of justice. It is to do justice in accordance with law that the appellate authority exists. It departs from its function when it permits the influence of partisan considerations."

(viii) Karnataka High Court judgment reported (1984) 57 STC 89 wherein held, inter-allia :-

"In a case of remand, it is the remand order which gives jurisdiction to the authority to redo the assessment. The assessing authority must, therefore, carefully examine the points complained of by the assessee and the opinion expressed by the appellate authority. The revised assessment order must fall strictly within the four corners of the remand order. The remand order at the instance of the assessee cannot be used to reopen the assessment for the purpose of taxing the escaped turnover. The Act provides a separate procedure for such purpose."

(ix) Madhya Pradesh High Court judgment reported (1986) 61 STC 287 – 293 (bottom) :-

"A remand could not be directed to fill up the lacuna. It is not meant to provide fresh opportunity."

(x) Allahabad High Court (Full Bench) reported (1979) 44 STC 84, held :-

"Where the appellate authority sets aside an order of assessment and remands the case to the assessing authority with certain directions for making a fresh assessment, the assessing authority

has, subject to carrying out such directions, the sane powers as it originally had in making the assessment under the Act. But, where the order of assessment is set aside by a revisional authority and the case is remanded to the assessing authority, the jurisdiction of the STO to make the assessment can be circumscribed by the specific directions given by the revisional authority in that regard."

(xi) Madras High Court reported (1994) 94 STC 460 as under:-

"Where the Tribunal remitted the petitioner's case to the assessing officer on the ground that the petitioner was not given an opportunity to represent his case, and had stated that the assessment order was liable to be set aside:

Held, that the observation of the Tribunal that its "findings with regard to the other points raised by the appellant would hold good" was not justified and it would be open to assessing authority to go into the question afresh and not be bound by the order of the Tribunal on facts."

(xii) Madras High Court judgment reported (1989)75STC 180 as under:-

"On the question whether the Tribunal to remand a case for assessment afresh on the grounds not specifically taken in the grounds of appeal before it or before the first appellate authority:

Held, that grounds taken during the course of arguments could be taken into consideration by the appellate forum, though the said grounds had not been specifically incorporated in the memorandum of grounds of appeal. The basic principles of natural justice require that a court or a quasi-judicial authority created under the provisions of special enactments has to apply its mind to the arguments advanced and points raised during the course of arguments. The Tribunal was therefore correct and within its jurisdiction in having directed the assessing authority to look into the documents produced and apply its mind."

(xiii) Andhra Pradesh High Court reported (1996) 103 STC 548, head-notes read as under :-

"Remand – High Court – Tribunal remanding matter for consideration, inter-alia, of question whether transactions Inter-State sales – Court setting aside direction and restricting remand

to other questions – No authority in assessing officer to consider whether transactions Inter-State sales."

(xiv) W.Bengal Taxation Tribunal judgment reported in (1995) 98 STC 98, head-notes reads as under :-

"Revision – Commercial Taxes Tribunal – Limitation – Remand by Taxation Tribunal to Commercial Tax Tribunal with direction for disposal within six months – Disposal few days after expiry of six months – Order valid – Time-limit not mandatory – Mere non-adherence to time-limit does not take away jurisdiction of Commercial Taxes Tribunal."

(xv) Calcutta High Court judgment in Birla Jute Manufacturing Co.Ltd. vs. CIT reported (1981) 128 ITR 235, head-notes read as under:-

"Remand – Restricted remand – remand restricted to investigation into facts already on record – Order of remand would become redundant if assessee was debarred from adducing evidence afresh – Fresh evidence can be edduced subject to admissibility of such evidence."

(xvi) In a judgment reported 1989 (40) ELT 152, held :-

"Higher authority is not bound by remand order of lower authority."

5. BINDING NATURE OF REMAND ORDER :

(i) Supreme Court judgment in the case of Bhopal Sugar Industries Ltd. vs. ITO, Bhopal reported (1960) 40 ITR 618 = AIR 1961 SC 182 referred to in (1996) 102 STC 513-520 :-

"Held, by his letter dt. March 24, 1955, the ITO virtually refused to carry out the directions which a superior Tribunal had given him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal was in effect a denial of justice. The order of the Appellate Tribunal having become final, it was not open to the judicial Commissioner to hold that the order was wrong. As the ITO had failed to carry out a legal duty imposed on him and such failure was destructive of a basic principle of justice, a writ of mandamus should issue ex debitojustitiae to

compel him to carry out the directions given by the Appellate Tribunal."

Judgment of the Judicial Commissioner reversed.

6. CAN APPEAL BE FILED AGAINST AN ORDER PASSED BY ASSESSING AUTHORITY ON REMAND WHEN ORDER OF APPELLATE AUTHORITY NOT CHALLANGED :

(i) Kerala High Court (Full Bench) in the case of M.SyedAlavi and Ors. vs. State of Kerala reported in (1981) 48 STC 150 :-

"Held, that the effect of not filing an appeal against the order of remand by the Appellate Assistant Commissioner was that finding was binding on the assessing authority when the case went back to that authority and also on the Appellate Assistant Commissioner while disposing ofthe appeal from the revised decision of the assessing authority; but it was not binding on the Appellate Tribunal in the appeal filed against the decision of the Appellate Assistant Commissioner. The Appellate Tribunal was free to arrive at its own decision on the question of liability of the petitioners to assessment to sales tax. It was thus clear that it was under an erroneous interpretation of the law that the Appellate Tribunal held that it had no jurisdiction to decide the issue regarding the petitioner's liability to assessment."

7. A FEW INSTANCES WHERE THE REMAND OF THE CASE WAS HELD PROPER :

(i) In the case of Cynamid India Ltd. reported in 1984 (15) ELT 186, held :-

"The remand would be appropriate if the additional new ground requires a detailed enquiry into questions of fact."

(ii) In the case of Precision Fasteners Ltd. reported in 1984 (15) ELT 188, held :-

"The remand for de novo trial is necessary when the classification under particular entry or exemption from duty is claimed for the first time at second appeal stage."

(iii) In the case of CCE vs. Hindustan Bobbin Ind. reported 1987 (30) ELT 315 and in the case of Ram Prakash 1987 (31) ELT 930, held:-

"The remand of matter is warranted if the order of lower authorities is based on incomplete examination of basic facts and not referring to relevant provisions of law and if no due consideration is given to the facts and evidence."

(iv) In the case of Hybrid Electronic System P.Ltd. reported in 1996 (86) ELT 273,held :-

"When procurement of documents was beyond the control of the assessee (under seizure with the department), delay was condoned and case was remanded back for de novo adjudication since documents were produced."

(v) In the case of K.G. GlucoBiols Ltd. reported in 1996 (87) ELT 463, held :-

"When prima facie case was in favour of the assessee in view of the Tribunal decision in another matter relating to the same product, the matter was remanded since manufacturers similarly placed are not to be discriminated."

(vi) Delhi High Court judgment in Principal CIT vs. Silverline reported (2016) 383 ITR 455, held :-

"Appeal to Appellate Tribunal – Powers of Tribunal – Power to permit new ground – Issue purely one of law – Tribunal can permit issue to be raised for first time before it."

(vii) Kerala High court judgment reported (1984) 57 STC 318, held :-

"There would be sufficient reasons to justify a remand when the Tribunal feels that the assessing authority has not chosen to get the documents which are relevant for the purpose of the assessment and the assessee has not been called upon to produce those documents. In such a case it is only fair that the case is remitted back to the assessing authority so that what ought to have been done is done."

(viii) Madhya Pradesh High Court judgment in the case of CIT vs. TollaramHassomal reported (2008) 298 ITR 22, head-notes read as under :-

"Appeal to Appellate Tribunal – Tribunal permitting additional grounds to be raised for the first time – Tribunal should remand case to Commissioner (Appeals)."

(ix) Madhya Pradesh High Court judgment in the case of BabulalPatodi vs. CIT reported (2008) 304 ITR 116 as under:-

"Where the Tribunal affirmed the order of the Commissioner (Appeals) saying that the grounds raised did not need to be dealt with:

Held, that the order passed by the Tribunal did not contain any reason and hence could not be given the stamp of approval. The Tribunal had to deal with the grounds before opining that they were general in nature. The order passed by the Tribunal was liable to be set aside and the matter remanded for decision afresh on the merits ascribing cogent and germane reasons."

(x) Punjab & Haryana High Court judgment in the case of CIT vs. Sanjeev Kumar Jain reported (2009) 310 ITR 178,head-notes read as under:-

"Appeal to Appellate Tribunal – Reassessment – Reassessment on basis of statements made by certain individuals – Assessee not given opportunity to cross-examine those individuals – Proceedings valid upto the point of recording statements – Proceedings after recording statements of individuals set aside – Matter remanded."

(xi) Punjab & Haryana High Court judgment in the case of CIT vs. N.P. Grodia reported (2009) 310 ITR 62, head-notes read as under:-

"Appeal to Appellate Tribunal – Cash Credits – Application by assessee to Assessing Officer to summon creditors – Creditors not summoned – Tribunal justified in remanding matter directing Assessing Officer to summon creditors."

(xii) Bombay High Court judgment in the case of CIT vs. Omprakash K. Jain & Ors. reported (2010) 322 ITR 362, head-notes read as under:-

"Assessment – Additions – Failure to consider Assessee's statement made subsequent to retracted statement documentary evidence on record – Matter remanded.'

(xiii) Delhi High Court judgment in the case of AnandFlori Farms India P.Ltd. vs. ITO reported (2010) 322 ITR 406, head-notes read as under:-

"Appeal to Appellate Tribunal – Counsel of assessee not available at time of hearing – Managing director of assessee contesting appeal but not presenting case properly as having no experience in taxation laws – Assessee seeking proper opportunity to make effective submissions before Tribunal – Matter remanded."

(xiv) Karnataka High Court in the case of Dayananda Extraction Industries Pvt.Ltd. vs. Dy.Commissioner of Comm.Taxes&Anr. reported in (2014) 67 VST 419, head-notes read as under :-

"Sales Tax – Assessment – Duty of officer to discuss case law cited by dealer – Extraction of oil from rice bran and soya bean seeds – Residue formed after extraction – Dealer claiming commodity same as rice bran which had already suffered tax – Citing judgments to this effect – assessment without considering judgments or discussing how distinguishable – Assessment set aside and matter remanded for consideration afresh."

