(25)

BEFORE APPELLATE TRIBUNAL, DELHI VALUE ADDED TAX, DELHI

Sh. Narinder Kumar, Member (Judicial)

Appeal No : 370-394/ATVAT/2017
Date of Decision : 18th of August, 2021

M/s. Amway India Enterprises Pvt. Ltd.,
Ground & 1st Floor,
Heirarchical Commercial Centre,
Jasola,
New Delhi – 110025. .... Appellant

V

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

Counsel representing the Appellant : Sh. A. K. Bhardwaj,
Counsel representing the Revenue : Sh. P. Tara

JUDGMENT

1. The appeals bearing No. 370 to 394 have been filed against orders dated 8/1/2018 passed by Learned Addl. Commissioner-Objection Hearing Authority (hereinafter referred to as OHA). Vide impugned orders, Learned OHA partly allowed the objections and partly affirmed the tax, interest and also the penalty as imposed by Learned VATO. Assessment pertains to the months of April, 2011 to March, 2012.

2. Initially, assessment was made by Assessing Officer vide

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orders dated 12/7/2013.

3. In brief, case of the appellant is that the company is engaged in the business of resale of goods by 'direct selling method'. Vide order dated 29/1/2013, it was directed by the VAT Department to get special Audit conducted, u/s 58A of DVAT Act, for the year 2011-12, through a designated auditor, namely, M/s Matta & Associates, CA.

4. On completion of Audit, a report was submitted by the above said firm to the VAT Department on 25/4/2013.

5. Thereafter, show cause notice was served on the company by the concerned VATO, for assessment purposes. on 10/5/2013, the company filed detailed reply to the said notice.

6. After going through the reply to the above notice, Assessing Officer framed 12 orders of assessment for the tax period beginning from April, 2011 to March, 2012 u/s 32 of the DVAT Act and raised tax demand with interest of Rs. 5,09,52,590/- (including tax of Rs. 4,10,47,163/- & interest Rs. 99,05,427/-).

7. As per case of the appellant in the memorandum of appeals, Impugned assessments are stated to have been framed on the following three issues –

i) **First issue;** Auditor's observations – the dealer has charged handling and delivery charges from the distributor in invoices raised during the year but has not paid any VAT on the

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charges recovered from the distributors, therefore, the tax shall be charged on the same under the purview of DVAT Act. The total of the handling and delivery charges for all the 12 tax periods being Rs. 5,47,950/-. The additional tax computed by the Learned VATO on the same for all the tax periods was Rs. 68,494/-.

ii) **Second issue;** that, the dealer has declared tax free sales of Rs. 68,47,544/- under DVAT Act and Rs. 79,79,64,762/- under CST Act during the entire year 2011-12. The exemption has been claimed by treating them as sales of 'Books and Periodicals' in accordance with Entry-5 of First Schedule of DVAT Act. But the special auditor has objected to this and has made observations that the dealer is liable to pay tax @ 5% instead of zero %. Learned VATO imposed additional tax of Rs. 4,02,40,615/- on this ground.

iii) **Third issue**; That, the Learned VATO in the order of assessment observed that the dealer has made the local sale of Coconut Oil amounting to Rs. 24,61,523/- and Olive Pomace Oil amounting to Rs. 73,78,810/- during the year and charged tax @ 5% on the pretext that these are covered under item No. 25 of Schedule-III of DVAT Act. The special auditor has observed that these are unspecified items and hence, should be charged to tax @ 12.5 %. The

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dealer, in reply to show cause notice, has emphasized that these are edible oils and are covered in Entry-25 of Schedule-III, thus, taxable @ 5%. The explanation of the dealer is not in conformity and spirit of the Entry-25 of Schedule-III of DVAT Act, hence not acceptable.

The Learned VATO, then further mentions, that, "the dealer is selling coconut oil in small packed containers. In north India, the coconut oil is mainly used for hair oils. The use of coconut oil for cooking in north India is almost negligible .... The size of packing also suggests that this is meant for hair oil or moisturizing of skin. Thus, it is amply clear that the coconut oil is being sold as cosmetic product and is thus liable for taxation @ 12.5% and not 5%." That, with regard to Olive Pomace Oil, the Learned VATO observed, that, the same cannot be termed as edible oil as the same is not fit for human consumption. The Olive Pomace Oil helps in healing of dry skin and is the common ingredient in hair conditioners. Olive Pomace Oil is the residue paste extracted with the help of solvents after the olive oil has been pressed. Because of that, Olive Pomace Oil is considered of an inferior grade for cooking purposes but is considered a great ingredient for soap making, skin care and hair care products .... Therefore, in view of the above, a sum of Rs. 98,40,333/- is taxed @ 12.5% against the tax charged @ 5% under the DVAT Act

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and on this ground additional tax of Rs. 7,38,025/- was imposed."

8. Case of the appellant further is that though the central turnover was included in the framing of assessments for the six tax period – May-2011/July-2011/Sept. 11/Nov.-2011/ Jan.-2012 and March, 2012, no assessment was framed under the CST Act.

9. Feeling dissatisfied with the orders of default assessments and imposition of penalty, the appellant filed objections u/s 74 of the DVAT Act.

10. As per case of appellant, in memorandum of appeals, vide impugned orders dated 8/1/2018, Learned OHA decided the **first issue** relating to handling of delivery charges in favour of the appellant and as such the tax demand arising from the said turnover was set-aside.

