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

Appeal No. 52-53/ATVAT/12
Date of Judgment : 13/10/2021

M/s. VLM INDIA PVT.LTD.,
Shop no. B-36, Geetanjali Enclave,
New Delhi - 110 017.

..... Appellant

v.

Commissioner of Trade & Taxes, Delhi.

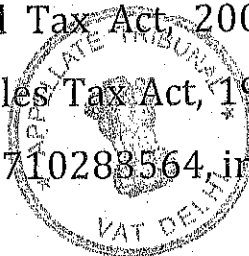
..... Respondent

CA Representing the Appellant
Present for the Respondent

: Sh. R. Bhatia
: Sh. P.Tara

JUDGEMENT

1. This judgment is to dispose of two appeals captioned above, bearing No. 52 and 53 of 2012. Dealer appellant stands registered under Delhi Value Added Tax Act, 2004 (herein after referred as DVAT) & Central Sales Tax Act, 1956 (herein after referred as CST) vide TIN No. 07710283564, in Ward -96.



Narinder Kumar
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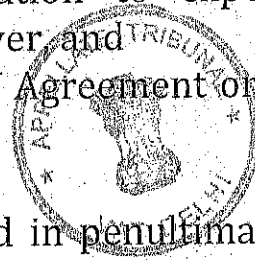
Appeal No. 52-53/ATVAT/12

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2. The dealer company has challenged order dated 25/01/2012 passed by Learned Objection Hearing Authority - Special Commissioner -II (herein after referred as Ld. OHA).
3. Vide impugned order Ld. OHA has upheld the notices of default assessment of tax, interest and that of penalty u/s 32 & 33 of DVAT Act.
4. Notice of default assessment of tax and interest came to be issued by the Assessing Authority, vide which he directed the dealer company to pay tax to the tune of Rs. 1945466/- with interest to the tune of Rs.810700/-, for the ^{following} reasons given therein.

"The company has shown major sales amounting to Rs. 36627623/- against 'H' form to the dealer /exporters alongwith the 'I' forms sales of Rs.2590855/- Hence, a penultimate sales i.e. sale preceding the sale occasioning export is also deemed to be in the course of export u/s 5(3) of CST Act is exempt from tax. Exemption to penultimate sale is subject to the conditions that the penultimate sale is:-

- (a) for the purpose of complying with the Agreement or Order in relation to export i.e. agreement with the foreign buyer and
- (b) such sale is made after the Agreement or Order in relation to export, and
- (c) same goods which are sold in penultimate sale



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should be exported. In Ram Bahadur Takkur V. Coffee Board(1991) 80 STC 199 (Madras HC) it was held that as long as identity of the purchased goods is not lost, exemption u/s is available to the selling dealer making the penultimate sale.

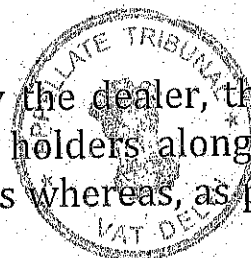
(d) A certificate in H Form having all the contents duly filled by the exporter alongwith supporting documents.

In the instant case, the dealer was asked to produce the proof of movement of goods in respect of these ISS made to exporters/exempt zone customers alongwith copies of form 31, copies of Export Orders received from the importes, shipping bill with packing list of goods exported by the purchasing dealers etc. The dealer has submitted the copies of 'Some of H Forms received from the exporter alongwith bill of lading. No other documents, as above, were provided by the dealer.

Following discrepancies have been noticed in the documents/information submitted by the dealer:-

(I) In the photocopies of H Forms provided, the required details given in the form H are not complete which is a violation of the provisions contained under the section as envisaged u/s 5(4) of CST Act 1956.

(II) As per sale invoices raised by the dealer, the dealer has sold huge quantities of lamp holders alongwith the cord sets/switches against H forms whereas, as per some



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of the bill of lading copies submitted by the dealer, the description of items exported nowhere matches with the penultimate sale items or the quantities.”