(xv) Madras High Court judgment reported (2012) 49 VST 210,head-notes read as under:-

"Sales tax – Seizure of documents – Best judgment assessment – No reply filed by dealer to pre-assessment notice – Documents produced for first time in appeal – Matter remanded for verification – Proper ……."

8. A FEW INSTANCES WHERE THE REMAND OF THE CASE WAS HELD NOT PROPER :

(i) Allahabad High Court judgment reported (1989) 72 STC 343, head-notes read as under :-

"Appeal – Remand – Power to be exercised judiciously – Appeal from order of best judgment assessment after rejection of accounts – Assistant Commissioner cannot set aside assessment unless evidence on record insufficient to decide appeal – Remand for further investigation into figures estimated by assessing authority – Unfustified."

(ii) Allahabad High Court judgment reported in (2008) 16 VST 130, head-notes read as under :-

"Sales Tax Tribunal – Remand – Grievance of Department that opportunity to be heard not granted to it by first appellate authority – Tribunal accepting contention but going on to remand matter to

assessing Officer to go into merits of dealer's claim – not proper – Matter remanded to First Appellate Authority."

(iii) Gujrat High Court judgment reported 2005 (191) ELT 72, head-notes read as under :-

"Remand – Justification of – Procedural lapse taken place in 1994 – Instead of remanding the case, in the interest of justice same decided on merits by High Court."

(iv) Allahabad High Court judgment reported (1990) 76 STC 41, head-notes read as under :-

"Appellate Tribunal – Penalty – Tribunal finding penalty not liable to be imposed under section 15-A(1)(h) – Remanding case for issuing notice under another class – Not justified – Tribunal has authority only to decide matter in issue – Order of remand set aside.".

(v) Allahabad High Court judgment reported (2001) 123 STC 357, head-notes read as under :-

"Exemption – New industrial unit – Sales Tax Tribunal – Dispute whether unit had purchased and was using old machinery – Tribunal remanding matter – Not justified owing to lapse of time – Tribunal as final fact-finding authority to itself decide."

(vi) Madras High Court judgment reported (2013) 357 ITR 597, head-notes read as under :-

"Appeal to Appellate Tribunal – Powers of Tribunal – Power to remand – Power to be use sparingly – All facts considered by assessing officer – Tribunal competent to consider effect of retrospective amendment – Order of remand - Not justified."

(vii) Bombay High Court judgment reported (2014) 364 ITR 632, head-notes read as under :-

"Appeal to Appellate Tribunal – Penalty – Amalgamation of companies – Levy of penalty on transferor company – Additional ground raised before Tribunal with evidence contesting levy of penalty on non-existing entity – Impact and legal effect of a order of amalgamation and winding up of assessee on penalty

proceedings pure legal issue – Tribunal ought not to have remitted legal issue to Assessing Officer – Tribunal directed to decide legal issue."

(viii) Orissa High Court judgment reported (1991) 83 STC 202, head-notes read as under :-

"Appellate Tribunal – Scope of powers – Is a taxing authority – Power to set aside order and direct fresh enquiry – Not to be exercised where all material available and Tribunal has power to finally decide – On facts order of remand to Assessing Authority not justified."

(ix) Supreme Court judgment reported 2004 (13) SCC 697, held :-

"Once the whole case is before the Appellate Authority, no justification for remand."

(x) Supreme Court judgment reported 2004 (12) SCC 201, held :-

"Held, passing strictures against an officer without hearing him is not justified."

(xi) Andhra Pradesh High Court judgment reported (2006) 147 STC 89, head-notes read as under :-

"Sales Tax Authorities – Bias – Remand by Sales Tax Tribunal for verification de novo – Officer representing State in appeal before Tribunal, himself undertaking verification under remand and passing order – Likelihood of bias owing to previous involvement in case – Order set-aside and direction to Commissioner to entrust matter to another officer."

(xii) W.Bengal Taxation Tribunal judgment reported (2006) 146 STC 195:-

"Held, remand by Board without disposing matter on merits unjustified."

(xiii) Allahabad High Court Judgmentreported (1977)39STC 222, held:-

"An order of remand can be passed if the Appellate or the Revising Authority feels that some further investigation is required in connection with a point raised before and decided by the Sales

Tax Officer. But a remand order cannot be passed to give a second inning, as it were, to the Sales Tax Officer to find our fresh defects in the account books."

(xiv) Supreme Court judgment reported 1995 (80) ELT 10, head-notes read as under :-

"Remand – Clear finding on a question relating to merits of the case, recorded by the CEGAT and still the matter remanded to the Collector for de novo adjudication – Such a remand is an exercise in futility – When Tribunal considers the "evidence sufficient" to record a finding on merit, the appropriate course is to decide the entire appeal and the cross-objections instead of remanding the matter to the Collector – CEGAT order set aside and Tribunal directed to decide the matter afresh on merits – Matter to be disposed of as early as possible."

(xv) Kerala High Court judgment reported (2010) 325 ITR 419 :-

"Held, ….. the Tribunal was wrong in holding that the appeal before the Commissioner (Appeals) was not maintainable. It was the duty of the Tribunal to consider the order of the Commissioner (Appeals) on merits and decide the appeal on every ground raised. Therefore, the tribunal was to issue notice to the assessee as well as the department and dispose of appeal."

Notification regarding Form CR-II

No.F3(628)/Policy/VAT/2016/PF/1658-70/ Dated: 15-03-2016

NOTIFICATION

In exercise of the powers conferred on me under section 27 of Delhi Value Added Tax Act, 2004 and in partial modification to the notification No.F.3(628)/Policy/VAT/2016/1424-36 dated 11th February, 2016 and No.F.3(628)/Policy/VAT/2016/PF/1572-1584 dated 1st March, 2016, 1, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby direct that the returns in Form CR-II for the first three quarters of the current financial year (i.e. 1st April, 2015 to 30th June,' 2015, 1st July, 2015 to 30th September, 2015 and 1st October, 2015 to 31st December, 2015) are required-to be filed by 31st March 2016.

Rest of the contents of the above said Notification shall remain unchanged.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding New Composition Scheme for Restaurants and Halwais @5% instead of 1%

No.F.3(29)/Fin(Rev-I)/2015-2016/dsvi/93 Dated: 18-03-2016

NOTIFICATION

No.F.3(29)/Fin(Rev-1)12015-2016. Whereas the Lt. Governor of the National Capital Territory of Delhi is of the opinion that it is expedient in the interest of general public so to do.

Now, therefore, in exercise of the powers conferred by sub-section (12) of section 16 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), (hereinafter referred to as “the Act”), the Lt. Governor of the National Capital Territory of Delhi, subject to the conditions specified in column (3) against the classes of dealers specified in column (I) of the Table below, and other general conditions as prescribed in this notification, hereby, provides for the scheme of composition of tax payable by the said dealers as specified in column (2) of the said Table. namely:-

Eligible class or classes of dealers	Composition Amount	Conditions
Every registered dealer whose turnover during the preceding year as well as the expected turnover during the current year does not exceed fifty lakh rupees and who is not making any sales other than that of ready to eat foods and non-alcoholic beverages including cooked food, snacks, sweets, savouries, juices, aerated drinks, tea and coffee etc. served in or catered indoors or outdoors by hotels, restaurants, sweet-stalls, sweet shops, clubs, caterers and any other eating houses: Provided that the condition of turnover during preceding year shall not apply to a dealer who commences his business during the current year.	Five percent of the entire turn-over	(1) The dealer shall, - (a) not be eligible for making purchases from or procuring goods from or making sales to or making supplies to any place outside Delhi; (b) not be eligible for making purchases from a person who is not registered under the Act except in the case of goods specified in the First Schedule; (c) not be eligible to claim tax credit under section 9 of the Act; (d) not calculate his net tax under section 11 of the Act; (e) not collect any amount by way of tax under the Act; (f) not be entitled to issue 'Tax Invoices'; and (g) continue to retain the original copies of all tax invoices and all retail invoices for all his purchases and copies of all retail invoices issued by him in respect of his sales as required under section 48 of the Act. (2) A dealer who is paying tax under section 3 of the Act, can opt for payment of tax under this scheme by filing an application in Form RH 01 appended to this notification within a period of thirty days from the first day of the year with effect from which composition is opted. (3) A dealer applying for a fresh registration can also opt for this scheme by filing application in Form RH 01 appended to this notification alongwith his registration application in Form DVAT 04. (4) A dealer opting to pay tax under this scheme shall pay tax, at the rates specified in section 4 of the Act, on the value of the opening stock held by him on the first day from which he opts for this scheme and shall furnish the details of such opening stock in Form RH 02 appended to this notification along with proof of payment of due tax in Form DVAT 20, with his application in Form RH 01. (5) Once a dealer has opted to pay tax under this scheme, he shall, except under the circumstances described at SI. No. (6) below, hot be eligible to withdraw his option before the end of the year for which opted to pay tax under this scheme. (6) A dealer who, having opted to pay tax under this scheme for a particular year, does not intend to opt for payment of tax under this scheme for the following year, shall, subject to the conditions contained in section 20 of the Act in so far as they are applicable and further subject to furnishing of intimation regarding withdrawal from this scheme in form RH 03 within thirty days from the end of the year fur which opted to pay tax under this scheme, be eligible to claim credit of tax paid on the opening stock held by him on the first day of said following year.

General Conditions : (1) All the provisions of the Act and the rules made thereunder which are not contrary to this scheme shall apply to every dealer opting to pay tax under the scheme.

(2) The tax period for the dealers opting to pay tax under this scheme shall be a quarter unless otherwise prescribed by the Commissioner for a dealer or class of dealers.

(3) In view of the second proviso to sub-section (1) of section 16 of the Act a dealer who has already opted for composition scheme as per sub-sections (1) to (11) of section 16 and who is covered under the class of dealers described in column 1 of the above table, shall mandatorily withdraw from the composition scheme with effect from 1st April, 2016 by filing application in Form DVAT 03 upto 30th April, 2016. However, such dealers can opt for composition under this scheme as per the procedure explained above.

(4) Notwithstanding anything contained in this notification, the Commissioner may notify, by a special or general order, that any or all of the forms appended to this notification shall be filed online.

(5) Tax paid by a dealer under this scheme shall not be adjusted at any stage against the liability of the dealer to pay tax under section 3 of the Act for any period other than the period for which the dealer was eligible for paying tax under this scheme.