Further, as per memorandum of appeals, the **second issue** relating to the periodical magazine of the appellant "AMAGRAM' – whether it is exempt under entry No. 5 of the Schedule-I of the DVAT Act or taxable @ 5% under entry No. 52 of the Schedule-III of the DVAT Act was decided against the appellant. However, the Learned OHA remanded the matter on the issue of inclusion of CST turnover of Rs. 79,79,64,762/-, giving directions for framing of the fresh and appropriate orders under the relevant provisions of the CST Act. In this way, the exempted sale of 'AMAGRAM'

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was confirmed for taxation @ 5% under the DVAT Act, to the extent of Rs. 68,47,544/-. The balance turnover of Rs. 79,79,64,762/- was remanded for fresh assessment under the CST Act.

As per memorandum of appeals, the **third issue** on the sale of 'coconut oils' and 'olive pomace oil', whether to be taxed @ 5% under entry No. 25 of Schedule-III of DVAT Act or to be taxed @ 12.5% under the residuary head was also decided against the appellant and the turnover of Rs. 24,61,523/- of coconut oil and turnover of Rs. 73,78,810/- of Olive Pomace Oil was decided by the Learned OHA to be taxed @ 12.5% and not @ 5% as contended by the appellant.

In view of the impugned orders dated 8/1/2018 passed by Learned OHA, the disputed amount of tax comes to Rs. 13,04,970.18, as alleged by the appellant.

11. Learned OHA has also upheld, beside others, the penalties imposed u/s 86 (10) and 86 (13) of DVAT Act.

12. Hence, these 24 appeals.

13. Arguments heard. File perused.

Issue of levy of VAT on sale of magazine "Amagram".

14. It is noteworthy that before the learned OHA, this issue was second issue.

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Learned counsel for the appellant has contended that the magazine being product brochure of the appellant and a monthly periodical which imparts information to the Amway business owners about various events etc., attracted applicability of entry No. 5 of the First schedule.

Learned counsel has also contended that as per case of the Revenue, the said brochure is covered by entry No. 52 of Third schedule. In this regard, department relied upon circular No. 2 issued by the Government, which inter-alia provides that catalogues are printed material.

Learned counsel for the appellant has submitted that entry no. 52 is general in nature as goods like books, general / periodicals and journals which find mentioned in entry no. 5 of First schedule can also be covered by entry no. 52, but they stand excluded because of specific entry no. 5.

Further, the contention is that specific entry prevails over general entry. As regards expression "catalogue", learned counsel for the appellant has submitted that this expression does not find mentioned in entry no. 5 of First schedule and entry no. 52 of Third schedule.

Further, it is contention of the learned counsel that the periodical issued by the appellant is covered by 'books' within the meaning of entry no. 5 of First schedule. In this regard, learned

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counsel has placed reliance on decisions in (1) **Commissioner of Customs, New Delhi Vs Gujrat Perstorp Electronics Ltd.,** 8568-8569 decided by the Hon'ble Supreme Court of India, (2) **M/s. Sonka Publication (India) Pvt. Ltd.,** WP(C) No. 10022/2018 decided on 7/5/2019 by our own Hon'ble High Court of Delhi, (3) **The All India Reporter Ltd. Vs The State,** (3 STC.219) decided by Hon'ble High Court of Madhya Pradesh.

Consequently, learned counsel for the appellant has urged that the findings recorded by learned OHA while affirming the findings of the Assessing Authority deserve to be set-aside and the appellant be exempted from paying any tax on these goods as provided in entry no. 5 of First schedule.

15. On the other hand, learned counsel for the Revenue has contended that firstly the Assessing Authority has rightly made assessment of tax as regards the magazine as its sale is covered by entry no. 52 of Third schedule, the same being a catalogue and the catalogue being a printed material, as per circular dated 26/4/2005.

Learned counsel for the Revenue has specifically pointed out to the beginning portion of the circular where it finds mentioned that on a number of representations received from different trade associations, bodies regarding clarification as regard to the entries, including printed material, matter was considered by the Government and approval was granted vide cabinet decision No. 958 dated 13/4/2005, before passing this circular. The contention

is that having been so approved by the Government, this circular has all force of law.

Learned counsel has further pointed out that in the second column of the circular, which pertains to items to be included in the printed material, books meant for reading stand excluded. The contention is that while catalogues find specific mention in column no. 2 of the circular, the magazine issued and sold by the appellant being a catalogue, learned OHA has rightly upheld the findings recorded by the Assessing Officer in levy of tax @ 5%.

16. In **Commercial Tax Officer, vs Binani Cement Ltd. & Anr,** Civil Appeal No. 336 of 2003, decided on 19/2/2014, relied on by learned counsel for the appellant, Hon'ble Supreme Court observed as under -

> "27. Before we deal with the fact situation in the present appeal, we reiterate the settled legal position in law, that is, if in a Statutory Rule or Statutory Notification, there are two expressions used, one in General Terms and the other in special words, under the rules of interpretation, it has to be understood that the special words were not meant to be included in the general expression. Alternatively, it can be said that where a Statute contains both a General Provision as well as specific provision, the later must prevail.

17. In **Orissa State Warehousing Corporation v Commissioner of Income Tax,** decided on 11/4/1999, relied on by learned counsel for the appellant, Hon'ble Supreme Court observed as under -

> "Lord Halsbury as early as 1901, in Cooke v. Charles A Vogehar Company (1901 A.C. 102) stated the law in the manner following: "a court of law, has nothing to do with the reasonableness or unreasonableness of a provision of a statute except so far as it may held it in interpreting what the legislature has said. If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub- section be not controlled by some of the other provisions of the statute, it must, since, its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise and unwise, or whether it leads to consequences just or unjust, beneficial or mischievous."