“.....While going through the bill of lading, as the packing list/shipping bill copies not provided. It could not be established that the goods sent by the audited dealer were actually exported by the exporters in terms of description and qty.. In all the copies of bill of lading submitted in r/o of exports, the items exported do not match with the sale invoices in terms of description and quantities sold /exported, hence the H form sale cannot be justified and the exemption of Vat becomes inadmissible.

(III) The dealer could not submit the proof of movement of goods in respect of all the H / I forms sales and the same has been admitted by the authorised representative to the Vato(Audit). Also, the balance sheet of the dealer reflects that during the AY 2007-08, the Noida Sales Tax authorities had levied a sales tax of Rs. 106914/- on the consignment sent by the audited dealer to one of its customers. The dealer was asked to provide the details of such disputed transaction so that the liability, if any, in respect of Delhi Vat can also be examined. The dealer has failed to provide the required details.

In Ram Bahadur Takkur V. Coffee Board(1991) 80 STC 199 (Madras HC) it was held that as long as identity of the purchased goods is not lost, exemption u/s is available to the selling dealer making the penultimate sale. In the instant case, the items sold by the dealer are different from that of exported as per few bills of lading copies

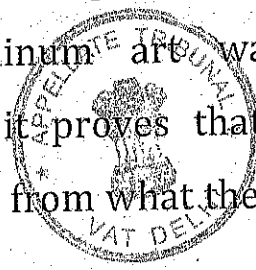
submitted by the dealer.

Therefore, keeping in view of all the above observations made and in the absence of proof of movement of goods, I have no other option but to disallow the penultimate sale of Rs. 15329371/- made in 1st Qtr.2007-08 against H/I form in the interest of Govt. Revenue and tax the same @ 12.5% under DVAT Act with interest charged thereon alongwith penalty u/s 86(12) imposed upon the dealer for tax deficiency"

5. Feeling dissatisfied with the notices of default assessment of tax, interest and penalty, objections were filed by the dealer company on 28/06/2010.
6. Vide impugned order dated 25/01/2012, Ld. OHA upheld the notice of default assessment framed by VATO, while observing in the manner as :-

"During scrutiny of the sale bills, purchase vouchers, GRs etc. it was found by the VATO (Audit) that the details in the H Forms were not complete.

In the sale bills the objector has sold lamp holder along with cord whereas as per the export documents, the goods exported were aluminum ware, mirror handicraft items etc. Thus, it proves that the goods exported were totally different from what they have been



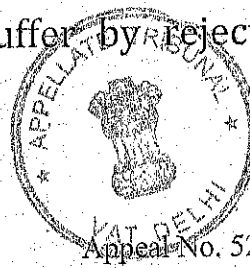
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sold by the objector to the exporter against H Forms.
Hence, all the sale was taxed at 12.5%."

7. Hence these appeals. Arguments heard. File perused.
8. Ld. Counsel for the appellant-dealer has argued that neither the Assessing Authority nor the Ld.OHA observed in the orders passed by them as to on account of which all the bills, H Forms were not complete, and as such the impugned order deserves to be set-aside.
9. Another ground raised by the Ld. Counsel for the appellant is that the description of the items sold by the dealer -appellant against H Forms tallied with the descriptions of the items exported and that in case there was any mis-match of any of the item sold, in the bill of lading, the Assessing Authority should not have denied concession to the dealer-appellant against H Forms.

Ld. Counsel for the appellant has submitted that the items sold by the dealer - appellant were lamp-holder with cord and that in case the official who prepared the bill of lading made any mistake in regarding the bills of the items therein, dealer - appellant could not be made to suffer by rejection of the concession on the basis of H Forms.



