BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar: Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Appeal Nos. : 563-572/ATVAT/13-14
Date of Judgment: 17/05/2022

M/s. Arise Surgical,
5/28, 2nd Floor,
Industrial Area, Kirti Nagar,
New Delhi. .....Appellant-~~Applicant~~

V.

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

Counsel representing the Appellant : Sh.R.K.Batra
Counsel representing the Revenue : Sh. M.L.Garg

JUDGMENT

1. Present ten appeals came to be filed 17-09-2013 challenging the order dated 04/11/2009 passed by Learned Objection Hearing Authority (hereinafter referred to as OHA). Vide this order, objections filed by the appellant-objector against assessment dated 4/11/2009 made by Learned Assessing Officer were disposed of.

2. Assessment was made by the Assessing Authority for the tax period 1st, 2nd, 3rd & 4th quarter of 2008-09; 1st quarter of 2009-10. In respect of 1st quarter of 2008-09, learned Assessing Authority observed in the manner as:-

"The dealer is dealing in sale of items Medical Stocking/ sleeves

used post operating as a protector composer or for faster recovery under the category of Surgical Equipment, Customized Compression Garments, Breast Implants & other Surgical Products 'since 1st quarter of year 2008-09 and charging VAT @4% under Schedule III of DVAT-Act instead of 12.5% VAT on sale of items called Medical stocking/ sleeves used post operating as a protector composer or for faster recovery as this product by it nomenclature or by use/ utility does not fall in the category of Medical Equipment, Devices and Implants. Hence this is to be taxed @ 12.5% and the resultant short tax is to be recovered with interest and penalty under section 86(10) of the DVAT Act.

The dealer is hereby directed to pay tax of an amount of Rupees 18,804/- and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 18-11-2009 for the 1st quarter 2008-09."

As regards the other quarters, the dealer was directed to pay the following amounts towards tax and interest :

2nd Quarter 2008-09	Rs. 12, 006/-
3rd Quarter 2008-09	Rs.29,069/-
4th Quarter 2008-09	Rs.9,646/-
1st Quarter 2009-10	Rs.9,857/-

It may be mentioned here that separate demand of penalty was

raised by learned Assessing Authority in respect of the five quarters.

3. Learned OHA disposed off the objections filed by the objector/ appellant by observing in the manner as:

> "The objector has claimed that his sales items are covered under entry No. 92 of IIIrd schedule of DVAT Act. The objector submitted a specimen copy of his sale item, which was a glub and other items. From the above definition of medical device, it is clear that product being sold by dealer does not fit any where into definition of medical device. The glubs are neither instrument, apparatus and nor implant. So it is very much clear in the instant case that the items sold by the dealer are not covered under entry 92 of third schedule. So the plea of the dealer is not accepted hence the tax, interest and penalty u/s 32 & 33 of the DVAT demand raised by Ld. VATO are legally valid and are upheld."

4. Hence these appeals.

5. Arguments heard file perused.

6. Case of the appellant is that the items, i.e. pressure garments sold by the dealer used to be manufactured and supplied exclusively to patients for post operative case, as prescribed by the surgeon.

Learned Counsel for the appellant has submitted that the dealer is engaged in the manufacturing and supply of Pressure Garments which is covered by the expression medical devices;

that these devices are used in the cure, mitigation, treatment or prevention of disease; that "Medical support stockings" and "Gloves" are medical pressure garments to provide constant and even-pressure on burn scars in order to control or diminish the appearance of hypertrophic scars.

Further, it has been submitted that these medical devices being pressure garments are prepared from Skin breathable material; that post operative reconstruction is required in the control of scar maturation.

Learned counsel for the appellant has submitted that learned OHA erred in confirming the notice of assessment while holding that pressure garments manufactured and sold by Appellant are not covered under Entry 92 of Third Schedule to the DVAT Act, 2004.

Further as contended on behalf of the appellant, Learned OHA erred is not adverting to full definition of medical device quoted in the impugned order.

7. It is case of the appellant that it manufactures and supplies readymade devices or custom fitted devices to be used as pressure therapy designed to minimize the overgrowth of the healed area by limiting the supply of oxygen and nutrients and to hasten the maturing of a scar; that as long as scar is active, it can be influenced by pressure and positioning, whereas the mature scar can be corrected only by medical devices.

APPELLATE TRIBUNAL VAT DELHI

17/5 17/5

8. On the other hand, Learned Counsel for the Revenue has contended that the Learned Assessing Authority rightly made assessments by observing that the products of the dealer did not fall in the category of medical equipment or device or implant, and accordingly, raised demand @ 12.5%.

As regards impugned order, Learned Counsel for the Revenue has contended that Learned OHA has correctly upheld the impugned assessment of tax and interest framed by the Learned Assessing Authority for the reasons recorded therein, and as such the appeal deserves to be dismissed.

9. Undisputedly, the words medical equipment/ device / implant have not been defined under DVAT Act.

In III[rd] Schedule of DVAT Act, there is no mention that for the purpose of classification of the said entry, i.e. entry No. 92, reference can be made to definition available under any other Act.