(6) If the turnover of a dealer who opted to pay tax under this scheme exceeds fifty lakh rupees at any time during the year for which so opted, he shall be liable to pay tax under section 3 of the Act on and from the date his turnover exceeds fifty lakh rupees and he shall, subject to the conditions contained in section 20 of the Act in so far as they applicable and further subject to furnishing the intimation in Form RH 03 within seven days from the date on which turnover exceeded fifty lakh rupees, be entitled to claim credit of the input tax paid on opening stock held by him in Delhi on such day.

(7) A dealer who has opted to pay tax under this scheme and has defaulted to furnish the returns for two consecutive tax periods by the prescribed due dates shall, with effect from the first day of the tax period immediately next to the latter tax period in respect of which the default has been committed-

(i) cease to be liable to pay tax under this scheme,

(ii) be liable to pay tax under section 3 of the Act.

Such a dealer shall, subject to the conditions contained in section 20 of the Act in so far as they applicable and further subject to furnishing the intimation in Form RH 03 within seven days after the end of due date prescribed for filing of return for the latter tax period in respect of which the default has been committed, be eligible to claim credit of the tax paid under this Act on the opening stock held by him in Delhi on the first day of the tax period immediately next to the latter tax period in respect of which the default has been committed.

(8) In case a dealer has opted for this scheme but has failed to comply with the renditions specified therein or who, at any later stage, is found not eligible for having opted this scheme, all the provisions of the Act including the liability to pay tax under section 3, along with interest due for delay, if any, shall apply *mutatis mutandi* as if the dealer has never opted for this scheme.

This notification shall come into force with effect from the 1st day of April, 20 16.

Department of Trade and Taxes
Government of NCT of Delhi

FORM RH01

[See notification under section 16(12)]

Application Form for opting Composition by an eligible dealer engaged in making sales of restaurant and halwai items under the scheme as notified by Government under sub-section (12) of section 16

Ward No.	

1. TIN												

2. Full Name of Applicant Dealer													

3. Full Address of Dealer													

4. Year for which the composition scheme is sought*									

*hereinafter referred to as "current year"

5. Turnover in the proceeding year (Rs.)								

6. Estimated Turnover in the current year (Rs.)								

7. Tax payable on opening stock held on the first day with effect from which scheme is being opted

Fair market value* or Purchase Value of the opening stock (whichever is higher) (Rs.)						Tax payable (Rs.)					

8. Deatils of Tax paid as per the details at (7) abvove

Description	Details									
(i) amount of tax paid* (Rs.)										
(ii)Date of Deposit			/			/				
	dd		mm				yyyy			
(iii)Challan No. if any										

(*Please attached original challan / proof of deposit)

Name and signature of applicant / authorized signatory

9. Verification

I/We .... hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my/our knowledge and belief and nothing has been concealed thereform.

Signature of Authorised Signatory ______________________

Full Name (*first name, middle, surname*) ______________________

Designation ______________________

Place																					

Date										
	Day		Month		Year					

Department of Trade and Taxes
Government of NCT of Delhi

FORM RH02
[See notification under section 16(12)]

Statement of opening stock held on the first day of the year from which composition is to be opted

1. TIN	
2. Full Name of Business	
3. Total Value of the Stock as on first day with effect from which composition scheme	
4. Details of Stock purchases (as per Table)	

<u>Table</u>

S.No.	Description of goods	Quantity	Purchase Value	Rate of Tax	Tax payable

*The above table can be prepared and attached with the form as per the requirement

Certification of Details

I/We .... hereby certify that all the above-mentioned stock details are true and correct to the best of my/our knowledge. Further certified that the particulars indicated above are the correct version of the documents, which are in my/our possession and can be produced before the Value Added Tax Department on demand.

Signature of the dealer

Name:

Address:

Date:

Place:

Department of Trade and Taxes
Government of NCT of Delhi

FORM RH03
[See notification under section 16(12)]

Intimation regarding withdrawal by a dealer engaged in sales of restaurant and halwai items from Composition scheme as notified by Government under sub-section (12) of section 16

Ward No. [ ]

1. TIN												

2. Full Name of Applicant Dealer													

3. Full Address of Dealer													

4. Year with effect from which withdrawal from								

composition scheme is sought*
*hereinafter referred to as "current year"

5. Turnover in the preceding year								

6. Reasons for withdrawal from composition scheme	

7. Details of input tax credit sought on opening stock

S. No.	Tax Invoice date	Tax Invoice No.	Supplier TIN No. under the Act	Purchase Price of unsold stock (Rs.)	Rate of tax (%)	Input Tax (Rs.)
			Total			

8. Verification

I/We .... hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my/our knowledge and belief and nothing has been concealed therefrom.

Signature of Authorised Signatory________________________________

Full Name (*first name, middle, surname*) __________________________

Designation ____

Name																					
Date				/			/														

By order and in the name of
The Lt. Governor of the National Capital Territory of Delhi,

A.K. Singh
Dy. Secretary, Finance (VI)

Notification regarding Grant of Exemption to Embassy of Socialist Republic of Vietnam

No.F.5(54)/Policy/VAT/2013/PF/1721-31 Dated: 18-03-2016

NOTIFICATION

In partial modification of this department's Notification No.F.5(54)/ Policy/VAT/ 2013/PF/ 1123-1135 dated 26/12/2013, the following conditions may be inserted against Sl.No.A-141, Vietnam (Registration No./TIN. 07509892160) in Part A- List of Embassies of Entry No. 1 of Sixth Schedule appended with the Delhi Value Added Tax Act, 2004:-

"(A) The facility of VAT refund shall be available to the Embassy on purchase of items viz;-

i. Telephone, Internet, Electricity, Water and Gas Bills of Chancery Premises and Embassy Residence and other telephone bills which are in the name of Embassy.

ii. Office Stationery, Office equipment, electronic items like Refrigerator, Television, Air Conditioner etc for official use.

iii. Fuel/petrol used by office cars and vehicles owned by diplomatic officers.

(B) The facility of VAT refund shall be available to the Diplomatic Officers on purchase of items viz.:-

i. Automobile – one no.
ii. Motorcycle – one no.
iii. Television – two nos.
iv. Washing machine – one no.
v. Air conditioners – two nos.
vi. Personal computer – one no.
vii. Oven and microwave – one each

(C) Non-diplomatic officers can purchase the items listed at para (B) above, within six months of their arrival.

Rest of the contents of the above said notification shall remain unchanged.

This notification shall come into force w.e.f. 30.12.2015.

(S.S.Yadav)
Commissioner, Value Added Tax

Notification regarding Delhi Value Added Tax Amendment Rules 2016

No.F.3(30)/Fin(Rev-I)/2015-2016/dsvi/121 Dated: 12-04-2016

NOTIFICATION

No.F.3(30)/Fin(Rev-I)/2015-16/.- In exercise of the powers conferred by section 102 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), the lit. Governor of the National Capital Territory of Delhi, hereby, makes the following rules further to amend the Delhi Value Added Tax Rules, 2005, namely:-

RULES

1. **Short title and commencement.-** (1) These rules may be called the Delhi Value Added Tax (Amendment) Rules, 2016.

(2) They shall come into force on the date of their publication in the Delhi Gazette.

2. **Amendment of Forms.**- In the Delhi Value Added Tax Rules, 2005 (hereinafter referred to as the principal Rules), in the Forms appended thereto,-

(1) in Form DVAT 16-

(a) in the instructions appended to field R12, for the instruction at SI. No. 4, the following instructions shall be substituted, namely :-

"Transmit (i) quarter wise and invoice wise Purchase and Sales data maintained in Form DVAT-30 and 31 OR (ii) quarter wise and dealer wise summary of purchase and sales in Annexure-2A and 2B appended to this Form. Purchase/Sale made from un-registered dealers may be entered in one row for a quarter. However, person wise details including PAN (Permanent Account Number) are required to be furnished in respect of sales made to unregistered dealers/persons, wherever these details have been obtained by the seller in compliance to the provisions under the Income Tax Act, 1961. Similarly, the unique ID (i.e. GEID) allocated to Government Departments/organizations is required to be mentioned in respect of sales made to Government Departments/ organizations. Further, the sale detail of goods sold to Embassies/Organizations specified in Sixth Schedule should be reported invoice wise in case opted for Form DVAT-30 and 31 or Embassies/Organizations wise, if opted for Annexure 2A and 2B, as the case may be":

(b) in Annexure 2A, in the Table, after column 5 and before column 6, the following columns shall be inserted, namely:-

Description of goods/items	Goods/item code
5A	5B

(c) in Annexure 2A(1), in the Table, after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	5B

"; and

(d) in Annexure-2B, -

(i) in the Table, in the title row, for the title in column 3, the following title shall be substituted, namely:-

"Buyer's TIN/Embassy/Organisation Regn. No./PAN/GEID";

(ii) after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	5B

"; and

(iii) for the footnote appended to the Table , the following footnote shall be substituted, namely:-

"Note :- Data in respect of sales to unregistered dealers (except where PAN of buyer is obtained) may be consolidated tax rate wise for each Quarter. Data of Embassies/Organisations listed in Sixth Schedule shall be provided entity wise.". (2) in Form DVAT 17-

(a) in the instructions appended to field R11, for the instructions at SI. No. 4, the following instructions shall be substituted, namely

"Transmit (i) quarter wise and invoice wise Purchase and Sales data maintained in Form DVAT-30 and 31 OR (ii) quarter wise and dealer wise summary of purchase and sales in Annexure-2A and 2B appended to this Form. Purchase/Sale made from un-registered dealers may be entered in one row for a , quarter. However, person wise details including PAN (Permanent Account Number) are required to be furnished in respect of sales made to unregistered dealers/persons, wherever these details have been obtained by the seller in compliance to the provisions under the Income Tax Act, 1961. Similarly, the unique ID (i.e. GEID) allocated to Government Departments/organizations is required to be mentioned in respect of sales made to Government Departments/organizations."

(b) in Annexure 2A, in the Table, after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	5B

";

(c) in Annexure 2A (1), in the Table, after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	5B

"; and

(d) in Annexure-2B, -

(iv) in the Table, in the title row, for the title in column 3, the following title shall be substituted, namely:-

"Buyer's TIN/PAN/GEID"; and

(v) after column 4 and before column 5, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
4A	4B

";

(3) in Form DVAT 30, in the Table, after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	BB

";

(4) in form DVAT 31, in the Table,-

(a) in the title row, for the title in column 3, the following title shall be substituted, namely:- "Buyer's TIN/Embassy/Organisation Regn. No./PAN/GEID"; and

(b) after column 5 and before column 6, the following columns shall be inserted, namely:-

"

Description of goods/items	Goods/item code
5A	BB

";

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding Returns in Form CR-II for the financial year 2015-16 are required to be filed by 16-May-2016.