18. In **Sonka Publication (India) Pvt Ltd. vs Union of India & Ors.** W.P.(C) 10022/2018 & CM 39032/2018 (stay) decided on 7/5/2019, Hon'ble High Court of Delhi observed as under -

"In C.C. (General), New Delhi v. Gujarat Perstorp Electronics Ltd. 2005 (186) ELT 532 (SC), Hon'ble Supreme Court was seized of the issue "whether the goods and materials imported by the Company in the form of FEEP comprising of equipments, drawings, designs and plans are classifiable under Chapter Heading 49.01 or 49.06 of Schedule 1 of the Customs Tariff Act, 1975 and the Company is entitled to the benefit under Notification Nos. 107/93-Cus and 38/94-Cus. or they are classifiable under Chapter Heading 4911.99 as contended by the department?" In the process of answering the said question in favour of the Assessee, Hon'ble Supreme Court observed as under:

"In popular sense, "book" means a collection of a number of leaves or sheets of paper or of other substance, blank, written or printed, of any size, shape and value, held together along one of the edges so as to form a material whole and protected on the front and back with a cover of more or less durable material. The Court also referred to dictionary meaning. It was observed that one must refer not only to the physical, but also functional characteristic of "book". It must be functionally useful for the purpose of assessee's business or profession. To put it differently, it must be a tool of his trade an article which must be part of the apparatus with which his business or profession was carried on. It must have utility value enabling its owner to pursue his business or profession

with greater advantage. It must, thus, satisfy a dual test. It must bear both physical and functional characteristics of a book. It must be a collection of a number of sheets of paper or of other substance, having suitable size, shape and value, bound together at one edge so as to form a material whole and protected on the front and back with covers of some kind and functionally useful to the assessee for carrying on his business or profession."

19. In **The All India Reporter Ltd. v The State,** (1952) 3 STC 219 (MP) decided on 4/3/1952, Hon'ble High Court of Madhya Pradesh observed as under -

"The All India Reporter which is issued in monthly parts containing law reports is periodical for the purpose of time 26 of the old unamended Schedule II to the C.P. and Berar Sales Tax Act, 1947. Consequently subscriptions received for the regular supply of the monthly parts should be excluded from the turnover, as relating to the supply of tax-free goods, while the sale prices of the separate yearly volumes made out of the monthly parts cannot be excluded from the turnover."

20. **In Hindustan Poles Corporation v Commissioner of Central Excise, Calcutta,** (2006) 145 STC 625, decided on 27/3/2006, Hon'ble Supreme Court of India observed as under -

> "The residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries. Unless the Department can establish that the goods in question can by no conceivable process of welding be brought under any of the tariff items, resort cannot be had to the residuary item."

21. Let's see as to what are the observations of Learned OHA on this point. Same read as under:

> "From the co-joint reading of Entry No. 5 of First Schedule, Entry No. 52 of Third Schedule and Circular No. 2 of 2005-06, it is observed that even though the items "Books, Periodicals and Journals including Maps, Charts and Globes" covered in Entry No. 5 of First Schedule, are also "Printed Material", but have been specifically excluded from the Entry No. 52 of Third Schedule of DVAT Act, 2004 by the Legislature with a clear intention of exclusion and keeping these items under the list of exempted commodities in the First Schedule.
>
> Further, the Government of NCT of Delhi vide Cabinet Decision No. 958j dated 13.4.2005, after receiving various

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representations from different Trader Associations and Bodies, issued clarification on five items including "Printed Material" whereby the item "Catalogue" has been specifically included under the item "Printed Material" at Entry No. 52 of Third Schedule. Therefore, after analysing the above said legal entries and circular it can safely be concluded that if any "Periodical" is in the nature of "Catalogue", then it would be justified to be covered in Entry No. 52 of Third Schedule of DVAT Act, 2004.

In this regard, the objector dealer further contended that his item i.e. Amagram is "Periodical" as it is printed and published on bi-monthly basis for imparting information to the distributors of the objector company and not a Catalogue, whereas the Assessing Authority after considering the contents of "Amagram" has treated it as "Catalogue". Therefore, the question arises is whether the bi-monthly periodical "Amargram" published by the objector dealer is a "Catalogue" or not?

On this issue, the definition/meaning of "Periodical" needs to be referred to, according to which "Periodical is one which is published with fixed interval between the issues or numbers". Therefore, any printed material which is published with a fixed interval can be called "Periodical". However, the Catalogue is conclusion of items for sale of interest to a

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particular group of buyers with marketing copy, pricing and ordering procedure. They are all for sale through one organisation. There may be some editorials content larded through the catalogue.

From the perusal of copies of Amagram (Issue number 79,80,81,82,83,84 and 85) relating to the period from March, 2011 to April 2012, it is observed that these magazines include and describe various kind of saleable products and items of the objector dealer depicting photographs, prices, contents, qualities and offers etc. It is observed that price of products are printed and displayed in the Amagram. Printing rates/prices of products in the magazine is not other than the business promotion and marketing by the objector dealer. Therefore, it can be safely concluded that these magazines are published by the dealer for Sales promotions as well as Advertisement and Marketing of its products through its distributors. These magazines include full pages promotional description of its products alongwith complete details of quality of products and its pricing. These magazines are sold to the distributors against the fixed charges. Therefore, there is no iota of doubt that this "Printed Material" in the name of "Amagram" is a "Catalogue".

