Sl. No. 3 dt. 23/7/21

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL, DELHI
Sh. Narinder Kumar, Member (J) and Sh. Rakesh Bali, Member (A)

Application No. 40/Misc./Stay/19-20
Appeal No. 127/ATVAT/2020-21
Date of Order: 22/07/2021

1. M/s. Bharti Telemedia Ltd.,
234, Okhla Industrial Area,
Ph-3, New Delhi – 110020. ..... Appellant –Applicant

Application No. 38/Misc./Stay/19-20
Appeal No. 128/ATVAT/2020-21

2. M/s. Bharti Telemedia Ltd.,
234, Okhla Industrial Area,
Ph-3, New Delhi – 110020. ..... Appellant –Applicant

Versus

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

Counsel for the Appellant- Applicant : Sh. Nikhil Gupta
Counsel for the Revenue : Sh. Pradeep Tara

ORDER

(On Applications U/s 76(4) of DVAT Act)

1. This common order is to dispose of applications u/s 76(4) of DVAT Act, 2004 (here-in-after referred to as the Act) in the

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above mentioned two appeals, as common questions are involved in the appeals.

2. The applications came to be filed with the memorandum of appeals, vide which impugned order dated 7/9/2020, passed by learned Objection Hearing Authority (OHA) rejecting the objections of the appellant company have been challenged.

The prayer in the applications is that the appeal be admitted for hearing without imposing any condition by way of pre-deposit of whole or some of the amount of penalty.

The default assessment under DVAT Act, 2004 pertains to the tax period – Annual 2013. "Set Top Box" (STB) is the goods subjected to Value Added Tax, particularly under section 2(1)(zc)(vi) of the Act.

Vide order dated 3.11.2007, learned Assessing officer observed that there was stock variation of Rs. 87,62,89,185/- (Rs. 89,58,47,890/- minus Rs. 1,95,58,705/- which was required to be taxed @ 12.5% along with interest.

Vide separate order of even date, the Assessing Officer directed the appellant company-dealer-applicant to pay a sum of Rs. 10,95,36,148/- by way of penalty u/s 86(10) of DVAT Act. Before imposing penalty, learned Assessing Officer had issued

notice dated 12/4/2017 to the appellant – dealer – applicant, u/s 59 (2) DVAT Act, 2004 for production of record as specified in the said notice, for carrying out assessment for the year 2013-14.

3. Objections were filed by the appellant company at it felt dissatisfied with the order 3/11/2017 passed by the Assessing Officer. The objections stand rejected vide the impugned order passed by Learned OHA. Hence these appeals accompanied by the applications.

4. As per case of the appellant/applicant, this company is engaged in providing Telecommunication Services to the customers and registered as a service provider by virtue of Licence granted by Government of India under Telegraph Act, 1885. Appellant company – dealer is registered under the Delhi Value Added Tax Act, 2004 vide Tin No. 07690335373, and also under CST Act.

Case of the applicant is that as a licencee of the Government of India, as per licence u/s 4 of Indian Telegraph Act and Indian wireless Telegraphy Act, this company is providing Direct to Home service (DTH service) to its subscribers for the purpose of viewing television programs, as per contract between the said company and the concerned customers.

It is the case of appellant that from the terms and conditions of Customers Relations-ship Form – it would transpire that:

i) STB and View Card supplied to customers is only for the purpose of enjoying the service offered by the Company.

ii) The customers cannot use the STB and view card for any other purpose other than the service offered by the Company.

iii) The company has full control over the content that the customer is entitled to watch, and can control that remotely from time to time.

iv) The company can remotely control/ update/ alter the software in the View Card and STB.

v) The company reserves the right to activate/ deactivate the service.

vi) The customer cannot remove/ re-locate the STB and view card without the permission of the company.

vii) The STB and view card is wirelessly connected to the system of the company and cannot operate without such connection. Therefore, even if physical possession of the STB and view card is with the customer, the effective control of the same is retained by the company.