F.3(628)/Policy/VAT/2016/113-125 Dated: 28-04-2016

NOTIFICATION

In exercise of the powers conferred on me under section 27 of Delhi Value Added Tax Act, 2004 and in partial modification to the notification No.F.3(628)/Policy/VAT/2016/PF/1658-1670 dated 15th March, 2016, I, S.S.Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby direct that the returns in Form CR-II for the financial year 2015-16 are required to be filed by 16th May, 2016.

Rest of the contents of the above said Notification shall remain unchanged.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding the requirement to furnish return with digital signatures in accordance with the provisions of the Information Technology Act, 2000 shall be for the tax period commencing from 1st April, 2016 and subsequent tax periods.

F3(643)/Policy/VAT/2016/157-169 Dated: 03-05-2016

NOTIFICATION

In exercise of the powers conferred on me under the fourth proviso to sub-rule (3) of rule 28 of the Delhi Value Added Tax Rules, 2005 and

in partial modification to notification ‘No. F.3(643)/Policy/VAT/2016/1585-159dated 7 1st March, 2016, I, S. S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby direct that the requirement to furnish return with digital signatures in accordance with the provisions of the Information Technology Act, 2000 shall be for the tax period commencing from 1st April, 2016and subsequent tax periods.

The rest of the contents ofthe said notification shall remain same.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding the details of purchases where the total amount of an invoice does not exceed Rs. 1000/- shall not be mandatorily required to be furnished in Form GE-II

F3(619)/Policy/VAT/2016/183-196 Dated: 06-05-2016

NOTIFICATION

In exercise of the powers conferred on me under section 27 of the Delhi Value Added Tax Act, 2004 And in partial modification to the notification number F3(619)/Policy/VAT/2016/1291-1304 dated 12th January, 2016 and subsequent even numbered notifications, I, S. S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby direct that the details of purchases where the total amount of an invoice does not exceed Rs.1000/- (one thousand rupees) shall not be mandatorily required to be furnished in Form GE-II and further that the returns in Form GE-II for all the four quarters of the financial year 2015-2016, which have not been filed till date, are now required to be filed upto 16th May, 2016.

It is further clarified that return in Form GE-II reflecting Nil purchases is required to be filed in case there are no purchases during the respective quarter.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Sealing and de-sealing of the premises

No.F.3(645)/Policy/VAT/2016/1688-93 16-03-2016

CIRCULAR NO. 41 OF 2015-16

Sub: Sealing and de-sealing of the premises.

Section 60 of the Delhi Value Added Tax Act, 2004 empowers the Commissioner to enter premises and seize records and goods of any person during surveys. The surveys are to be conducted on the premises of a dealer to detect tax evasion. The survey teams are headed by an officer of the level of Assistant Commissioner/VATO and comprises of AVATOs & VATIs. The size of the team depends upon the number of premises and size of the dealer to be surveyed.

2. The survey team can seize incriminating documents and any other unaccounted papers found during search. A proper acknowledgement of the seized goods and papers is to be given to the dealer after the survey. If the dealer refuses to cooperate or obstructs the team, then the premises can be sealed for such activities. The business activities of the dealer come to stand still after sealing of the premises. The sealed property can be de-sealed after satisfying the provisions of sub-section (4) of section 60 and rule 23 of Delhi Value Added Tax Rules, 2005.

3. Sometimes, it happens that the survey team may not be able to complete the task due to inadequate staff even after normal business hours. After assessing the situation, the team can abandon the search operation in consultation with his supervisory officer to resume the same next day. The premises should be locked and a seal/mark may also be affixed a security measure. Posting of a security guard can also be considered if need so arises. The survey can be resumed next day from the stage it was left on previous day. in this way, business of the dealer remains affected.

4. This issues with the prior approval of the Commissioner, VAT

(R.K.Mishra)
Spl.Commissioner (Policy)

Circular regarding Assessment of Enforcement Survey/Seizure Cases by respective ward officers .

No.F.3(651)/Policy/VAT/2016/1734-38 19-03-2016

CIRCULAR NO. 42 OF 2015-16

SUBJECT: Assessment of Enforcement Survey/Seizure Cases by respective ward officers.

In a recent judgement in the matter of M/s Capri Bathaid Private Ltd. & others Vs Commissioner (Trade and Taxes), dated 02.03.2016, Hon'ble Delhi High Court has observed that multiplicity of authorities should be avoided.

To comply with the aforesaid judgement of Hon'ble court, it has now been decided to assign the assessment of all cases pursuant to Enforcement surveys to officers of wards concerned except the cases for which proceedings/jurisdiction has been transferred by the Commissioner, Value Added Tax through a separate order under section 67 of Delhi Value Added Tax Act, 2004.

Therefore, all officers with whom such cases are lying pending as on date, are hereby directed to transfer the aforesaid cases to the concerned ward officers immediately and after transfer ward authorities shall ensure that assessments are completed within the time frame specified under the said Act.

Any deviation to the order shall be viewed seriously and may attract disciplinary action.

This issues with the approval of Commissioner, VAT.

(R.K. Mishra)
Spl. Commissioner (Policy)

Circular regarding Sealing and de-sealing of the premises

No.F.3(645)/Policy/VAT/2016/1739-44 21-03-2016

CIRCULAR NO. 43 OF 2015-16

Sub: Sealing and de-sealing of the premises

In supersession to earlier Circular No. 41, 2015-16 issued vide No.F.3(645)/POLICY/VAT/2016 /1688-93/ dated 16-03-2016 regarding sealing and de-sealing of the business premises, it is stated that Section

60 of the Delhi Value Added Tax, 2004 empowers the Commissioner to enter premises and seize records and goods of any person during surveys. The Surveys are to be conducted on the premises of a dealer to detect tax evasion. The survey teams are headed by an officer of the level of Assistant Commissioner/VATO and comprises of AVATOs and VAT's. The Size of the team depends upon the number of premises and size of the dealer to be surveyed.

The survey team can seize incriminating documents and any other unaccounted papers found during search. A proper acknowledgement of the seized goods and papers is to be given to the dealer after the survey. If the dealer refuses to cooperate or obstructs the team, then the premises can be sealed for such activities. The business activities of the dealer come to a standstill after sealing of the premises. The sealed property can be de-sealed after satisfying the provisions of sub-section (4) of section 60 and rule 23 of Delhi Value Added Tax Rules, 2004.

Sometimes, it happens that the survey team may not be able to complete the task due to inadequate staff even after normal business hours. After assessing the situation, the team can abandon the survey in consultation with his supervisory officer to resume the same next day. The premises should be locked and a seal/mark may also be affixed as a security measure. Posting of a security guard can also be considered, if need so arises. The survey can be resumed next day from the stage it was left on previous day. In this way, business of the dealer would remain unaffected.

This issues with the prior approval of the Commissioner, Value Added Tax.

(R.K. Mishra)
Spl. Commissioner (Policy)

Circular regarding VAT deduction at source in respect of works contracts

No.F.3(654)/Policy/VAT/2016/1800-1802 28-03-2016

To

1. All Central Government Ministries/Departments/Directorates/ PSUs/ Corporations/ Boards/ Authorities etc.
2. All Delhi Government Departments / Directorates / PSUs/ Corporations / Boards / Authorities etc.

3. All other Government Departments / Directorates / PSUs / Corporations/ Boards/ Authorities etc. having their offices functioning within the National Capital Territory of Delhi

Sub: VAT deduction at source in respect of works contracts.

Sir,

It is to bring to kind notice of all that section 36 A of the Delhi Value Added Tax Act, 2004 requires every person, at the time of making payment or credit to a contractor, to deduct TDS @ 4%, if the contractor is a registered dealer or @ 6% in case the contractor is unregistered. The amount so deducted by such person (i.e. the contractee) is required to be deposited to the Delhi Government Treasury within a period of 15 days following the month in which such deduction is made. Failure to deduct TDS entails penalty apart from liability of interest.

It has come to the notice of the Trade & Taxes Department that some of the Government Departments are carrying out the works contract activities by assigning the various departmental contracts to the contractors. Under the provision of DVAT Act 2004, it is the responsibility of such departments to deduct TDS on the payments made to the contractors to whom the works contract has been assigned. Secondly, it has also been noticed that some of the government departments are assigning the works contracts to other government agencies being specialized in the field for execution of deposit works.

In view of above, as deduction of VAT at source being mandatory in respect of works contracts, all the government departments are advised to deduct at source the TDS in accordance with the provisions of Section 36A of DVAT Act, 2004 and deposit the same with the Trade & Taxes Department which is otherwise their duty to do so and the failure would tantamount to attracting the penal provisions under the said Act.

Yours faithfully,

S.S. Yadav
Commissioner, Value Added Taxes

Circular regarding New Composition Scheme for Restaurant and Halwais

F.3(664)/Policy/VAT/2016/106-112 27-04-2016

CIRCULAR NO. 1 OF 2016-17

Subject: New Composition Scheme for Restaurants and Halwais

A new composition scheme has been recently notified by the Government vide notification dated 18/03/2016 in exercise of powers conferred in section 16(12), wherein the registered dealers whose annual turnover is upto Rs.50 Lakhs and who makes sales of cooked food, snacks, sweets, savouries, juices, aerated drinks, tea and coffee etc. have an option to pay composition tax @ 5%.

In the above context, it is clarified that the condition requiring payment of tax on opening stock is not applicable to those dealers who, w.e.f. 1st April, 2016, intend to shift from composition scheme under section 16(1) to the new composition scheme notified under section 16(12), as the goods heldby such dealers on the transition date have already suffered VAT at the time of purchase and also no ITC on such purchases has been claimed by such dealers. Thus, the field 8 of Form RH01 is irrelevant for such dealers, as they are not required to pay tax on their opening stock held onl." April, 2016. The condition requiring payment of tax on opening stock is applicable only when a dealer paying tax under the normal scheme of the Act (i.e. as per section 3) opts for composition scheme. It is also clarified that such dealers while shifting from composition scheme under section 16(1) to the new composition scheme notified under section' 16(12) w.e.f. 1st April, 2016 shall not be eligible for claiming ITC on closing stock held by them on 31 st March, 2016.