10. **In State of Goa and Others vs. Leukoplast (India) Ltd. (and other appeals),** (1997) 105 STC 318 (SC), the case of the assessee was that it had got a license to manufacture products namely zinc oxide/adhesive plaster B.P.C. (leukoplast), surgical wound dressing (handyplast); balladona plaster B.P.C.; capsicum plaster B.P.C. and cotton crepe bandages B.P.C. (leukocrapes) under the Drugs and Cosmetics

Act and its production was controlled at every stage by the Drug Control Authorities.

While dealing with this contention, the Hon'ble Apex Court observed in the manner as:

> "The Question is how these terms are understood by people generally? For example, can a bandage be treated as a drug or a medicine? Will the position be different if the bandage is medicated? These questions cannot be decided by reference to any definition of the Drugs and Cosmetics Act or product control licence issued by the Drugs Controller. There is no definition given in the local Sales Tax Act or in the Central Sales Tax Act of these terms. It has to be found out how these products are understood and treated in the market. In the ordinary commercial sense, are these articles considered as drugs or medicines? These are basically questions of fact."

Therein, in para 13, Hon'ble Apex Court went on to observe as under:

> "In our view, whether the products manufactured by the assessee can be treated as "drugs or medicines" cannot be answered straightway. The medicinal content of the products, if any, has to be ascertained. Its curative function has to be found out. Can the product be called a medicament at all? Is it used to cure or alleviate or to prevent disease or to restore health or to preserve health? Are these products treated as drugs or medicines in common parlance? These are basically questions of fact."

APPELLATE TRIBUNAL VAT DELHI

17/1

17/5

11. In view of the decision in **Leukoplast (India) Ltd's** case (supra) following points were to be considered and determined by the learned OHA :-

i. As to how these products were understood and treated in the market;

ii. As to whether in the ordinary commercial sense, those articles were considered as medical devices or equipments;

iii. The medicinal content of the products, if any;

iv. Curative function of the products in question;

v. Are these items used to cure or alleviate or to prevent disease or to restore health or to preserve health?

12. As is available from the impugned order, objector submitted before Learned OHA only the specimen copy of sale items,i.e. a glove and the Learned OHA, keeping in view of the definition of medical device went on to observe that the product did not fit anywhere in the said definition.

However, Learned OHA did not discuss as to why the said product was not covered by the said definition of medical device or equipment. Learned OHA further observed that glove is neither an instrument nor apparatus and even not implant. However, Learned OHA did not record any reason while arriving at this opinion.

All the above 5 points raised in the above said decision are

17/5 17/5

basically questions of fact. It was for the assessee - dealer to lead proper evidence as to the items manufactured and sold by the said dealer during the relevant tax period, to prove that the same are treated as or covered by the expression " medical equipment, device, or implant" as provided under entry 92 of III[rd] Schedule of DVAT Act.

13. As observed by Learned OHA, in addition to a glove, other items were also produced before him. However, there is no view or opinion expressed by Learned OHA in impugned order regarding the remaining items, to say if those or any one of them was or was not covered by entry 92 of Schedule III.

At the cost of repetition, it may be mentioned here that before any adjudication regarding the assessment framed by the Assessing Authority as regards items manufactured and sold by the dealer, all the relevant facts were to be established, in view of decision in **Leukoplast (India) Ltd.'s case (supra).** During pendency of this appeal, only on 28/04/22, dealer filed an application to lead evidence. Said application has been dismissed for the reasons recorded therein.

14. However, in the given facts and circumstances, when the Learned OHA has not effectively determined the issues involved, by taking into consideration all the relevant facts and circumstances, we deem it a fit case to remand the matter to Learned OHA for decision afresh.

APPELLATE TRIBUNAL VAT DELHI

17/5 17/5

15. It may be mentioned here that vide impugned order, Learned OHA also upheld the imposition of penalty u/s. 86(10) of DVAT Act. However, we find that in the impugned order, Learned OHA did not record even a single reason for upholding the said penalty.

16. As noticed above, when the objections are to be decided afresh, the order upholding the penalty by Learned OHA is also set aside and the matter is remanded to Learned OHA for decision afresh.

Result:

17. As a result, all these appeals are disposed of and while setting aside the impugned order passed by the Learned OHA, the matter is remanded to Learned OHA with the direction to decide the objections filed by the dealer-objector afresh, keeping in mind the settled legal proposition and the material relied upon by the dealer – objector. Learned OHA to afford reasonable opportunity to the dealer- objector to lead evidence on the facts required to be established and necessary for effective adjudication of the matter in dispute.

APPELLATE TRIBUNAL VAT DELHI

18. Dealer to appear before Learned OHA on 27/05/22.

19. File be consigned to the record room. Copy of the order be sent 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 : 17/05/2022

17/5/2022

(Rakesh Bali)
Member (A)

17/5/2022

(Narinder Kumar)
Member (J)

Appeal No: 563-572/ATVAT/13-14/4419-27 Dated: 20/05/2022

Copy to:-

(1) VATO (Ward-)
(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) AC(L&J)

REGISTRAR

APPELLATE TRIBUNAL VAT DELHI