Further, it has been alleged by the applicant that the applicant and its customers have no intention whatsoever of sale/purchase or transfer of right in Set Top Box (STB); that the contract for DTH

services is a contract for service, and supply of goods, as a medium of delivering that service, cannot be dissected and subjected to sales tax / VAT and the attempt of the Department to do so is ex-facie illegal, bad in law and liable to be quashed.

5. As regards the order dt.3.11.2017, it is significant to note that while dealing with the contentions raised on behalf of the appellant, learned Assessing Officer firstly referred to provisions of sub-clause (d) of Article 366 (29)(A)of Constitution of India, then to the provisions of section 2(1)(zc)(vi) DVAT Act, 2004, and also to the information or record made available by the company during hearing.

6. Here, learned counsel for the applicant has contended that this is not a case where provisions of section 2(1)(zc)(vi) of the Act are attracted, when there is no transfer of right to use the STB to the exclusion of others; the STB is provided by the company to the customer free of charge and as a medium of service; and that the control over the STB remains with the company. In support of this contention, learned counsel has referred to decision in **Lakshmi Audio Visual Inc. an another v. Assistant commissioner of Commercial Taxes and another**, 2001 SCC Online Kar 789, by Hon'ble High Court of Karnataka; para 97 of decision in **BSNL v. Union of India**, (2006) SCC 1;

Commissioner of Service Tax v. Adani Gas Ltd., 2020(40)GSTL 145(SC); **Idea Mobile Communications Ltd. v. CCE, Cochin**, (2011) 12 SCC 608; **State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.**, (2002) 3 SCC 314; and **Sun Direct Tv Pvt. Ltd. v. State of U.P.**, 2013 52 NTN DX 373.

7. On the point of pre-deposit for the purposes of entertaining an appeal, sub-section (4) of section 76 of DVAT, Act 2004 provides that no appeal against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person. However, as per First proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

8. Here, in the given facts and circumstances, question arises as to whether the appellant should be admitted waiving deposit of entire amount of tax and interest, as well as penalty, or the applicant company should be called upon to deposit some of the amount of tax, interest and penalty, in terms of the impugned

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order.

As regards applicability of section 2(1)(zc)(vi) of the Act and Article 366(29A) of the Constitution of India, and the expression "transfer of right to use the goods", the Assessing Officer concluded as under :

> "the customer is having the complete and exclusive possessions and control of the set-top boxes and other peripheral provided to him;
>
> the customer after specific warranty period is paying for the making defective part goods to the company ;
>
> that the company is charging different amount for different plans in the name of installation which are at variance as discussed above and therefore, as per the above provisions of the Act, this is not the transfer of capital goods but it is transfer of right to use the goods which is leviable for VAT. "

9. Tax and interest came to be levied and penalty was imposed on the basis of following observations :

> "One of the important ingredients for examination to determine as to whether the right to use has been transferred or not is by ascertaining as to who is having the control over the goods. In the instant case, the company provides set-top box and other peripheral, dish antenna to the customer's place and the customer is at will to use such set-top box and other goods. It is all desire of the customer to use the material provided to him as per

his wish and time and the control of such equipment have also been provided to the customer and the company is not having any control once it is given to the customer.

Moreover, as informed by the counsel such equipments are having a limited warranty of six months and once the warranty is over, the customer has to pay for making the deficiency good and therefore, all this narration come to conclude that it is very much coming under the definition of right to use the goods.

Besides that when asked, the company provided the different plans being offered by them to the customer. As per information made available by the company which they have downloaded and printed from the site of the Airtel, Digital TV the different plan have been offered by the company to the customer ranging from Rs. 99/- to Rs. 5,500/-.

Further as per site of the company, the company is offering plans at different amount viz. plan of Rs. 2,090/- and monthly charges for transmission of electromagnetic waves @ Rs. 777/- p.m. likewise plan for Rs. 1,980/- monthly charges Rs. 702/- p.m., plan for Rs. 1,690/- monthly charges Rs. 445/- plan for Rs. 2,090/- monthly charges Rs. 777/- p.m. plan for Rs. 1,740/- monthly charges Rs. 503/- p.m. Since the company is offering different plans at different rates, it goes to prove that the company is charging for the different kind of set top boxes i.e. normal set-top box, HD set-top box, set-top box with recording etc. and not only for installation because the installation either of H.D. plan or of non-H.D. plan would remain the same and it will not vary with the plan cost.