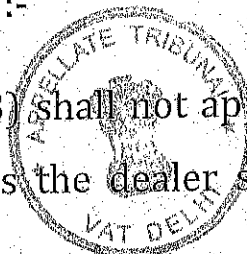
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10. As regards the observations made by Ld. OHA that the dealer company could not submit proof of movement of goods, in respect of the H Form sales, the contention of the Ld. Counsel for the appellant dealer is that all the requisite documents were made available to the Assessing Authority, but even then such observations were made. Accordingly, Ld. Counsel has urged that the impugned be set-aside and the notice of default assessment of tax and interest be also set-aside.
11. As regards penalty, Ld. Counsel for the appellant contented that this is not a case where the tax deficiency is alleged to have occurred because of any mala-fide intention on the part of the dealer-appellant, and as such the notice of default assessment of penalty deserves to be set-aside.
12. As noticed above, one of the discrepancy in the documents submitted by the Dealer-Appellant was that requisite details as available in the photocopies of 'H' Form were incomplete and the same amounted to violation of provisions u/s 5 (4) of CST Act.

Section 5 (4) of CST Act reads as under :-

"The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the



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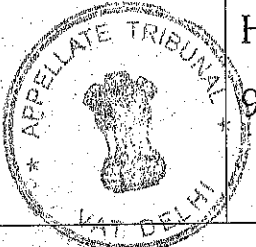
goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority."

While disposing of the objections, Ld. OHA took notice of this deficiency as observed by the Assessing Authority in 'H' Forms. The Assessing Authority, observed in the notice of default assessment of tax and interest that as per sale invoice raised by the Dealer-Appellant, the dealer had sold huge quantities of lamp holders alongwith the cord sets/switches against 'H' forms, but as per some of the copies of the bills of lading submitted by the dealer, the description of items exported did not match with the penultimate sale items or the quantities. Few examples, given by the Assessing Authority, read as under :-

Inv. No./Dt.	Items Sold/Qty.	Bill of Lading No/Dt.	Item Exported/Qty.
VLMI/RI/07-	Cord Set/Switches	ECSMBDHEL8980	Aluminium Artware,

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08/061 16.06.200 7	Lamp holders/1300Pcs /sets	13-08-2007	Wood Articles, with lampshades, mirror & motorcycle/ in Kgs
VLMI/RI/ 07- 08/030 15.05.200 7	Lamp holders/ Shade rings 650 sets/1300pcs	DSUJHT011684 4	Handicrafts articles of glass, fabric, metal mirror etc.30kgs
VLMI/RI/ 07- 08/033 16.06.200 7	Lamp holders/ cables/terminal Blocks/250 sets/400 mtrs/50 pc	MBD/UL/HAM/ 366 17.12.2007	Aluminum Artwares/9 37 kgs
VLMI/RI/ 07- 08/061 09.01.200 8	Lamp holders/ shaderings/ cord sets, isolators/700 sets/3500 pcs	W0120880406 39 24.4.2008 	Iron/Glass Artware/ & Handicraft/ 906 kg.

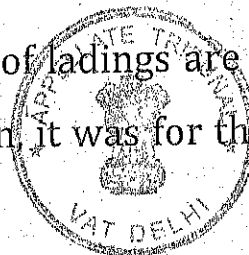
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Having gone through the bills of lading, Assessing Authority observed that it could not be established that the goods sent by the Dealer-Appellant were actually exported by the exporter in terms of description and quantity sold/exported and as such 'H' form sale could not be justified by the dealer. As a result the Assessment Authority declined the exemption of VAT.

In the course of arguments, even though Ld. Counsel for the appellant has submitted that description of the items sold tallied with the description of the items exported, when we have enquired from the Ld. Counsel for the appellant as to the invoices regarding sale of the items, depicting particular code of each item sold, so that same could be tallied with the code of the items exported, it has been submitted by the Counsel that code numbers were not being assigned to the items during the relevant period. On the other hand, Ld. Counsel for the revenue has submitted that without coding, no tax can be imposed, and that there is no merit in the contention of Ld. Counsel of the Appellant.

