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

Review Applications No.492-495/ATVAT/2022
In Stay Applications No. : 397-400/ATVAT/22
Date of Order: 08/07/2022

M/s. Shivalaya Construction Co. P. Ltd.
Flat No. 310 Jaina Apptt.
Sector-13, Rohini,
Delhi – 110085.

.....Applicant

v.

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

Counsel representing the Applicant : Sh. Ravi Chandhok
Counsel representing the Revenue : Sh. P.Tara

Order on Applications for Review of Order dated 03/06/2022

1. This common order is to dispose of four review applications captioned above, as the same arise out of common order dated 03/06/2022 passed by this Appellate Tribunal while disposing of applications u/s 76(4) of DVAT Act filed in Appeals No. 385-388/22.

2. Vide order dated 03/06/2022, dealer – applicant was directed to deposit 20% of the disputed demand towards tax and interest, within 25 days from the date of passing of the said order.

Without complying with the said order regarding pre-deposit for entertainment of four appeals, dealer has filed these four review applications on 29/06/2022.

3. The grounds put-forth in the applications for review of order dated 03/06/2022 with prayer for review and modification of the said order, can be summarized as under:

> 1. That even if it is assumed that the Applicant made inter-State purchases, the same would lead to payment of tax @ 6% and would not affect the entitlement of the Applicant to pay tax under the Notification dated 28/02/2013, under which dealers could opt for scheme A or scheme B and thereby opt to pay tax either @ 3% or @ 6%; and that making of inter-state purchases does not bar the applicant from payment of tax under the composition scheme;
>
> 2. That while disposing of the application u/s 76(4) of DVAT Act this Appellate Tribunal mistook as if the applicant – dealer had challenged original assessment orders dated 31/03/2018 and rather the ground raised by the appellant-applicant-dealer is that assessments framed after the order of remand dated 01/08/2018 should have been framed within the limitation prescribed u/s 34(1) of the Act;

that the extension in the period of limitation as per section 34(2) of DVAT Act is applicable only in case a matter is remanded by Appellate Tribunal or Court, and not where a matter is remanded by OHA, even as per decisions by the Hon'ble High Court and by this Appellate Tribunal;

3. That as per copies of returns submitted at the time of arguments on the applications u/s 76(4) of DVAT Act, amount of Rs. 1,53,65,814/- claimed by the applicant by way of refund has not yet been refunded, submission was made to take into account this fact while passing order on pre-deposit, but no concession has been granted in this regard and that deposit of 20% of the disputed amount in the given situation would cause hardship to the applicant.

4. Before dealing with the grounds and arguments advanced, in brief, facts leading to the four appeals accompanied by applications under section 76(4) of DVAT Act, and then these review applications are as under:

Vide notice of default assessment dated 29/07/2019, learned Assessing Authority framed assessment u/s 32 of DVAT Act relating to each of the four quarters of 2013-14. The reason for framing of assessment was that the dealer – appellant committed breach of the terms and conditions of the Composition Scheme, as in the returns and 2A and 2B for the 2nd, 3rd and 4th quarter of 2013-14, the dealer is stated to have shown purchases from interstate dealers to the tune of Rs. 36,74,822/-, Rs. 10,01,146/- & Rs. 96,88,959/- respectively, whereas under the said

Composition Scheme, said purchases from inter-state dealers were not permissible. Feeling aggrieved by the said assessments, dealer filed objections u/s 74 of DVAT Act. Said objections came to be dismissed by learned OHA vide order dated 29/12/2021.

Applicant-dealer is engaged in civil works contract and registered under Delhi Value Added Tax Act, 2004. Case of the dealer-applicant is that it had opted for Composition Scheme declared vide Notification dated 28/02/2013. The Composition Scheme falls under Scheme A of the said notification. The dealer opted to pay 3% tax of the entire turnover relating to work contract.

Assessments initially made

It may be mentioned here that initially assessments were made on 31/03/2018. The impugned assessments dated 29/07/2019 came to be framed after remand of the matter in terms of order dated 01/08/2018 earlier passed by Learned OHA.

Undisputedly, that remand order was passed taking into consideration the submission of the dealer-objector that Assessing Authority had not provided any opportunity of being heard.

It may be mentioned here that subsequent to the remand of the matter by learned OHA, Authorised Representative of the dealer appeared before Learned Assessing Authority. At that time, the dealer put forth the ground that it was due to mistake that local

purchases made by the branches located outside Delhi were shown in column 2A meant of central purchases of the returns.

Reassessments After Remand

Vide assessment framed on 29/07/2019, Learned Assessing Authority observed that the dealer had failed to comply with the conditions specified in the Composition Scheme and as such it was not eligible for benefits under the said scheme. Consequently, demands of Rs. 2,06,93,532/- for the 1st quarter, Rs. 2,55,82,882/- for the 2nd Quarter, Rs. 2,14,66,320/- for the 3rd Quarter and Rs. 1,79,41,324/- for the 4th quarter were raised treating the dealer as a normal dealer and in this way the tax already deposited by it was forfeited.