Therefore, the company in the name of installation, in fact, is selling the products to the customers.

During the course of proceedings, the counsel, however, informed that they are the service provider on the Direct To Home (DTH) platform and set-top box are not sold to the customers as the same remain the property of the company which capitalized in the books of accounts.

However, when the return of the company was scrutinized it has been gathered that the column Nos. R6.1 and R11.9/R11.14 where the dealer has to disclose its figures for capital goods, the dealer has shown Nil amount against these columns meaning thereby neither the capital goods were purchased nor sold during the year 2013-14."

10. Assessing Officer has calculated the stock variation in the manner as:

"As per the statement, the dealer in his return for 2nd qtr. 2014-15 filed on 21/10/2014 the dealer has shown total amount of stock held by him on 31/3/2014 to the tune of Rs. 1,95,58,705/-. On the other hand if we go by the total purchases and total sales made by the dealer during the year 2012-13, the dealer was having total purchases of Rs. 1,15,92,09,517/- and made the sales to the tune of Rs. 52,45,99,347/- and therefore, at the end of the financial year 2012-13 and on 31/3/2013, the dealer was having the stock of Rs. 63,46,10,170/-. This must have been the opening stock of the dealer as on 1/4/2013. During the year 2013-14, she had the purchases of Rs. 82,19,54,328/- with the gross turn over (GTO) /sales of Rs. 56,07,16,608/- and must be having closing stock of Rs. 26,12,37,720/- on 31/3/2014.

Therefore, as per this mathematical calculation on 31/3/2014, the dealer must be having the closing stock of Rs. 89,58,47,890/- (This includes stock of Rs. 63,46,10,170/- the dealer carry forwarded which must be the opening balance as on 1/4/2013).

However, in his return for 2nd qtr. 2014-15, in Annexure ID, filed by him on 21/10/2014, the dealer has shown stock in hand as on 31/3/2014 to the tune of Rs. 1,95,58,705/-. Therefore, there is stock variation of Rs. 87,62,89,185/- (Rs. 89,58,47,890/- minus Rs. 1,95,58,705/- which is required to be taxed @ 12.5% along with interest."

Whether a case of Transfer of right to use STB?

11. It has been argued on behalf of the appellant-Objector that the transaction of telecommunication is actually a service wherein the dominant intent is to provide DTH services and provision of Set Top Box is just to enable the service which remains the property of the objector; that the applicant and the customer have consensus ad idem in this regard as Customer Relationship Form; that ownership of the STB is always with the company; and that as such, this is not a case of sale or transfer of right to use the property by the applicant to the customer.

Almost similar submission was put forth by learned counsel for the applicant before Learned OHA.

Learned OHA, while dealing with this contention, observed that in the present case, there is no manner of doubt that the STB falls

within the ambit of "goods". In this regard, ld. OHA referred to decision of Hon'ble Apex Court in BSNL's case, wherein it was held that in a contract falling under clause 29A of Article 366 of the Constitution the dominant nature test would not apply but the contract could be split up to determine the value of that part of the contract which amounted to services and that portion of the contract which amounted to a deemed sale.

Here, it has been submitted that STB is only a medium for supply of telecommunication service to the customer, and as such it cannot be said to be a case of deemed sale as per provisions of DVAT Act.

Next, it was contended before Learned OHA, that the company derives revenue mainly from the subscription fee realized from its customers and not from the sales of the STB, which is just an incidental transaction.

Learned OHA found it difficult to accept said contention of the objector, while observing that as in today's business scenario nothing can be/ is given free of cost. Wherever, new connections are installed or subscribed by a customer, onetime amount is charged from the customer which necessarily and generally includes the price of the setup boxes and even price is charged for the wire (as per the length measurement) along with subscription charges for one/two months. Thus, Learned OHA was of the view that it could not be said that

STBs were given without charging anything from the customers. Learned OHA noticed that the costs of the said setup boxes were capitalized by the objector in its books of account.