Further, the legislative intent behind classification of items under Entry No. 5 of First Schedule and Entry No. 52 of

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Third Schedule also required to be considered. If we see the items covered under Entry No. 5 of First Schedule, we found that these are the items which are meant and used for Educational, knowledge, and Awareness purposes and having Academic Value and therefore must have been covered under the list of exempted commodities (First Schedule). Therefore, the items/printed material (like Amagram in present case) which are published for Sales promotions or Advertisement or Marketing or Promotion of the company cannot be covered under the same entry i.e. Entry No. 5 of First Schedule.

Therefore, in view of above mentioned facts and circumstances and considering the legal provisions, I am of the considered view that the sale of item "Amagram" by the objector dealer to its distributors will be covered under Entry No. 52 of Third Schedule of DVAT Act, 2004 and to be taxed @ 5%.

22. Entry No. 5 of the First Schedule contains the following items –

"Books, periodicals and journals including maps, charts and globes."

23. Entry No. 52 of the Third Schedule contains the following items –

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"Printed material including diary, calendar".

24. The relevant portion of circular No. 2 of 2005-06 No. F.(144)/2004/policy/VAT/814-964 dated 26/4/2005 issued by the Government, reads as under –

> "Clarification on items to be covered under "Textile", Sugar", "Tobacco", Paper" & Printed material"
>
> A number of representations were received from different Trade Associations/Bodies regarding clarification with respect to the entries for Textile. Tobacco, Sugar, Paper and Printed material in First & Third Schedule of DVAT Act. The matter was carefully considered by the Government with the prior approval of the Government vide cabinet decision No. 958 dated 13.04.2005.

Sl. No.	Column 1 Category	Column II items to be included
5.	Printed material	Stationery articles, namely, accounts books, (Sl.No. 49 of the 3rd Sch.) paper envelops, diaries, calendars, race cards, catalogues but excluding books meant for reading.

25. As submitted by learned counsel for the appellant, dictionary meaning of 'Catalogue 'reads as under -

1.	CAMBRIDGE UNIVERSITY PRESS	"a book that contains a list of all the products"
2.	COLLINS	A catalogue is a list of things such as the goods you can buy from a particular company

Applying the above meaning of word 'catalogue' to the magazine of the appellant, and the provisions of the aforesaid circular issued by the Govt., the decisions cited by learned counsel for the appellant, do not come to the aid of the appellant, and it can safely be said that same is a catalogue, and accordingly covered by printed material.

In the course of arguments, learned counsel for the appellant has not disputed that the said magazine is sold by the appellant, and not distributed free. Therefore, the same is covered by the definition of sale of goods as defined under DVAT Act.

In view of the discussion, there is no ground to discard the reasoned findings recorded by the Learned OHA. Therefore, the contentions raised on behalf of the appellant on this issue cannot be accepted. And, it is ordered accordingly.

Next Issue

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26. **Rate of VAT on the sale of "Coconut oil" and "Olive Pomace oil"-**

(whether to be covered under Entry no. 25 (Edible oil) of Third Schedule of DVAT Act, 2004 (taxable @ 5R%) or to be treated as unspecified item taxable @ 12.5.% ?)

On this issue, Learned OHA has recorded following views:

"The objector dealer, during FY 2011-12, made local sales of Coconut oil of Rs. 24,61,523/- and Olive Pomace oil of Rs. 73,78,810/- totalling to Rs. 98,40,333/- and charged tax at the rate of 5% on he ground that both these oils are Edible oils and are covered under Entry No. 25 of Third Schedule of DVAT Act, 2004. The Assessing Authority rejected the arguments of objector dealer and treated both the oi8ls as cosmetic products and under none Edible category and taxed @ 12.5% as unspecified/unclassified items.

The objector dealer challenged the decision of Assessing Authority. The objector dealer referred Entry No. 25 of the Third Schedule of DVAT Act, 2004 which mentions "Edible Oils and Oil Cake". It is also argued that both these oils are commonly used in the Indian kitchen for cooking and to classify them as non edible is incorrect. It is also argued that it is wrong to say that in North India Cocnut oil is used as hair oil only and not for cooking. It is contended that the

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Olive Pomace oil and Coconut oil bottle clearly mentions it as Edible oil.

In this regard, reference has to be made to the Entry No. 25 of Third Schedule of DVAT Act, 2004, which is reproduced below :-

"Edible Oils and Oil Cake."

However, from the perusal of the impugned assessment orders as well as snap shot of the website of the objector dealer under the category "Persona" for the purpose of sale. There means, the intention of the objector dealer is very clear to treat and sale these oils not for the purpose of cooking and eating but for use as persona/cosmetic items. Therefore, by applying "Dominant Intention Test", the dominant purpose/objective of sell of these products from the perspective of not only of buyers but also from the objector dealer himself is "Non-edible". Furthermore, these oils are sold in small packed containers which are basically used for the purpose of cosmetic products since the edible oils are general sold in the big containers/bottles. The clientage of the objector dealer is mainly middle and high class of society which generally purchase the edible oils in the sufficient quantity in big containers/bottles for monthly/bi-monthly consumption. This kind of clientage is not prone to buy the edible oils in small packed containers. Further, Olive Pomace

oil is generally not used as edible oil as the same is not fit for human consumption as it is considered of an inferior grade for cooking purpose. It is considered as an ingredient for soap making, skin care and hair care products. The argument of the objector dealer that bottles of Olive Pomace oil and Coconut oil has mentioned it as edible oil does not makes any difference and does not go in support of dealer because by mentioning edible oil on the packing of a bottle does not make it edible oil. The Objector dealer's argument of having FSSAI as well as MCD licence for Edible oil, does not in any way make these oils as Edible oil, since it has failed to succeed it has failed to succeed Dominant Intention Test.