However, benefit of tax credit was granted to the dealer to the tune of Rs. 7, 21, 044/- for the 1st quarter, Rs. 12,59,746/- for the 2nd Quarter, Rs. 11,04,514/- for the 3rd Quarter as per 2B issued by the selling dealers .

5. Feeling aggrieved by the fresh assessments on remand, dealer filed objections.

Learned OHA dismissed the objections and said dismissal led to filing of four appeals accompanied by four applications under section 76(4) of DVAT Act.

Said four applications under section 76(4) of DVAT Act came to be disposed off vide order dated 03/06/2022, which is sought not only to be reviewed but also modified.

6. Regulation 24 of Delhi VAT (Appellate Tribunal) Regulations 2005 provides as to on which ground application for review of an order lies. Said regulations read as under:

Regulation 24 reads as under :

"1. Subject to the provisions contained in sub-section (2) of section 76 of the Act and the rules made there under, any person considering himself aggrieved by an order of the Tribunal and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for a review of the order within sixty days from the date of service of the order:

Provided that the Tribunal may at any time, review the order passed by it suo motu also for reasons to be recorded by it in writing.

2. Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.

3. Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:

Provided that-

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the order was made, without strict proof of such allegation."

7. In view of the above provision pertaining to review of order, any person feeling aggrieved by the order of the Appellate Tribunal is to satisfy that the review is being sought because of discovery of new and important matter or evidence and that the said matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced at the time the order was passed by the Appellate Tribunal or on account of some mistake or error apparent on the face of record or for any sufficient reason.

8. Here, as noticed above, review is being sought in respect of order passed to comply with condition of pre-deposit for entertainment of appeal.

Assessee-applicant alleges that the order suffers from mistake or error apparent on the face of record because its pleas as

regards period of limitation for framing of assessment or reassessment, and on the point of refund have been correctly understood because of "incorrect understanding" and in addition thereto, as admitted by the applicant, it could not raise the ground on true application of terms and conditions of composition scheme.

Terms & Conditions of Composition Scheme

9. As regards composition scheme, applicant has alleged for the first time in these Review Applications that even if it is assumed that the applicant made inter-State purchases, the same would lead to payment of tax @ 6% and would not affect the entitlement of the Applicant to pay tax under the Notification dated 28/02/2013, under which dealers could opt for scheme A or scheme B and thereby opt to pay tax either @ 3% or @ 6%; and that making of inter-state purchases does not bar the applicant from payment of tax under the composition scheme.

Admittedly, this ground has been raised here for the first time. In other words, this ground was not raised in the applications u/s 76(4) of DVAT Act or at the time of arguments on the said applications. This is not a case of discovery of any new fact or plea which was not within the knowledge of the dealer. No

Justification has ~~been~~ to be shown as to why it was not raised before Revenue or Learned OHA.

Therefore, applications for review of the order dt.3.6.2022 are not maintainable on this fresh ground raised for the first time and which was not subject matter of the applications under section 76(4) of DVAT Act.

Amount of Refund Due

10. So far as the other ground that the department has not considered claim of the dealer for refund, in the course of arguments on these review applications it has been submitted by counsel for the applicant at the bar, while ensuring that he has specific instructions from the representative of the dealer, that a sum of about Rs. 50,00,000/- is due to the dealer from the department by way of refund as regards the tax period in question.

It is made clear that on this point counsel for the applicant has not been able to point out any mistake or error on the face of record in the order dated 3.6.2022.

While passing order on the applications u/s 76(4), on the point of refund, this Appellate Tribunal observed in the manner as:

"While concluding arguments, Counsel for the applicant has submitted that refund claim of the dealer is yet to be decided by the department, and this fact be also taken into consideration.

On the other hand, Counsel for the Revenue submits that tax period being 2013-14, in absence of any material on record, it cannot be said if any refund claim remains to be decided or if any amount was carried forward or adjusted.

No such material having been brought to notice, it cannot be said at this stage, and would have to be addressed by counsel for the appellant at the time of final arguments, if it is a case of carrying forward or adjustment of any amount in view of provisions of section 38(3)(b) or (4) of the DVAT Act and if so, its effect."

In this regard, it needs to be mentioned that earlier this figure of refund due and that too only pertaining to the tax periods in question, was not provided either in the application or in the course of arguments. It was while parting with arguments on the applications u/s 76(4) of DVAT Act, what the counsel for the applicant referred to was that an amount of Rs. 1,53,65,814/- claimed by the applicant by way of refund not yet refunded, be taken into account while passing order on pre-deposit.

Since at the time of arguments on these review applications, counsel for the applicant has for the first time stated at the bar, that he has specific instructions from the dealer, that a sum of

Rs. 50,00,000/- is due to the dealer from the department by way of refund as regards the tax periods in question and that department has not decided the said claim so far.

Even though the claim of dealer on this point of refund is yet to be decided and the amount due, as now informed by the counsel for applicant, is yet to be verified, as not opposed to, this much amount can be taken into consideration for the purposes of pre-deposit for entertainment of appeals.