It is further clarified that the applications in respect of the new composition scheme are to be filed manually in respective wards or at reception counter of the Department, till the time an order specifically requiring online filing of forms is issued by the Commissioner, VAT in exercise of powers conferred in the notification.

This issues with the approval of Commissioner, VAT.

R.K. Mishra
Spl. Commissioner

Notification regarding Notification Regarding the Change in Rate of VAT in Diesel

No.F.3(2)/Fin(Rev-I)/2016-17/dsvi/141 06-05-2016

Na.F.3(2)/Fin(Rev-1)12016-17/.- Whereas the Lt. Governor of the National Capital Territory of Delhi is of the opinion that it is expedient in the interest of general public so to do;

Now, therefore, in exercise of the powers conferred by section 103 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), the Lt. Governor of the National Capital Territory of Delhi, hereby, makes the following amendments in the Fourth Schedule appended to the said Act, namely :-

AMENDMENTS

1. In the Fourth Schedule, for the existing rows pertaining to serial numbers 13, the following rows shall be substituted, namely:-

"

13.	Diesel (High Speed Dieselil; Super Light Diesel Oil, Light Diesel Oil)	16.75 paise in the rupee

"

11. This notification shall come into force with effect from the day immediately following the date of its issuance.

By order and in the name of the
Lt. Governor of the National Capital Territory of Delhi,

A.K. Singh
Dy. Secretary-VI (Finance)

Notification regarding change in rate of VAT in schedules

F.3(3)/Fin(Rev-I)/2016-17/dsvi/148 09-05-2016

No.F.3(3)/Fin{Rev-I)/2016-17/,-Whereas the Lt. Governor of the National Capital Territory of Delhi is of the opinion that it is expedient in the interest of general public so to do;

Now, therefore, in exercise of the powers conferred by section 103 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), the Lt. Governor

of the National Capital Territory of Delhi, hereby, makes the following amendments In the Schedules appended to the said Act, namely:-

AMENDMENTS

1. In the Third Schedule,-

(a) for the entry at serial no. 28, the following entry shall be substituted, namely:-

"28. Ferrous and non-ferrous metals and ,alloys thereof including their sheets, foils and extrusions.

Non-ferrous metals include aluminium, copper, zinc etc." ;

(b) in the entry at serial no. 41A, in the Table appended thereto, in the description in column 2 pertaining to row at serial no. 3, for the concluding words, symbols and brackets "data processing machines, Uninterrupted power supply units (UPS)", the words "data processing machines" shall be substituted;

(c) the following entry shall be inserted at serial no. 51, namely-

"51. All types of footwear as are specifically not covered by any other entry of any of the Schedules to the Act.";

(d) for the entry at serial no. 57, the following entry shall be substituted, namely:"

57. Readymade garments but not including those made of khadi.";

(e) for the entry at serial No. 82, the following entry shall be substituted, namely:-

"82. All types of School Bags." ;

(f) in the entry at serial no. 85, before sub-entry (b), the following sub-entry shall be inserted, namely-

"(a) Sweets and Namkeens.": and

(g) the following entries shall be Inserted at serial numbers 190 and

191, namely:-

"190, E-Rickshaw, Battery operated vehicles and Hybrid Automobiles operated on Battery and Fuel.

191. All kinds of Marble."

2. In the Fourth Schedule,-

(a) for the existing row pertaining to serial no. 9, the following row shall be substituted, namely:-

9.	Un-manufactured tobacco, tobacco and tobacco products in all forms such, as cigarettes (irrespective of form and length), chewing tobacco, gutkha, cigars, hooka tobacco, khaini, zarda, surti, bidis etc.	Twenty paise in the rupee

(b) the entry at serial No. 11 shall be omitted.

This notification shall come into force with effect from the day immediately following the date of its issuance.

By order and in the name of the
Lt. Governor of the National Capital Territory of Delhi,

A.K. Singh
Dy. Secretary-VI (Finance)

Notification regarding filing of form DS-1 online by all registered dealers of Delhi in respect of any commodities/goods to be moved from Delhi to any place outside the territory of Delhi on account of sale, stock transfer etc.

F.3(671)/Policy/VAT/2016/251-63 19-05-2016

Whereas, the Department of Trade and Taxes, Government of National Capital territory of Delhi vide notification No. F.7(433)/Policy-1l/VAT/2012/1464 dated 23.3.2012, had notified an online Form T-1 for providing information to the department in respect of movement of petroleum products (except Petrol, Diesel, Aviation turbine Fuel, Petroleum Gas or Compressed Natural Gas), Tobacco and Gutka, consequent to their sale, stock transfer or local movement, for whatsoever reason, by the

registered dealers engaged in the trade of these commodities before the actual movement of such goods occurs.

And whereas, now the Department of Trade and Taxes has designed and developed a new simplified online Form namely Delhi Sugam-1 (In short "DS1') in place of Form T-1 for providing information to the Department in respect of movement of any goods from Delhi to any place outside the territory of Delhi due to sale, stock transfer or for whatsoever reason, by the registered dealers by using their login, before actual movement of the goods occurs.

And whereas, earlier Form T-1 was only required to be filed for providing information to the department in respect of movement of petroleum products (except Petrol, Diesel, Aviation turbine Fuel, Petroleum Gas or Compressed Natural Gas), Tobacco and Gutka, consequent to their sale, stock transfer or local movement, for whatsoever reason by the registered dealers engaged in their trade, before the actual movement of such goods occur. However, Delhi Sugam-1 (DS1) is required to be filed by all the registered dealers for all the commodities/goods before actual movement of the goods occurs.

Therefore, I, S.S. Yadav, Commissioner, Value Added Tax, Government of National Capital Territory of Delhi, in exercise of the power conferred under section 70 of the Delhi Value Added Tax Act, 2004, hereby, direct that the details in respect of any commodities/goods to be moved from Delhi to any place outside the territory of Delhi on account of sale, stock transfer or due to whatsoever reason, shall be submitted online, in Form Delhi Sugam-1 (DS1), as annexed with this Notification, by all the registered dealers of Delhi before t he actual movement of such goods occurs.

This Notification shall come into force with effect from the 1st June, 2016 in supersession of all previous notifications on this subject.

S.S. Yadav
Commissioner, Value Added Tax

FORM DELHI SUGAM·1 (DS1)

1. Sale Type

Select from the drop down list
C- Form
F-Form
H- Form
I-Form
J-Form
Export out side India
Others(Please Specify)

2. Sale Details

Seller's TIN	
Invoice No.	
Invoice Date	

3. Purchaser's/Receiving person's Details

TIN	
Name	
State	

4. Commodity / Item details

Sl.No.	Description	Information
1.	Item Name	Select from the drop down list
2.	Delhi VAT rate (%)	Select from the drop down list
3.	Amount/value of the commodity/item	
4.	CST Amount	

5. Mode of Transport

Sl.No.	Description	Information
1.	Mode of Transport	Select from the drop down list
		By Road - Transporter Vehicle
		By Road· own Vehicle
		Through Courier
		By Train
		Through Pipe line
		By Air
		Through Internet

6. Transporter's Details

Sl.No.	Description	Information
1.	Transporter/ owner's name	
2.	Vehicle No.	
3.	GR/Airways/ RR/Courier receipt No.	
4.	GR/Airways/RR/Courier receipt date	
5.	likely Date of actual movement of goods from Delhi.	

Notification regarding Extension of the date for filing CR-II upto 16/05/2016

F.3(628)/Policy/VAT/2016/238-50 dated 19/05/2016 19-05-2016

In exercise of the powers conferred on me under section 27 of the Delhi Value Added Tax Act, 2004 and in partial modification to the notification number F.3(628)/ Policy/VAT/2016/1424-36 dated 11th Februrary, 2016 and subsequent even numbered notifications, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby direct that the returns in Form CR-II for all the four quarters of the financial year 2015-16 are required to be filed by 16th June, 2016.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Filing of online return for fourth quarter of 2015-16-extension of period thereof.

F.7(420)/VAT/Policy/2011/PF/134-139 28-04-2016

Circular No. 2 of 2016-17

Sub: Filing of online return for fourth quarter of 2015-16 - extension of period thereof.

In exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S.Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of fourth quarter

return for the year 2015-16, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 16/05/2016.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act. 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

S.S. Yadav
Commissioner, VAT

Circular regarding Competition amongst the officers on relevant legal provisions, procedures and guidelines.

No.F.3(668)/Policy/VAT/2016/145-151 29-04-2016

Circular No. 3 of 2016-17

Sub:- Competition amongst the officers on relevant legal provisions, procedures and guidelines

To motivate the officers to acquire knowledge of the Delhi Value Added Tax Act, 2004, Central Sales Tax Act, 1956, other relevant Acts, Rules and provisions and to inculcate the spirit of healthy competitiveness, the department has decided to organize a monthly competition of Assistant Commissioners, Assistant Value Added Tax Officers and Value Added Tax Inspectors on these Acts, Rules and procedures.

The participation in the competition shall be mandatory for all the aforesaid officers and based on the result of competition, the best performing officers shall be suitably rewarded along with a certificate of appreciation. The first competition shall be held on 1st June, 2016 and thereafter on 1st working day of every month.

The relevant details relating to schedule and mode of competition shall be conveyed to concerned officers in due course before the date of competition.

This issues with the approval of Commissioner, VAT.

R.K. Mishra
Spl. Commissioner Policy

Circular regarding Display of Certificate of Registration

No.F.3(668)/Policy/VAT/2016/145-151 10-05-2016

Circular No. 4 of 2016-17

Sub: Display of Certificate of Registration: reg.

In compliance of Rule 14(3) of Delhi Value Added Tax Rules, 2005 all the ACs/ward incharges are hereby directed to ensure, within their respective jurisdiction, that all the registered dealers, shall prominently display the certificate of registration at their principal place of business and a certified copy thereof at all other places of business in Delhi. Further. the dealer shall also prominently display his TIN and ward number outside the main entrance of all places of business in Delhi.

All the ACs/ward incharges are further directed to ensure strict adherence to the above directions by ensuring compliance by all dealers within their respective jurisdiction.

Anand Kumar Tiwari
Joint Commissioner (Policy)

Circular regarding Filing of on-line return for fourth quarter of 2015-16 - extension of period thereof

No.F.3(420)/Policy/VAT/2011/215-220 16-05-2016

Circular No. 5 of 2016-17

Sub: Filing of online return for fourth quarter of 2015-16 - extension of period thereof.