Therefore, after considering the facts of the case as well as the legal provisions, I am of the considered view that in the present case sale of "Coconut Oil" and "Olive Pomace Oil" cannot be treated as Edible oil and therefore not to be covered under Entry NO. 25 of Third Schedule of DVAT Act, 2004 and hence, these oils have been correctly treated as unspecified/unclassified item taxable at the rate of 12.5% in accordance with provisions of Section 4(1)(e) of DVAT Act, 2004. Accordingly, the objections of the objector dealer on this account are hereby dismissed and concerned assessment orders created demand of tax, interest and penalty on this account are upheld."

"Coconut oil" & "olive Pomace oil"

Contention on behalf of appellant:

27. On this issue, case of the appellant is that 'Coconut oil' and 'Olive Pomace oil' falls under entry No.25 of Third Schedule of the DVAT Act and accordingly, these goods are liable to tax @ 5%, but Revenue has wrongly taxed these items @12.5%.

Ld. Counsel for the appellant has submitted that there is no specific entry for Coconut oil or Olive Pomace oil and that all such oils (if edible) would be covered under entry no.25. In this regard, Ld. Counsel has placed reliance on decisions in **Hindustan Poles Corporation V Commissioner of Central Excise, Calcutta** (2006)145 STC 625 SC and **Indian Metals & Ferro Alloys Ltd., Cuttak V. Commissioner of Central Excise, Bhuvaneshwar** , 1991 Supp (1) SCC, 125.

Contentions on behalf of Revenue

28. As per case of Revenue, on audit, the Special Auditor had observed that these were unspecified items, which were subject to levy of charge @ 12.5% , but in reply to the show cause notice, the dealer emphasised that these are edible oils.

Ld. Counsel for the Revenue has submitted that the Coconut oil was being sold by the appellant in small packed containers which are mainly used as hair oil in northern India, where use of such oil for cooking is almost negligible.

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Ld. Counsel for Revenue has further contented that as per the web-site of the appellant – dealer the product of Coconut oil has been shown under the category of *Persona*. Accordingly, Ld. Counsel has urged that Ld. OHA has rightly upheld the findings recorded by the Assessing Authority for detailed and sound reasons given in Para 36 of the impugned order.

As regards Olive Pomace Oil, Ld. Counsel for the Revenue has contended that this oil, being unfit for human consumption, could not be termed as edible oil; that this oil helps in healing of dry skin and also because it is considered to be of an inferior grade for cooking purpose, to be a great ingredient for soap making, skin care and hair care products.

Accordingly, Ld. Counsel for the Revenue has urged that the Ld. OHA has rightly upheld the findings recorded by the Assessing Authority, vide impugned order.

"coconut oil"

As regards Coconut oil, Learned counsel for the Revenue has also relied on snap shot of the website of the objector dealer under the category "Persona" for the purpose of sale. Learned OHA also based his findings on the advertisement by the appellant of Coconut oil under the said category. As further observed by the Learned OHA, said oil is sold in small packed containers which are basically used for the purpose of cosmetic products since the edible oils are general sold in the big containers/bottles. It is noteworthy

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that the matter pertains to the year 2011-12 i.e. the situation that was about 10 years back.

In this situation, it was for the appellant to produce material before Learned OHA to explain as to why the Coconut oil was so advertised under the category of "Persona", and not under the category which covers edible oils. Burden to prove this fact was on the appellant. But, the appellant failed to discharge the burden in this regard. Therefore, there is no ground to discard the findings recorded by Learned OHA not to treat the Coconut oil product as an edible oil product, and rather to treat the same as a unspecified cosmetic item.

29. In **Commissioner of Central Excise vs M/s. Madhan Agro Industries (I) Pvt. Ltd.,** Civil Appeal No. 1766 of 2009 and Civil Appeal Nos. 6703-6710 of 2009, decided on 13/4/2018, cited by learned counsel for the appellant Hon'ble Supreme Court observed as under -

> "The learned Appellate Tribunal in Raj Oil Mils vs. Commissioner of Central Excise (supra), therefore, took the view that even small packets of 200 ml or less would be more appropriately classifiable under chapter 15 as coconut oil and not as hair oil under chapter 33. The said decision of the Tribunal has been affirmed by this Court and the appeals by the Revenue (Civil Appeal Nos. 20233-2037 of 2014) have been dismissed on 7/12/2014. The dismissal of the appeals,

though by a non-speaking order, is one on merit and therefore, the order of the Tribunal in Raj Oil Mills (supra) can be understood to have merged with the decision of this Court as held in V.M. Salgaocar & Bros. (P) Ltd. Vs. Commissioner of Income Tax.

For the aforesaid reasons, we take the view that the coconut oil in small packings in respect of which the present dispute with regard to classification has arisen is more appropriately classifiable under chapter 15, heading 1513 and not under chapter 33, Heading 3305. Consequently while dismissing the appeals filed by the Revenue, we affirm the orders to the above effect passed by the learned Appellate Tribunal. "

The above cited case pertained to items covered by Central Excise. Here, the dispute is covered by the provisions of DVAT Act, 2004. Therefore, in the peculiar facts of this case, the cited decision does not come to the aid of the appellant.

Olive Pomace Oil:

29. As regards Olive Pomace Oil, there is no example of any advertisement which depicted said oil under the category of "Persona".