In the given situation, even if the bills of lading are stated to have been prepared by the third person, it was for the Dealer-



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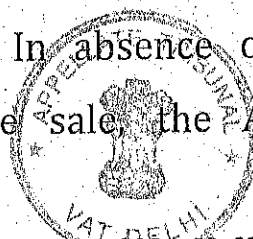
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Appellant to establish that the description of the goods/items sold by it tallied with the description of the items/goods exported. So, we do not find any merit in the contention that there was no deficiency in the H forms.

13. The Assessing Authority specifically observed that the dealer had not submitted before him proof of movement of goods in respect of all H-forms sales. In the course of arguments, on behalf of the dealer - appellant, no document like GR etc. relating to movement of goods, has been brought to our notice. The Assessing Authority further observed that the authorized representative that the dealer admitted before him that proof of movement of goods in respect of all the H-forms sales, was not given.

It was also observed by the Assessing Authority that the dealer failed to provide details regarding levy of sale tax on certain consignments said to have been dispatched by the dealer to one of its customers, during the assessment year 2007-08, as per balance sheet.

In this regard, it may be mentioned here that GR issued by the Transporter is the main documents to prove movement of goods from one state to another. In absence of GR to substantiate the claim of inter-State sale, the Assessing



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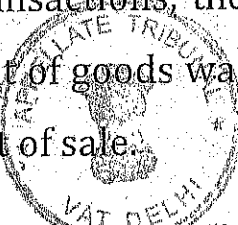
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Authority shall have no option but to assess the said sales as local sale. In this regard, reference may be made to decision by our own Hon'ble High Court in **B.R. Fibres (P) Ltd. v. Commissioner, VAT** (2015) 84 VST 570. Therein, this Tribunal had observed that inter-State movement could not be judged by documents stage as retail invoices, bank statement, C-forms etc. and such the appeal filed by the dealer was dismissed for want of production of even alternative documents such as form-38 (state entry form), stamp of the security department while entering in the State, etc.

Therein, Hon'ble Court observed that in the said case, in respect of six transactions, out of 26, there was no material to show that the movement of goods was caused by and was the result of the contract of sale.

Hon'ble Court observed as under –

“In the present case, the assessee was able to substantiate its contention that 20 of the transactions were, in fact, inter-state sales. This was because each one of them had the necessary supporting document in the form of GRs. However, in the case of these 6 transactions, there is no material to show that the movement of goods was caused by and was the result of the contract of sale.”



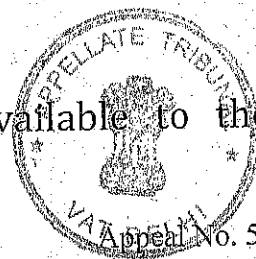
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The assessee counsel contends that this Court must consider the facts in totality of circumstances i.e. 20 out of 26 transactions are undisputed and that given the factual compulsion i.e. the inability to use a formal carrier the assessee should not be prejudiced. Though this submission is attracted, the Court is at the same time aware that there is no presumption either way that an inter-state sale claimed by the assessee is one per se."

Hon'ble High court also referred to decision in Commissioner of Sales Tax V. Pure Beverages Ltd. (2005) 142 STC 522 (Gujarat), wherein reliance was placed upon decision titled as State of Rajasthan v. Sarvotam Vegetables Products (1996) 101 STC 547 to conclude that the tender of a C form by the selling dealer raises a fundamental presumption that the purchasing dealer is a registered dealer. Hon'ble Court observed that, that is as far as the presumption can be taken. As to whether the transaction itself was covered by an inter-state sale or otherwise is a burden that the assessee has to discharge. Hon'ble High Court further observed that the dealer - B.R. Fibres had done so in other 20 transactions but was unable under the remaining 6 cases.