In partial modification to this department's Circular No. 02 of 2016-17 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of fourth quarter return lor the year 2015-16, in Form DVAT-16. DVAT-17 and DVAT-48 along with required annexure/enclosures to 23/05 /2016 .

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act. 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAl-56.

S.S. Yadav
Commissioner, Value Added Tax

Gazette Notification of the Delhi Value Added Tax (Amendment) Act 2016 (Delhi Act 03 of 2016)

No. F.14(12)/LA-2016/cons2law/77-86 05-07-2016

Notification

No.F.14(12)/LA-2016/cons2law/77-86: The following Act of the Legislative Assembly of the National Capital Territory of Delhi received the assent of the Lt. Governor of Delhi on the 24th June, 2016 and is hereby published for general information:-

'THE DELHI VALUE ADDED TAX (AMENDMENT) ACT, 2015 (DELHI ACT 03 OF 2016)

(As passed by the Legislative Assembly of the National Capital Territory of Delhi on the 13th June, 2016)

(24th June, 2016]

An Act to further amend the Delhi Value Added Tax Act, 2004 (3 of 2005).

BE it enacted by the Legislative Assembly of the National Capital Territory of Delhi in the Sixty-seventh year of the Republic of India as follows:-

1. Short title, extent and commencement.- (i) This Act may be called the Delhi Value Added Tax (Amendment) Act, 2016.

(ii) It extends to the whole of the National Capital Territory of Delhi.

(iii) It shall come into force on such date as the Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act.

2. **Amendment of section 3.**- In the Delhi Value Added Tax Act, 2004 (hereinafter referred to as the principal Act), in section 3, after sub-section (10), the following sub-section shall be inserted, namely:-

"(11) Notwithstanding anything contained in this Act to the contrary, the Government may by notification specify the goods on which a person shall pay tax in advance at the rates notified by the Government but not exceeding the rates applicable on such goods under this Act, when he imports such goods into the National Capital Territory of Delhi from a place outside India, subject to such

conditions as may be specified in the notification. The aforesaid payment of tax in advance shall be counted towards the final tax liability of the taxable person:

Provided that the Government may by notification exempt any person or class of persons from payment of tax in advance or reduce the rate of payment of tax in advance subject to such conditions as may be notified:

Provided further that if on an application made by a person the Commissioner or an officer authorized by him, after verifying all aspects of the case, arrives at a decision that such person should be exempted from payment of tax in advance or that the rate of payment of tax in advance should be reduce for such person, he may do so and impose such terms and conditions on such person as he may deem fit.

Explanation.- The person, who imports goods into the National Capital Territory of Delhi, shall pay tax in advance, on the presumption that such goods are meant for the purpose of sale or for use in manufacture or processing of goods meant for sale, unless, it is proved otherwise by such person. It is further presumed, unless it is proved otherwise by such person, that such goods or any product manufactured therefrom shall not be sold below the price at which such goods have been purchased and imported.".

3. **Amendment of section 29.**- In the principal Act, in section 29, after sub-section (1), and before the Explanation 1 clause, the following sub-section shall be inserted, namely:-

"(2) The Commissioner may by notification in the official gazette, require any dealer or class of dealers to file the returns only through electronic mode appending digital signatures or any other electronic identification process and with effect from such date as may be specified therein.".

4. **Insertion of new section**.- In the principal Act, after section 50, the following new section shall be inserted, namely:-

"50A Electronic communication of sale information.-(1) the Government may by notification in the official gazette require any dealer or class of dealers to install such physical compliance devices or software, as may be considered necessary for instantaneous communication of the information of sale invoices to the Commissioner.

(2) The cost of equipment and installation of the device and software, as may be required under sub-section (1), shall be borne by the dealer.".

5. **Amendment of section 86.**- In the principal Act, in section 86, in sub-section (10), for the words

"ten thousand rupees", the words "one thousand rupees" shall be substituted.

6. **Insertion of new section.**- In the principal Act, after section 91, the following new section shall be inserted, namely:-

"91A Special Courts and Public Prosecutor .- (1) Notwithstanding anything contained in this Act to the contrary, the Government may, if considers expedient or necessary, constitute, by notification in the Official Gazette, a Special Court with the concurrence of the Chief Justice of the Delhi High Court for the purposes of the trial of offences under this Act.

(2) For the Special Court, the Government shall appoint a person to be the Public Prosecutor and may appoint more than one person to be the Additional Public Prosecutors.".

7. **Amendment of section 92.**-In the principal Act, in section 92,after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Every officer or person so authorized shall, upon investigation of the offence, submit a report to the Commissioner with the recommendations for sanctioning prosecution or otherwise and the Commissioner, shall, then take a decision as to whether prosecution is essentially required in the matter and if so, the authorized officer shall launch prosecution before the Metropolitan Magistrate having jurisdiction over the area or before a court specially designated by the government for the purpose.".

8. **Amendment of section 93.**- In the principal Act, in section 93, in sub-section (1) the following proviso shall be inserted, namely:-

"Provided that the composition of offence shall not apply in case of second and subsequent offence of the same nature.".

9. **Amendment of section 107.**- In the principal Act, in section 107, for the words, symbols and digits "under the 'Act', for any period ending

before first day of April, 2013", the words and symbols "already assessed under section 32 or section 33 of the Act , as the case may be, before a period of at least one year from introduction of such Amnesty Scheme" shall be substituted.

O.P. Mishra
Addl. Secretary (Law, Justice & L.A.)

Notification regarding Filing of returns through Digital Signatures

No. F.3(643)/Policy/VAT/2016/419-31 01-07-2016

Notification

In exercise of the powers conferred on me under the fourth proviso to sub-rule (3) of rule 28 of the Delhi Value Added Tax Rules, 2005 and in supersession of Notification No.F.3(643)/Policy/VAT/2016/1585-1597 dated 01/03/2016 and No.F.3(643)/Policy/ VAT/ 2016/157-169 dated 03/05/2016 I, S. S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby require that—

– the dealers, whose gross turnover (i.e. turnover under the Delhi Value Added Tax Act, 2004 plus turnover under the Central Sales Tax Act, 1956) during the financial year 2015-16 exceeded one crore rupees, shall furnish their returns in Form DVAT 16 or in Form DVAT 17, as the case may be, with digital signatures in accordance with the provisions of the Information Technology Act, 2000 for the tax period 1st April, 2016 to 30th June, 2016 and subsequent tax periods; and

– the dealers who are registered under the Delhi Value Added Tax, 2004 on or after 1st April, 2016 shall furnish their returns in Form DVAT 16 or in Form DVAT 17, as the case may be, with digital signatures in accordance with the provisions of the Information Technology Act, 2000 for the tax periods following the year during which their gross turnover exceeds one crore rupees.

Explanation 1- In view of the provisions of sub-rule (1) of rule 3 of Central Sales Tax (Delhi) Rules, 2005, where the return under the Delhi Value Added Tax Act, 2004 is required to be filed with digital signatures, the return in Form 1 shall also be required to be filed with digital signatures.

Explanation 2- The dealers other than those who are mandatorily required to file returns through digital signatures under this notification can also, at their own option, file their returns through digital signatures.

Explanation 3- Dealers filing their return through digital signatures are not required to submit the return verification form in Form DVAT 56 for acknowledgement of the return separately.

Explanation 4- The dealers once started filing returns with digital signatures shall continue to file the returns with digital signatures even if their annual turnover falls below one crore rupees any time in future,

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding Withdrawal of Delhi Sugam -1 (DS-1)

No.F.3(671)/Policy/VAT/2016/251-63 27-05-2016

Notification

Whereas, the Department of Trade and Taxes, Government of National Capital territory of Delhi vide notification No.F.3(671)/Policy/VAT/2016/251-63 dated 19.05.2016, had notified an online Form Delhi Sugam-1 (DS1), in exercise of the powers conferred under section 70 of the Delhi Value Added Tax Act, 2004, for furnishing the details in respect of any commodities/ goods to be moved from Delhi to any place outside the territory of Delhi on account of sale, stock transfer or due to whatsoever reason, by all the registered dealers of Delhi before the actual movement of such goods occurs.

And whereas, on receiving feedback from some stakeholders, it has now been decided to not to implement the said notification.

Now, therefore, I, S.S. Yadav, Commissioner, Value Added Tax, Government of National Capital Territory of Delhi, in exercise of the powers conferred under section 70 of the Delhi Value Added Tax Act, 2004, hereby, withdraw the aforesaid notification.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Grant of Registration under DVAT & CST

No.F.3(521)/Policy/VAT/2015/221-26 17-05-2016

Circular No. 6 of 2016-17

Sub: Grant of Registration under DVAT & CST.

New technological developments, especially in the field of Information Technology have ushered a new era of providing instant, hassle-free services to citizens without human interface. Using the latest technology advancements, the Department of Trade and Taxes has developed a mobile application DVATMsewa to provide various services to traders. One of the services to be provided through the new App is registration of dealers under the DVAT Act, 2004 and CST Act, 1956. The following procedure is hereby prescribed to deal with requests for registration of dealers received through DVATMsewa App without verification of business premises by VAT Inspector and to complete the registration process almost instantaneously.

1. Dealer has to download the DVATMsewa APP on his mobile and register himself on the mobile APP by giving his basic information like name, Adhaar number, date of birth, mobile no. and residential address.

2. Thereafter the user/dealer will provide further information relating to his business through the APP like name of firm/organisation, constitution of Business, dealer type, PAN No., E-mail, Business address and will also upload image of business premise through the App which will capture the GPS coordinates of his place of business.

3. On submission of the request of the dealer, the computer system of the Department will verify Aadhar details from Aadhar/UID portal and will also verify PAN details of the dealer with Income Tax data being maintained by NSDL.

4. After successful verification of PAN and Aadhar details, the details submitted by the dealer for registration shall be made available to the Ward VATO in his login. The VATO will have to check the address of business premises as submitted by the dealer and location of business premise on the map as indicated in google map by the coordinates of the Image of business premises uploaded.

5. If the VATO finds that the address matches with the location as per GPS coordinates uploaded by dealer, he will verify the same

and reference 10 and password will be sent to the registered applicant through e-mail on the same day.

6. Dealer will then file registration application under DVAT and/ or CST, as the case may be, and deposit fee online. Scanned requisite documents are also required to be uploaded with the application.

7. In case of applications received through the App no verification by VATI will be required. The final application will come to VATO's account who will approve or reject it, as may be considered fit by him. On Approval by VATO final TIN will be generated.