Learned OHA was of the view that this oil, being unfit for human consumption, could not be termed as edible oil; and that this oil helped in healing of dry skin and also because during that

period, it was considered to be of an inferior grade for cooking purpose, and was rather considered to be a great ingredient for soap making, skin care and hair care products. Learned OHA has observed that said oil used to be sold during that period i.e. 2011-12 in small packed containers which are basically used for the purpose of cosmetic products, the reason being that edible oils were generally sold in the big containers/bottles.

However, all the above said observations have been made by the Assessing Officer and learned OHA, without any record or basis.

In this situation, the observations/findings recorded by the Revenue as regards Olive Pomace Oil, without any supporting or corroboratory material on record, the test of dominant intention could not be applied to tax the item @ 12.5% instead of 5%, by shifting it from entry 25 and placing it in the entry pertaining to unspecified items.

As a result, the impugned order passed by Learned OHA as regards Olive Pomace Oil upholding levy of tax and interest, deserves to be set aside. And, it is ordered accordingly.

Impugned order by Learned OHA for remand on a particular point

30. As noticed above, it is case of appellant that turnover assessed by the Learned OHA requires a correction as the CST

turnover of Rs. 79,79,64,762/- pertaining to "AMAGRAM' is in fact, Rs. 77,41,95,883/- and the balance turnover of Rs. 2,37,68,880/- out of the total turnover of the "AMAGRAM' of Rs. 79,79,64,762/-, in view of the reasoning given by Learned OHA requires to be taxed @ 5% under the DVAT Act and not CST Act.

As per case of the appellant, in view of the impugned order of the Learned OHA, the disputed turnover will be Rs. 4,04,56,757/- and disputed amount of tax and interest 27,75,943.18.

31. Learned counsel for the appellant has contended that the learned OHA, vide impugned order, remanded the matter to the Assessing Officer on the issue of inclusion of CST turnover of Rs. 79,79,64,762/-, while giving directions for framing of fresh assessment and appropriate orders under the relevant provisions of CST Act.

The contention is that the Assessing Authority had the exclusive and original jurisdiction to make assessment, but, *within the time limit prescribed* u/s 34(1) of DVAT Act; that law does not permit OHA to extend the period of limitation for the purpose of fresh assessment; and that the said jurisdiction having not been exercised *within the prescribed period,* the Assessing Authority cannot be permitted to proceed with the matter.

Accordingly, learned counsel for the appellant has urged that

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the impugned order, vide which learned OHA has remanded the matter to the Assessing Authority for the purpose of afresh assessment as regards the central sales, under CST Act, deserves to be set-aside.

32. In support of his contention, learned counsel for appellant has relied upon decision in **State of Punjab & Ors. v. M/s Shreyans Indus Ltd. Etc.** in Civil Appeal Nos. 2506-2511 of 2016 decided on 04/03/2016 by Hon'ble Supreme Court. Therein, reference was made to the decision in **Bharat Heavy Electrical Ltd. v. Assistant Commissioner of Commercial Taxes (INT-I), South Zone, Bangalore and others,** (2006) 143 STC 10, wherein it was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess an assessee gets extinguished and this extension confers a very valuable right on the assessee.

33. On the other hand, learned counsel for the Revenue has contended that as regards assessment in respect of central sales worth Rs. 79,79,64,762/-, since learned OHA accepted the objection of the dealer – appellant that assessing the central sales under DVAT Act is incorrect, in view of this technical mistake by the Assessing Authority, learned OHA was justified in remanding the matter to the Assessing Authority with directions to pass assessment order afresh under the relevant provisions of CST Act.

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Learned counsel has referred to the provisions of Section 80 of DVAT Act, and contended that the order passed by Assessing Authority is in substance and according to the intent and purposes of DVAT Act, and as such any mistake, defect or omission in such assessment will not make the orders invalid.

Learned counsel has further contended that the OHA, in exercise of powers vested with him u/s 74(7) of DVAT Act, correctly remanded the matter under CST Act for correct assessment, particularly, when objection in this regard was raised by the appellant itself that the assessment pertaining to central sales turnover should have been made under CST Act, and not under DVAT Act,

34. In this regard, learned counsel for Revenue has relied on decision in **M/s Shaila Enterprises v. Commissioner of Value Added Tax,** (2016) 94 VST 367 (Del), in particular, para 17, to point out that same contains discussion as to the power of OHA on the point of remand, and to issue directions for making of fresh assessment as contained u/s 34(2) of DVAT Act.

Reference has also been made to decision in **M/s Aimil Ltd v. Commissioner of Value Added Tax,** W.P. (C) No. 4597/2017, decided on 24/5/2017 by our own Hon'ble High Court.

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35. To appreciate this contention, let's read as to what learned OHA has observed in the impugned order on this point. Observations of Learned OHA read as under -

> "However, so far as assessment of tax, interest and penalty in respect of Central sales of Rs. 79,79,64,762/- under section 32 and 33 of DVAT Act, 2004 is concerned the dealer has submitted that assessing the Central Sales under DVAT Act is incorrect. Therefore, even though the Assessing Authority has correctly decided the issue of taxability of the said item @ 5% even on Central sales which has been discussed and decided in above paras no. 18 to 31, however, the Assessing Authority has made technical mistake by assessing Central sales under the provisions of DVAT Act-2004 and therefore, I am inclined to remand the matter on this issue to the Assessing Authority to pass fresh and appropriate orders under the relevant provisions of CST Act to meet the end of justice within next two months after providing due opportunity of hearing and to produce documents/records to the objector dealer. If the Objector dealer does not appear for hearing or do not produce the relevant records/documents, despite of providing due opportunity, the Assessing authority shall be free to pass appropriate orders as per law. The objector dealer shall appear for hearing along with relevant records before Assessing Authority on 23.01.2018 at 11.00 AM."