Plea of splitting up of part of contract of service from that of sale

12. In Bharti Telemedia Ltd. v. State of Tripura, WP(C) No. 560/ 2010, decided on 19/2/2015, relied on by ld. OHA, one of the issues before Hon'ble High Court of Tripura was as to whether the contract could be easily divided and the value of the goods could be ascertained with exactitude.

As observed by Hon'ble High Court in State of Tripura's case, in order to find out as to whether the right to use goods has been transferred or not, it is to be ascertained as to who has effective control over the goods.

As far as STBs are concerned, Hon'ble High Court observed in the manner as:

> "they (STB) are in total control of the customer. Under his effective control, the STBs are installed in the house of the customer. He can use the STB when he wants to. He can use the STB to view whichever channel he wants to view. He may or may not use the STB. The company does not even have the power of entering the premises of the customer. Most importantly as per the terms of the agreement, the companies are responsible for the functioning of the STBs only for a period of 6 (six) months. The warranty is valid only for six months and thereafter there is no warranty. Therefore, if STB of a customer is spoiled after six months

he will have to pay for repair or replacement of the same. We are of the considered view that this amounts to transfer of the right to use goods."

While making assessment in this case, ld. OHA has taken a cue from the decision in State of Tripura's case. Even though, said decision is sub-judice before Hon'ble Apex Court, it cannot be said that the Revenue/authorities should not have relied on the said decision which pertained to the appellant company and involved same controversy as to transfer of right to use the same item i.e. STB.

Only after analysis on merits, it can be found out if the department was or was not justified in making impugned assessment considering the transaction of supply of STB by the applicant to the customers, for the reasons given in the two orders.

Herein, learned counsel for applicant has contended that this is a case of contract of rendering of service, but the Assessing Officer has made assessment as regards sale of STB, which is not permissible in a case of a composite contract of service and sale.

Hon'ble High Court in State of Tripura's case (supra) referred to the decision in BSNL's case wherein it was held that after the Forty Six Amendment, the sale element of all the six contracts covered under **Clause 29-A of Article 366** are separable and may be subjected to sale tax.

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Herein, assessment has been made by the authorities as regards turnover pertaining to sale of STB, while relying upon the above decision which pertained to the matter of the applicant company and the same item i.e. STB and based on almost same facts.

13. In BSNL Vs. Union of India (2006) 3 SCC I, Hon'ble Apex Court observed in the manner as –

> "The licence clearly manifest that it is one for providing telecommunication service and not for supply of goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only does this position flow from the terms of contract, this also flows from Section 4 of the Telegraph Act which provides for grant of licence on such conditions and consideration of such payments as it thinks fit".
>
> "The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form **in any case other than the exceptions in Article 366(29-A)**, unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts **other than those mentioned in Article 366 (29A)** continues to be - did the parties have in mind or intend separate rights arising out of the sale of goods.

If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test".

14. Hon'ble Supreme Court in another controversy of the "Sales Tax" and "Service Tax" in the matter of Idea Mobile Communication Ltd. v CCE & Customs, (2011) 12 SCC 608 observed as follows –

> "Observed 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 but that would not in any manner 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. It was also held that for the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service."

15. In the case of **Xerox Modicorp Limited vs. State of Karnataka** (2005) 142 STC 209 (SC), Hon'ble Apex Court observed that under the Agreements, apart from the service element, for which no tax is sought to be levied, there is the element of supplying parts and components like toners/developers etc. Merely because price is not being separately charged for this, does not detract from the position that the supply is for a price. Hon'ble Court further observed that such supply has all the elements of sale as understood in law. There is transfer of title in movables for a price. The mere fact that it is not

known in the beginning whether or not a part will have to be replaced is irrelevant. Hon'ble Court further observed that even when worn out or damaged parts are replaced by new parts and even if worn out or damaged parts become the property of the contractor, it amounts to transfer of property in goods. Merely, taking back the damaged parts of the machine is not sufficient to hold that there is no transfer of property in goods.