8. Registration Certificate would be made available in the login of dealer on the same day.

9. Signed copy of the RC would be dispatched to the dealer by post till the online despatch facility through digital signatures is extend ed to all Registration Authorities of the department.

In the aforesaid process, Registration number/TIN would be issued with in a working day to the dealer. All Assessing Authorities are directed to follow the aforesaid process . In case of applications not received through mobile App, the existing process of registration after VATI verification will continue

Anand Kumar Tiwari
Jt. Commissioner (Policy)

Circular regarding Filing of on-line return for fourth quarter of 2015-16 - extension of period thereof

No.F.3(420)/Policy/VAT/2011/264-269 23-05-2016

Circular No. 7 of 2016-17

Sub: Filing of online return for fourth quarter of 2015-16 - extension of period thereof.

In partial modification to this department's Circular No. 05 of 2016-17 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S.Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of fourth quarter return for the year 2015-16, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 27/05/2016.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004.

The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding New Composition Scheme for Restuarants and Halwais

No.F.3(664)/Policy/VAT/2011/264-269 30-05-2016

Circular No. 8 of 2016-17

Subject: New Composition Scheme for Restaurants and Halwais

A new Composition Scheme under section 16(12) of the DVAT Act was recently introduced vide notification No. F.3(29)/Fin.(Rev-l)/2015-16/dsvi/93 dated 18/03/2016, wherein the registered dealers whose annual turnover is upto Rs. 50 Lakh and who make sales of cooked food, snacks, sweets, savouries, juices, aerated drinks, tea and coffee etc. (i.e. who are engaged in restaurants/halwai business) were given an option to pay composition tax @ 5% w.e.f. 1st April, 2016. In view of the second proviso to section 16(1), such dealers, who were earlier opting composition @1% under section 16 (1) were mandatorily required to opt out of the composition w.e.f. 1st April, 2016 by filing Form DVAT-03 upto 30th April, 2016 and to pay tax as a non-composition dealer as per the provisions of the DVAT Act or to opt to the new Composition Scheme @ 5% by filing Form RH-01 alongwith the Form DVAT-03 (for withdrawal of composition @ 1%) upto 30th April, 2016. A dealer engaged in restaurant/halwai business who is still continuing with composition @ 1% under section 16(1) after 31st March, 2016 is not only liable to pay due tax as per the rates specified in section 4 of the DVAT Act as a non-composition dealer but also liable to pay penalty under section 86(24) for contravening the provisions of the DVAT Act.

Therefore, in view of above, all Zonal Addl. Commissioner/Jt. Commissioners and also the Ward VATOs/ AVATOs are hereby directed to ensure that no such dealer (engaged in restaurant/halwai business) is continuing with composition of tax @1% under section 16(1) after 31st March, 2016 and if found so appropriate action against such dealers for recovery of due tax and penalty may be initiated as per the statutory provisions of the DVAT Act.

This issues with the approval of Commissioner, VAT.

R.K. Mishra
Spl. Commissioner

Circular regarding No collection of VAT by teams deputed under section 60 of DVAT ACT

No.F. 7 (5)/L&J/Circular/2016/372 11-04-2016

Circular

Sub: No collection of VAT by Teams deputed under Section 60 of DVAT Act, 2004.

In compliance of the orders of Hon'ble High Court of Delhi in the matter of M/s Gullu's in Writ Petition No. 1566/2016 and M/s Capri Bathaid Pvt. Ltd. & Others, in WPC No. 8913/2014, all the VAT Authorities deputed under Section 60 of DVAT Act 2004, are hereby directed to refrain from collecting any tax by way of cheque or through any other mode against any tax deficiency during the course of field survey.

Even if during the proceedings under Section 60 of the DVAT Act, the dealer comes forward voluntarily to deposit tax through cheque or any other mode towards any tax deficiency to take advantage of provisions of Section 87(6), the officers shall decline to receive the same and promptly advise the dealer to deposit the same as per the procedure laid down for depositing VAT.

Non-compliance of the above instructions shall be viewed seriously and shall attract disciplinary action against the officer concerned.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Empowerment by Commissioner VAT under Rule 65 of the DVAT Rules 2005

No.F.7 (4)/DVAT/LSC/15-16/326-331 23-03-2016

Circular

Sub: Empowerment by Commissioner, VAT, under Rule 65 of the DVAT Rules.

In exercise of powers available under Rule 65 of the DVAT Rules, 2005 read with Section 68 of the DVAT Act, 2004 (Delhi Act 3 of 2005) and Rule 48 of the DVAT Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby empower all officers appointed

under sub-section (2) of Section 66 of the DVAT Act, 2004, not below the rank of Special Commissioner to appoint an officer or a person to exercise any of the powers in Chapter X of the Delhi Value. Added Tax (DVAT) Act, 2004 (Delhi Act 3 of 2005) and to grant. authority to the officers/persons so appointed, in Form DVAT 50 for exercise of the powers by them under the aforesaid Chapter of the Act.

The order shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Guide lines for VAT Authorities of Department of Trade and Taxes in terms of jurisdiction and duties assigned in exercise under chapter X of DVAT ACT

No.F.7(6)/L&J/Circular/2016/343 11-04-2016

Circular

Sub: Guide lines for VAT Authorities of Department of Trade & Taxes in terms of jurisdiction & duties assigned in exercise of powers under Chapter X of the DVAT Act, 2004.

In compliance of judgment in the matter of M/s Capri Bathaid Pvt. Ltd. & Others, in WPC No. 8913/2014, all officers appointed as VAT Authorities in the Department of Trade & Taxes and exercising powers under Chapter X of DVAT Act, 2004 are once again directed to follow the following instructions in letter and spirit.

All officers while exercising any of the powers under Chapter X of the Act viz., Audit, Survey/ Inspection or Stopping & Detention of Goods Vehicles shall prepare reports based on the information or records in their possession and duly examined by them. Whereafter, the reports along with the information & records shall be mandatorily forwarded to the concerned Ward/Branch officer having jurisdiction over the dealer for assessment of tax and penalty, in accordance with the laid down procedure.

Non-compliance of the above instructions shall be viewed seriously and shall attract disciplinary action.

S.S. Yadav
Commissioner, Value Added Tax

Notification regarding Filing of returns through Digital Signatures

No. F.3(643)/Policy/VAT/2016/419-31 01-07-2016

Notification

In exercise of the powers conferred on me under the fourth proviso to sub-rule (3) of rule 28 of the Delhi Value Added Tax Rules, 2005 and in supersession of Notification No. F.3(643)/Policy/VAT/2016/1585-1597 dated 01/03/2016 and No. F.3(643)/Policy/ VAT/ 2016/157-169 dated 03/0512016 I, S. S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, hereby require that—

- the dealers, whose gross turnover (i.e. turnover under the Delhi Value Added Tax Act, 2004 plus turnover under the Central Sales Tax Act, 1956) during the financial year 2015-16 exceeded one crore rupees, shall furnish their returns in Form DVAT 16 or in Form DVAT 17, as the case may be, with digital signatures in accordance with the provisions of the Information Technology Act, 2000 for the tax period 1st April, 2016 to 30th June, 2016 and subsequent tax periods; and
- the dealers who are registered under the Delhi Value Added Tax, 2004 on or after 1st April, 2016 shall furnish their returns in Form DVAT 16 or in Form DVAT 17, as the case may be with digital signatures in accordance with the provisions of the Information Technology Act, 2000 for the tax periods following the year during which their gross turnover exceeds one crore rupees.

Explanation 1 - In view of the provisions of sub-rule (1) of rule 3 of Central Sales Tax (Delhi) Rules. 2005, where the return under the Delhi Value Added Tax Act, 2004 is required to be filed with digital signatures, the return in Form 1 shall also be required to be tiled with digital signatures.

Explanation 2 - The dealers other than those who are mandatorily required to file returns through digital signatures under this notification can also, at their own option, file their returns through digital signatures.

Explanation 3 - Dealers filing their return through digital signatures are not required to submit the return verification form in Form DVAT 56 for acknowledgement of the return separately.

Explanation 4 - The dealers once started filing returns with digital signatures shall continue to file the returns with digital signatures even if their annual turnover falls below one crore rupees any time in future.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Gazette Notification of the Delhi Value Added Tax (Amendment) Act 2016 (Delhi Act 03 of 2016)

No. F.14(12)/LA-2016/cons2law/77-86 05-07-2016

Notification

No. F.14(12)/LA-2016/cons2law/77-86: The following Act of the Legislative Assembly of the National Capital Territory of Delhi received the assent of the Lt. Governor of Delhi on the 24th June, 2016 and is hereby published for general information:-

"THE DELHI VALUE ADDED TAX (AMENDMENT) ACT, 2016 (DELHI ACT 03 OF 2016)

(As passed by the Legislative Assembly of the National Capital Territory of Delhi on the 13th June, 2016) [24th June, 2016]

An Act to further amend the Delhi Value Added Tax Act, 2004 (3 of 2005).

BE it enacted by the Legislative Assembly of the National Capital Territory of Delhi in the Sixty-seventh year of the Republic of India as follows:-

1. Short title, extent and commencement.- (i) This Act may be called the Delhi Value Added Tax (Amendment) Act, 2016.

(ii) It extends to the whole of the National Capital Territory of Delhi. (iii) It shall come into force on such date as the Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act.

2. Amendment of section 3.- In the Delhi Value Added Tax Act, 2004 (hereinafter referred to as the principal Act), in section 3, after sub-section (10), the following sub-section shall be inserted, namely:-

"(11) Notwithstanding anything contained in this Act to the contrary, the Government may by notification specify the goods on which a person shall pay tax in advance at the rates notified by the Government but not exceeding the rates applicable on such goods under this Act, when he imports such goods into the National Capital Territory of Delhi from a place outside India, subject to such conditions as may be specified in the notification. The aforesaid

payment of tax in advance shall be counted towards the final tax liability of the taxable person:

Provided that the Government may by notification exempt any person or class of persons from payment of tax in advance or reduce the rate of payment of tax in advance subject to such conditions as may be notified:

Provided further that if on an application made by a person the Commissioner or an officer authorized by him, after verifying all aspects of the case, arrives at a decision that such person should be exempted from payment of tax in advance or that the rate of payment of tax in advance should be reduce for such person, he may do so and impose such terms and conditions on such person as he may deem fit.