Section 80 of DVAT Act reads as under:

> "(1). No assessment, notice summons or other proceedings made or issued or taken or purported to have been made or issued or taken in pursuance of any of the provisions of this Act or under the earlier flaw shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such assessment, notice summons or other proceedings, if such assessment, notice summons or other proceedings are in substance and effect in conformity with or according to the intent and purposes of this Act or any earlier law.
>
> (2). xxxxxxxxxx
>
> (3). No assessment made under this Act shall be invalid merely on the ground that the action could also have been taken by any other authority under any other provisions of this Act."

36. In view of the above provisions of section 80 of DVAT Act, I find merit in the contention of learned counsel for the revenue that the mistake, defect or omission in the assessment made by the Assessing Authority by including the central sales turnover while making assessment regarding turnover covered by DVAT Act, will not make the orders invalid. In the given situation, only option available to the Learned OHA was to issue directions to the

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Assessing Authority to issue separate notice of default assessment as regards central sales turnover, so as to segregate it from the turnover covered by DVAT Act.

As regards time-period prescribed for making of assessment, as noticed above, assessment was made by Assessing Officer on 12/7/2013 and Learned OHA disposed of the objections vide order dated 8/1/2018.

As noticed above, the Learned OHA accepted the objection of the appellant-objector that as regards the aforesaid turnover, assessment was required to be made under CST Act, and found that it was by mistake made under DVAT Act alongwith the other turnover covered by DVAT Act, it was a case of inadvertent mistake.

In the given facts & circumstances, the decisions cited by learned counsel for the appellant do not help the appellant, and the question of expiry of prescribed period for making of assessment does not arise.

As a result, there is also no merit in the contention raised by learned counsel for the appellant that the department should have gone in revision, instead of passing an order of remand. The order of remand passed by Learned OHA is therefore, upheld.

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Imposition of penalty u/s 86(10) of DVAT Act

37. On this issue, in the impugned order, learned OHA has observed in the manner as –

> "In the present case, the assessing authority observed that the objector dealer consciously violated the provisions of law and furnished inaccurate particulars of taxable sale and therefore liable for penalty. From the perusal of assessment orders and facts of the case, it is observed that the objector dealer has filed false, misleading and deceptive returns in a material particular and therefore liable for penalty u/s 86(10) of DVAT Act, 2004.
>
> Further, the objector dealer is also liable to pay penalty u/s 86(12) on account of tax deficiency arises due to various reasons as already discussed above.
>
> Therefore, the assessing authority has correctly imposed the penalties in accordance with the provisions of section 86(10) read with section 86(12) and Section 86(3) of the DVAT Act, 2004 in respect of local turnover assessable under DVAT Act, 2004."

38. On the point of imposition of penalty under this provision of law, Learned Counsel for the appellant has contended that as per decision in **Hindustan Steel Ltd. Vs State of Orissa,** 1970 AIR 253; 1970 SCR(1) 753, penalty cannot be ordinarily imposed,

unless the dealer acts deliberately in defiance of law or is guilty of conduct contumacious or dishonest or unless the dealer has acted in conscious disregard to its obligation.

Ld. Counsel has also placed reliance on decision in **M/s. Jatinder Mittal Engineers and Contractors V Commissioner of Trade & Taxes, Delhi**. STA No. 2/2011 & 3/2011 decided on May 12, 2011, by our own Hon'ble High Court.

On the other hand, Ld. Counsel for the Revenue has submitted that when the Assessing Authority clearly observed that the dealer consciously violated the provisions of law and furnished inaccurate particulars of taxable sale and Ld. OHA has observed that the dealer filed false, misleading and deceptive in material particular, it cannot be said that the Revenue has illegally imposed penalty u/s. 86(10) of the DVAT Act.

In view of the above discussion, it cannot be said that the assessing authority wrongly observed that the dealer consciously violated the provisions of law and furnished inaccurate particulars of taxable sale, as regards the turnover on sale of the printed material i.e. catalogue and coconut oil, and that the dealer filed false, misleading and deceptive returns on these material particulars. In M/s. Jatinder Mittal Engineers and Contractors case (supra), Hon'ble High Court observed as under -

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"Though there is an omission in not showing the gross turn-over, the fact remains that when default assessment notice was issued to the assessee, he explained the expenses incurred on the aforesaid accounts. .....

It is a different thing that such an approach on the part of the assessee was not accepted by the OHA or the Tribunal. It can safely be inferred that the aforesaid approach of the assessee was bona-fide. It cannot be said that the return filed by the assessee was false, misleading and deceptive in material particular. The claim was bona-fide may be the assessee was not able to prove the same, even otherwise, we find that it was an arguable case. For this reason, we are of the opinion that provision to sub-Section 10 of Section 86 could not be invoked in a matter like this. This condition stipulated therein is not satisfied and we, thus, decide the question of law no.1 in favour of the assessee and delete the penalty imposed under Section 86(10) of the Act."