14. In view of the material made available to the Assessing



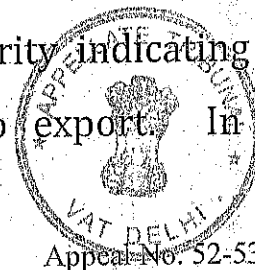
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Authority, which was also considered by the learned OHA, as well as the documents submitted during hearing on objections, the learned OHA rightly observed that the dealer had failed to place to any documentary evidence to rebut the observations made by the Assessing Authority on the point of movement of goods, and further that accordingly the dealer could not claim benefit of any concessional rate and tax against H-forms, as per provisions of section 5(3) and 5(4) of CST Act.

15. Learned counsel for the Revenue has referred to the provisions of section 5(3) of CST Act and submitted that in such like cases strict compliance with the requirement of law is an absolute necessity, and that here, when the dealer failed to produce even the agreement between the said company and the buying dealer, in view of decisions in **M/s Saraf Trading Corporation vs. State of Kerala**, Civil Appeal Nos 474-481 of 2011, decided by the Hon'ble Apex Court on 13/1/2011 and **A.R. Associates vs. Commissioner of Commercial Taxes**, (2001) 122 STC 134 (Kar.), the objections have been rejected by the learned OHA.

16. It is not case of the dealer that the requisite agreement was produced before the Assessing Authority indicating that the transaction was made in relation to export. In State of



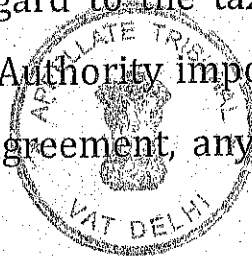
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Karnataka vs. Azad Coach Builders (P) Ltd. & Anr., 2010 (9) scale 364, Hon'ble Apex Court held that there has to be an inextricable link between local sales or purchase and if it is clear that the local sales or purchase between the parties is inextricably linked with the export of goods, then only a claim under section 5(3) for exemption under the Sales Tax Act would be justified. Therefore, we find merit in the contention raised by learned counsel for Revenue that in absence of the requisite agreement, it cannot be said if the transaction of sale or purchase between the parties was inextricably linked with the export of goods, and as such, the claim u/s 5(3) of CST Act has been rightly rejected.

17. On the point of penalty, the only contention raised by learned counsel for the appellant that because the dealer – appellant had no mala-fide intention, It is true that imposition of penalty under DVAT Act is not automatic and penalty is to be imposed when all the essential ingredients of the relevant provision of law stand duly established.

Here the penalty has been imposed u/s 86(12) read with section 33 of DVAT Act, having regard to the tax deficiency. Keeping in view that the Assessing Authority imposed penalty in view of non production of the agreement, any material in



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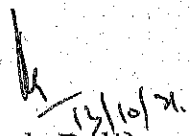
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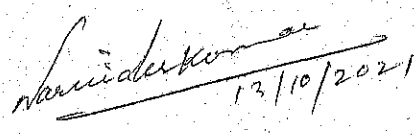
proof of movement of goods and that the description of the goods said to have been sold by the dealer did not tally with the other documents, as discussed above, we do not find any merit contention raised by the appellant, even on the point of penalty.

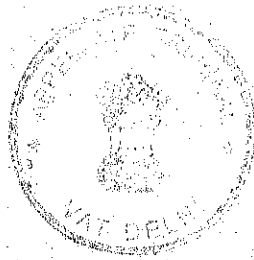
18. In view of the above discussion, when there is no merit in these appeals, the same are hereby dismissed.
19. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 13/10/2021


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)

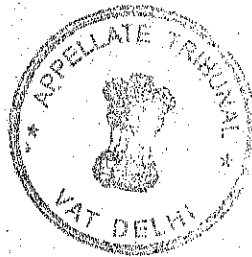


Appeal No. 52-53/ATVAT/12/1376-83

Dated: 13/10/21

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| (3) Govt. Counsel | (8) AC(L&J) |
| (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. | |
| (9) Commissioner (T&T) | |




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