Explanation.- The person, who imports goods into the National Capital Territory of Delhi, shall pay tax in advance, on the presumption that such goods are meant for the purpose of sale or for use in manufacture or processing of goods meant for sale, unless, it is proved otherwise by such person. It is further presumed, unless it is proved otherwise by such person, that such goods or any product manufactured therefrom shall not be sold below the price at which such goods have been purchased and imported.”.

3. Amendment of section 29.- In the principal Act, in section 29, after sub-section (1), and before the Explanation 1 clause, the following sub-section shall be inserted, namely:-

“(2) The Commissioner may by notification in the official gazette, require any dealer or class of dealers to file the returns only through electronic mode appending digital signatures or any other electronic identification process and with effect from such date as may be specified therein.”.

4. **Insertion of new section**.- In the principal Act, after section 50, the following new section shall be inserted, namely:-

“50A Electronic communication of sale information.-(1) the Government may by notification in the official gazette require any dealer or class of dealers to install such physical compliance devices or software, as may be considered necessary for instantaneous communication of the information of sale invoices to the Commissioner.

(2) The cost of equipment and installation of the device and software, as may be required under sub-section (1), shall be borne by the dealer.".

5. **Amendment of section 86**.- In the principal Act, in section 86, in sub-section (10), for the words "ten thousand rupees", the words "one thousand rupees" shall be substituted.

6. **Insertion of new section**.- In the principal Act, after section 91, the following new section shall be inserted, namely:-

"91A Special Courts and Public Prosecutor .- (1) Notwithstanding anything contained in this Act to the contrary, the Government may, if considers expedient or necessary, constitute, by notification in the Official Gazette, a Special Court with the concurrence of the Chief Justice of the Delhi High Court for the purposes of the trial of offences under this Act.

(2) For the Special Court, the Government shall appoint a person to be the Public Prosecutor and may appoint more than one person to be the Additional Public Prosecutors.".

7. Amendment of section 92.-In the principal Act, in section 92,after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Every officer or person so authorized shall, upon investigation of the offence, submit a report to the Commissioner with the recommendations for sanctioning prosecution or otherwise and the Commissioner, shall, then take a decision as to whether prosecution is essentially required in the matter and if so, the authorized officer shall launch prosecution before the Metropolitan Magistrate having jurisdiction over the area or before a court specially designated by the government for the purpose.".

8. Amendment of section 93.- In the principal Act, in section 93, in sub-section (1) the following proviso shall be inserted, namely:-

"Provided that the composition of offence shall not apply in case of second and subsequent offence of the same nature,".

9. Amendment of section 107.- In the principal Act, in section 107, for the words, symbols and digits "under the 'Act, for any period ending before first day of April, 2013", the words and symbols "already assessed under

section 32 or section 33 of the Act , as the case may be, before a period of at least one year from introduction of such Amnesty Scheme" shall be substituted.

O.P. Mishra
Addl. Secretary (Law, Justice & LA)

Notification regarding appointing 26th July 2016 as the effective date of DVAT (Amendment) Act 2016 (Delhi Act 03 of 2016)

No. F.3(4)/Fin.(Rev.-1)/2016-17/DS-VI/238 25-07-2016

Notification

No.F.3(4)/Fin.(Rev.-1)/2016-17/238.– In exercise of the powers conferred by sub-section (3) of section 1 of the Delhi Value Added TPA (Amendment) Act, 2016 (Delhi Act 03 of 2016), the Lieutenant Governor of the National Capital Territory of Delhi, hereby, appoints the 26th July 2016 as the date on which said Act shall come into force.

By order and in the name of the
Lt. Governor of the National
Capital Territory of Delhi

Notification regarding Filing of returns through digital signature

No. F.3(643)/Policy/VAT/2016/658-68 24-08-2016

Notification

In exercise of the powers conferred on me under section 70 of Delhi Value Added Tax Act, 2004 and under rule 28 of the Delhi Value Added Tax Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby withdraw notifications No.F.3(643)/Policy/VAT/2016/1585-1597 dated 1st March, 2016, and notifications No.F.3(643)/Policy/VAT/2016/419-431 dated 1st July, 2016, regarding mandatory requirement of filing returns in Form DVAT 16 or in Form 17, as the case may be, with digital signatures.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding requirement of item wise details in Forms Annexure - 2A, Annexure - 2B, DVAT- 30 and DVAT 31

No.F.3(670)/VAT/Policy/2016/343-48 06-06-2016

Circular No. 9 of 2016-2017

Sub: Requirement of item-wise details in Forms Annexure-2A, Annexure-2B, DVAT-30 and DVAT-31

Certain amendments in the Delhi Value Added Tax Rules, 2005 have been recently made vide notification No.F.3(30)/FinfRev-1)idsvi/121 dated 12/D4/2016 requiring furnishing of item-wise details of sales and purchases in DVAT Returns and in Forms DVAT-30 and DVAT-31.

Since the issuance of notification, the representatives of markets as well as Sales Tax Bar Association are raising the following issues:-

1. Dealers are facing practical problems in furnishing item descriptions/item codes as the softwares being used by them do not provide for such details. Upgrading of software will require sometime,

2. Since the notification has been issued on 12/04/2016, filing of item-wise details may be made mandatory from the tax period commencing from 01/04/2016

Therefore, in view of above, it has been decided that furnishing item-wise details in the DVAT Returns as well as in Forms DVAT-30 and DVAT-31 shall be mandatory required from the In period commencing from 1st April, 2016. For the tax period 1st January, 2016 to 31st March, 2016 specifying the item details shall be optional.

This issues with the approval of the Competent Authority.

Ajay Kumar
Joint Commissioner

Circular regarding Arrangement of Zones

Misc/HR/18/12426-438 02-06-2016

Circular

In Supersession of previous circular dated 04.05.2016 the arrangement of Zones will be as given below till further orders:

Zone	Wards Included
Zone 1	1,3,4 5,6, 24 to 32, 35 to 39
Zone 2	2, 7 to 23
Zone 3	33, 34, 40, 41, 43 to 55, 65, 68, 69, 73
Zone 4	56 to 60, 64, 66, 70, 105, 106.
Zone 5	61 to 62
Zone 6	63, 67, 71, 72
Zone 7	74 to 84
Zone 8	87 to 95
Zone 9	85, 86, 96 to 104,
Zone 10	E- commerce
Zone 11	KCS.
Zone 12	Special Zone

This shall commence with effect from 03.06.2016.
This issues with prior approval of CVAT.

Neeraja R. Kumar
Asstt. Commissioner (HR)

Circular regarding Description of Goods/Items along with their Item codes

No.F.3(643)/Policy/VAT/2016/410-16 01-07-2016

Circular No. 10 of 2016-2017

The Government of National Capital Territory of Delhi vide Notification No.F.3(30)/Fin(Rev-I)/2015-16/dsvi/121 dated 12/04/2016 had notified rules for furnishing description of goods/items along with their item code in the forms DVAT-30, DVAT-31 and DVAT return Form 16 and its Annexures.

To facilitate the compliance of the above Notification, the description of goods/items as per the DVAT Schedules as well as the goods/items which are largely traded in Delhi but are not covered by any of the schedules has been prepared after wide consultation with stakeholders. The list alongwith item codes has been uploaded on the website of the department.

As per provisions of aforesaid notification dated 12/04/2016, all registered dealers of Delhi are mandatorily required to file their returns as per the above list for the tax period commencing from 1st April, 2016 and all subsequent tax periods.

This issues with the approval of the competent authority.

R.K.Mishra
Spl.Commissioner (Policy)

Circular regarding E-Office Implementation

HR/Misc/2016-17/2682-85 07-04-2016

Circular

In exercise of the powers conferred on me under section 70 of Delhi Value Added Tax Act, 2004 and under rule 28 of the Delhi Value Added Tax Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby withdraw notifications No.F.3(643)/Policy/VAT/2016/1585-1597 dated 1st March, 2016, and notifications No.F.3(643)/Policy/VAT/2016/419-431 dated 1st July,2016, regarding mandatory requirement of filing returns in Form DVAT 16 or in Form 17, as the case may be, with digital signatures.

This notification shall come into force with immediate effect.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding E-Office Implementation Update

HR/Misc/2016-17/2896-99 18-04-2016

Circular

In exercise of the powers conferred on me under section 70 of Delhi Value Added Tax Act, 2004 and under rule 28 of the Delhi Value Added Tax Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby withdraw notifications No.F.3(643)/Policy/VAT/2016/1585-1597 dated 1st March, 2016, and notifications No.F.3(643)/Policy/VAT/2016/419-431 dated 1st July,2016, regarding mandatory requirement of filing returns in Form DVAT 16 or in Form 17, as the case may be, with digital signatures.

Aseem Kumar Goel
Asst. Commissioner, HR

Circular regarding Extension of the last date for filing returns for the first quarter of 2016-17

No. F.3(420)/Policy/VAT/2011/PF/518-24 28-07-2016

Circular No. 11 of 2016-2017

Sub: Filing of online return for first quarter of 2016-17- extension of period thereof.

In exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S.Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of first quarter return for the year 2016-17, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 31/08/2016.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Issuance of Statutory Forms in advance

No. F.3(310)/Policy/VAT/2016/552-557 08-08-2016

Circular No. 12 of 2016-2017

Sub- Issuance of Statutory Forms in advance.

In partial modification to this Department's Circular No. 24 of 2012-13 issued vide No.F.3/310/Policy/VAT/2012/964-970 dated 12-12-2012, the words, 'Special Commissioner-II ' used in point iv, shall henceforth be read as Special Commissioner (Policy). The rest of the contents of the above said Circular shall remain the same.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Filing of online return for first quarter of 2016-17 extension of period thereof

No. F.7(420)/Policy/VAT/2011/PF/690-696 31-08-2016

Circular No. 13 of 2016-2017

Sub: Filing of online return for first quarter of 2016·17 - extension of period thereof.

In partial modification to this department's Circular NO.11 of 2016-17 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S.Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of first quarter return for the year 2016-17, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to **10/09/2016**.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

S.S. Yadav
Commissioner, Value Added Tax

Circular regarding Filing of online return for first quarter of 2016-17 extension of period thereof

No. F.3(420)/Policy/VAT/2011/PF/712-17 09-09-2016

Circular No. 14 of 2016-2017

Sub: Filing of online return for first quarter of 2016-17 - extension of period thereof.

In partial modification to this department's Circular NO.13 of 2016-17 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, S.S.Yadav, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of first quarter return for the year 2016-17, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 19/09/2016.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

S.S. Yadav
Commissioner, Value Added Tax