Therein, Hon'ble Court observed that approach of the assessee was bona-fide. Here, as discussed above, the appellant even after having advertised coconut oil under the category of "persona," claimed that it was an edible oil, and as regards the magazine, the same being a printed material covered by the circular, the appellant placed the same in Entry No. 5 of First Schedule, which did not fall in the said entry at all, and it could not

be said to be a bona-fide approach of the appellant. In the given facts and circumstances of the present case, the decision cited by learned counsel for the appellant does not help the appellant. As a result, the appellant has been correctly held liable for penalty u/s 86(10) of DVAT Act, 2004, as regards coconut oil and the magazine. However, as regards the Olive Pomace Oil, it cannot be said that the approach of the appellant – assessee was not bona-fide. Therefore, while assessing the penalty u/s 86(10) of DVAT Act, the turnover of Olive Pomace Oil, for the relevant period, is to be excluded. And it is ordered accordingly.

Imposition of penalty u/s 86(13) of DVAT Act:

39. On this point, in the impugned order, learned OHA has observed as under –

> "The assessing authority imposed a penalty of Rs. 82,09,432/- vide penalty order dated 12/07/13 u/s 86(13) of DVAT Act 2004. The said penalty is imposed by the assessing authority as the dealer was not maintaining separate books of accounts for the State of Delhi for the tax period 2011-12 as required u/s 48 of DVAT Act, 2004 read with Rule 42 of the DVAT Rules. The assessing authority as well as special auditor observed that the objector dealer was not maintaining separate books of accounts for Delhi branch and was also not preparing separate annual accounts i.e. balance sheet and profit and loss accounts for Delhi branch as per

provisions of Section 48 and Rule 42. Even separate trial balance for Delhi branch was not made available for the purpose of audit and assessment. In the absence of separate books of accounts, annual accounts as well as trial balance for Delhi branch, it was not possible to ascertain about the sale of capital goods and other incomes which are subject to VAT and CST.

The objector dealer has assailed the imposition of penalty u/s 86 (13) of DVAT Act, 2004 on the ground that the separate accounts for the sales and purchases for the State of Delhi are being maintained and the returns are being filed on the basis of these returns only. It is further contented that the DVAT Act does not require a separate balance sheet for the State of Delhi be drawn and there is no violation of provision of Section 48 read with Rule 42. It is further argued by the objector dealer that requirements of Section 49 clearly suggest that 44 AB (IT Act) return is sufficient compliance for the DVAT Act provisions and hence it is incorrect to suggest that Rule 42 (i) enjoined submission of annual accounts and P & L Account and balance sheet for a branch."

In this regard, Ld. Counsel for the appellant has contended that penalty under this provision of law has been imposed due to non-maintenance of separate Balance Sheet in respect of its Delhi Office. The contention is that when audited Balance Sheet,

prepared on all India basis, was produced at the time of audit, penalty under this provision of law should not have been imposed. In this regard, once again reference has been made to decision in Hindustan Steel Ltd.'s case (supra), wherein it was observed that penalty should not be imposed merely for the reason that it is lawful to do so.

On the other hand, Ld. Counsel for the Revenue has referred to provisions of Section 48 of DVAT Act, Rule 42 of DVAT Rules, 2005 and particularly to the Explanation available under Rule 42. While relying on these provisions, learned counsel for Revenue has rightly contended that as per Rule 42 of DVAT Rules, 2005, Books of Accounts, as stated in this rule, are required to be maintained separately **at the principal place of the business carried out in Delhi.**

In Hindustan Steel Ltd.'s case (supra), the question was regarding imposition of penalties for failure to register as a dealer. The case is distinguishable on facts.

In M/S Jatinder Mittal Engineers and Contractor's case (supra), it was noted that the assessee had maintained the centralized books of accounts, particularly, Profit and Loss Account, which the assessee was supposed to do as per the normal accounting practice. The assessee had allocated proportionate expenses to Delhi Sales incurred on account of labour/services. Said decision does not come to the aid of the appellant in view of

the specific provisions under DVAT Act. Therefore, the penalty imposed by the Assessing Authority and upheld by learned OHA, in respect of the turnover pertaining to the printed material and coconut oil, u/s 86(13) of the Act is upheld.

40. As noticed above, in the above cited decision, the assessee had maintained the centralized books of accounts, particularly, Profit and Loss Account, which the assessee was supposed to do as per the normal accounting practice, and the assessee had allocated proportionate expenses to Delhi Sales incurred on account of labour/services. That was not a case covered by the Explanation available under Rule 42 of the Rules, reproduced above, under which Books of Accounts were required to be maintained separately at the principal place of the business carried out in Delhi, but the appellant violated this provision of law. Therefore, penalty has been rightly imposed under this provision of law and also rightly upheld by the Learned OHA.

41. No other argument has been advanced by learned counsel for the appellant.

Conclusion

42. In view of the findings recorded above, these appeals as regards challenge to the levy of tax and interest are partly allowed, while setting aside the impugned order passed by Learned OHA whereby he upheld the levy of tax and interest also in respect of Olive

Pomace Oil; and also while setting aside the impugned order passed by Learned OHA as regards the penalty u/s 86(10), so far as the turnover of Olive Pomace Oil, for the relevant period, is concerned. As regards challenge to the other findings recorded by learned OHA, the appeals are dismissed.

43. Revenue to take steps, in consonance with this judgment, in accordance with law.

44. Copy of the judgment be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 18/08/2021.

Narinder Kumar 18/8/2021.

(Narinder Kumar)
Member(J)

Appeal No. 370-394/ATVAT/2017/784-791 Dated: 18/8/21

Copy to:-

(1) VATO (Ward-203)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) VATO (L&J)

APPELLATE TRIBUNAL SALES TAX DELHI

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