16. **In BSNL's case (supra)**, Hon'ble Apex Court opined in the manner as –

> "A telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the hand set, if any. That and any other accessory supplied by the service provider, in our opinion, remain to be taxed under the State Sales Tax Laws."
>
> ".....To constitute a transaction a transfer of right to use goods, the transaction must have 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; (d) for the period during which the transferee has such legal right, it has to be the exclusion of the transferor; (e) during the period for which it is to be transferred, the owner cannot again transfer the same right to others. The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale clearly exclude the indispensability of delivery of physical possession thereof as an essential pre-condition."

For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner :

(A) Goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

(B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) x xxx

(E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

17. Only after deep analysis on merits, and the decision in **Xerox Modicorp Limited**'s case (supra), it can be found out if the

department was or was not justified in making impugned assessment considering the transaction of supply of STB by the applicant to the customers, for the reasons given in the two orders.

Stock variation

18. Here, Learned counsel for the applicant has contended that the method adopted by the Assessing Officer to find out stock variation was not justified. Further, it has been submitted that statements of Trading Accounts were made available to the authorities, which reveal that relevant data available therein was ignored by the authorities, in arriving at the finding of stock variation.

On the other hand, learned counsel for the Revenue has submitted that the authorities calculated stock variation, on the basis of material whatever was made available by the applicant, and it cannot be said that the method adopted in arriving at the conclusion as to stock variation was wrong.

Learned counsel for Revenue has submitted that keeping in view the basic principles of Accounting standards, the Trading Account statement is not supposed to reflect any entry pertaining to Capitalized Goods, but herein as per information furnished by the appellant company in the return regarding Capital Goods, the requisite information was shown as ' NIL.

Prima facie, regarding capital goods, the appellant company furnished to the department, self contradictory stand.

Record reveals that the company was repeatedly asked by the Assessing Officer to provide requisite record, prima facie it appears that the entire record was not made available. Applicant is to explain if entire record specifically pertaining to purchases and sale of STB was made available by the company to the Assessing Officer and the Learned OHA for the purposes of assessment, and if not, as to its effect?

Applicant is also to explain if entire record pertaining to taking back of STB(s), if any, or replacement of STB(s), if any, and providing of STB(s), if any, on expiry of warranty period of six months was or was not made available to the Assessing Officer and Learned OHA for the purposes of assessment, and if so, as to its effect?

Assessment Year

19. When learned counsel for the Revenue has submitted that the figures of the previous year were taken into consideration only for the purposes of calculations of the stock variation, and this is not a case of any assessment as regards the previous year, applicant shall also have to explain and satisfy on merits as to how this is a case of assessment beyond the prescribed period of limitation?

Concealment of material information in the concerned Return

20. While making assessment, the Assessing Officer observed in the manner as:

> "However, when the return of the company was scrutinized it has been gathered that the column Nos. R6.1 and R11.9/R11.14 where the dealer has to disclose its figures for capital goods, the dealer has shown Nil amount against these columns meaning thereby neither the capital goods were purchased nor sold during the year 2013-14."

In the course of arguments on these applications, learned counsel for the applicant has submitted that this omission was because of procedural lapse on the part of the company.

A company like the applicant company have business at large scale opts to have best services of Chartered Accountants, In-house Advocates and all other concerned with filing of returns. Here, the question arises as to whether non-providing of requisite information by the appellant in the return was on account of procedural lapse on the part of the company, as put forth by counsel for the appellant-applicant, or it was a deceptive or misleading return filed by the company or it was an intentional concealment from the department, as per case of the department, and its effect?

21. In State of Tripura's case (supra), Hon'ble High Court has observed:

"[28] True it is that the petitioner companies have not sold the STBs to the customers. There can however be no manner of doubt that the right to use these goods i.e. the STBs has been transferred to the customers. In today's world, nothing is given free of cost. The cost of the STB is obviously included in the activation charges and/or the monthly subscription. Under the TVAT Act even where payment of the goods is made by way of deferred payment the goods can be subjected to tax."

In this regard, Learned counsel for the applicant has submitted that in the present matter, while making assessment, Assessing Officer has used the very observations made by Hon'ble High Court.

There is nothing wrong even if the Assessing Officer has used some of the phrases or terminology available in the aforesaid decision, in which assessment by the Revenue Department, pertaining to same item i.e. STB, was challenged by the appellant company. It is a different matter that the said decision is sub judice before Hon'ble Apex Court, as submitted by counsel for the applicant.

22. No other point has been urged during hearing on these applications.

In this case, after having heard learned counsel for the parties and going through the assessment, the impugned order, and material available on record, we find that this is a matter which involves following ~~tribal~~ triable issues:

a. "Whether Set Top Box is provided by the appellant

company for its exclusive use by the customer(s) and said use amounts to transfer of right to use the same to the exclusion of all others, including the appellant company?"

b. "Whether it is a case of transfer of STB as Capital Goods, as per case of the company? If so, its effect?"

c. "As to what is the impact of the term of the Customer Relationship Form which provides that suchlike equipments are having a limited warranty of six months, as regards the expression "transfer of right to use the goods" available under section 2(1)(zc)(vi) of DVAT Act, once the warranty period of STB is over ?"

In view of the above ~~tribal~~ triable issues involved in this matter, we find that prima facie case is made out for interim direction of protection of the company.

23. On the point of grant of stay or interim order of protection as prayed in this matter, it is apposite to refer to the observations made by Hon'ble Apex Court in Ravi Gupta Vs. Commissioner Sales Tax, 2009(237) E.L.T.3, that on merely establishing a prima facie case, interim order of protection should not be passed.

24. In the case of **UOI v Adani Export**, 2007(218)ELT 164, Hon'ble Apex Court has held that the discretion of stay has to be exercised judiciously by the Appellate Authority, while following

three aspects to be focused while dealing with the application for dispensing of pre-deposit:

(a) prima facie case,

(b) balance of convenience, and

(c) irreparable loss.

25. On the point of admission of appeal with or without pre-deposit, there can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved.

26. In Ravi Gupta's case (supra) Hon'ble Supreme Court has observed that if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Hon'ble Court has further observed that petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand.

27. Further, it has been observed that laying down of the principles to be taken in to consideration while disposing of such stay application, does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest.

Whereas denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given.

Here, as noticed above, prima facie, it appears that:

(i)as regards its version that STB are capital goods of the appellant company, prima facie, the appellant company furnished to the department-authorities, self contradictory stand, as in the column Nos. R6.1 and R11.9/R11.14 of the return, the dealer had to disclose its figures for capital goods, but this figure was shown as Nil amount, meaning thereby that during the year 2013-14neither any capital goods were purchased nor sold;

(ii)even though as per case of the applicant, STB is supplied by the company to the customer without any consideration, careful perusal and analysis of relevant record on the following points is necessary, to find out if supply of STB amounts or not, to transfer of exclusive right of use by the company to the customer:

(a) invoices of the relevant period regarding purchase of STB;
(b) invoices depicting item-wise collection of amount from the distributor, if any, regarding supply of STB;
(c) invoices depicting item-wise collection of amount initially from the consumer(s), if any, for the items supplied including STB;
(d) ITC, if any, claimed by the appellant company for the relevant period, as regards items including STB;
(e) Benefit under any statutory form(s), if any, claimed by the

appellant company for the relevant period, as regards items including STB;

(f) taking back of STB(s), if any, during and after the warranty period of 6 months;

(g) replacement of STB(s), if any, during and after the warranty period of 6 months;

28. In the given facts and circumstances, and the case law cited by learned counsel for the parties, and the case law relied on by us, we are of the view that this is a case where applicant company should be called upon to deposit 20% of the impugned tax and interest, and 20% of the impugned penalty, under section 76(4) of DVAT Act, for the purposes of admission of these appeals. We order accordingly. Applicant company to deposit the amount by way of pre-deposit within 25 days from today.

However, it is made clear that the observations made above are merely for the purposes of disposal of these applications on the point of pre-deposit for the purposes of admission of appeal, and shall have no effect on the decision of the appeal on merits.

Announced in open Court.
Date : 22/07/2021

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Appeal No. 127-128/ATVAT/20-21/582-590 Dated: 23/7/21

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