In view of this fact stated by counsel for the applicant at the bar, after instructions from the dealer, the order dated 3/6/2022 even though does not call for review, I find that same needs modification. Learned counsel for the Revenue has rightly submitted that for modification in the stay order, separate application should have been filed. It is only in the interest of justice that prayer of the applicant for modification on this ground has been considered while considering the prayer for review of the order.

Accordingly, prayer for review is declined.

As regards modification, having regard to the submission made by counsel for applicant at bar that its claim for refund of Rs.50 lacs, for the tax period to which appeals pertain, remains to be decided by the Revenue, the value of the refund claim stated to be due, but not decided, is a relevant factor to

be taken into consideration for the purposes of order on pre-deposit.

Period of Limitation for framing of Assessments, and for framing of Re-assessments on remand

11. With the discussion on the above two grounds being over, the plea that impugned re-assessments as regards first three quarters are barred by limitation in view of decisions cited at the time of arguments on stay applications, and that the order dated 3.6.2022 regarding pre-deposit is based on "incorrect understanding", is the only plea to be decided if the order regarding pre-deposit suffers from some mistake or error on the face of record.

12. Counsel for applicant submits that during arguments he had challenged the re-assessments as regards first three quarters, and in the process only referred to the previous assessment orders without arguing on their illegality or validity, the same having been set aside by the OHA and as such on this ground mistake has crept in the order dt.3.6.2022.

The contention is opposed by counsel for the Revenue while submitting that the order dt.3.6.2022 does not suffer from any mistake on this point.

For just appreciation of this point , the relevant portion of the order dated 03/06/2022 needs to be reproduced. Same reads as under:

> "It is significant to note that the ground raised before learned OHA, in the second round, was that "that the reassessment orders were barred by limitation in view of the provision u/s 34 of DVAT Act", but it was in the course of arguments on the applications u/s 76(4) of DVAT Act that the assessments initially made were also sought to be challenged on the ground that same were barred by limitation."

13. In view of the above contention raised by counsel for the applicant while arguing the stay application, it is beyond comprehension as to how it has been averred in these review applications that the point of limitation raised in the appeals pertained only to the reassessments passed after the order of remand. The Appellate Tribunal has not introduced the said arguments of its own or attributed the same to the counsel. It was mentioned and discussed in the order , because it was so argued by counsel for the applicant.

When this contention of counsel for the applicant is against record, it is held that the order dated 3.6.2022 does not suffer from any such mistake.

14. As regards the plea that impugned re-assessments as regards first three quarters are barred by limitation in view of decisions cited at the time of arguments on stay applications, and that the order dated 3.6.2022 regarding pre-deposit is based on "incorrect understanding", counsel for the applicant has contended that the order on pre-deposit suffers from error on the face of record and as such needs to be reviewed so as to waive the condition of pre-deposit for entertainment of appeals.

15. On the other hand, counsel for the Revenue has submitted that the Appellate Tribunal has thoroughly discussed the arguments advanced on the stay application, and the order dated 3.6.2022 does not suffer from any mistake or error on the face of record, these applications for review deserve dismissal. At the same time, counsel has submitted that applicant has also sought modification of the said order, but separate applications should have been filed for the prayer of modification.

16. On the scope of review of an order, it is well settled that there is difference between a mere erroneous decision and a decision which may be characterized as vitiated by "error apparent". There is no dispute over the legal proposition that a review is by no means an appeal in disguise. In case of appeal, an erroneous decision is reheard and corrected, if so

required. Review lies only in case of patent error. Power of review is not to be taken to be appellate power available to Appellate Court to correct all errors committed by the subordinate authority.

17. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of record. So, where an error has to be established by lengthy and complicated arguments, it would not be covered by the scope of review.

Here, while arguing the review applications, counsel for the applicant has argued at length taking time as much as he spent on the stay applications almost repeating the arguments advanced.

Applicant alleges that it is a case of "incorrect understanding". In view of this averment, when according to applicant it is a case of wrong decision or reasoning by this Appellate Tribunal, on the point of pre-deposit, in my view, the applicant should have gone in appeal instead of seeking review of the said order.

In a case where substantial question of law is involved and without any elaborate argument, it can be pointed out that no two opinions are entertainable about said point of law and an

error in the order can be pointed out, it would be a case of an error apparent on the face of record.

Having regard to peculiar facts and circumstances of this case, it is not a case where no two opinions are entertainable about said point of limitation based on facts and law. Same needs adjudication after arguments are advanced in the appeals on merits, but not here in these review applications where the applicant has come up with the averment that the decision in the form of order dt.3.6.2022 by this Appellate Tribunal is an erroneous decision based on "incorrect understanding".

18. As per record, four returns filed by the dealer, in respect of each quarter of the tax period 2013-14 were furnished on the following dates :

i. 1st quarter 13/8/2013
ii. 2nd quarter 22/11/2013
iii. 3rd quarter 7/2/2014
iv. 4th quarter 9/5/2014

As per case of applicant, reassessments could be framedin respect of:

1st quarter : 12/8/2017;
2nd quarter : 21/11/2017;
3rd quarter : 6/2/2018 and
4th quarter : 8/5/2018.

Further, as per case of applicant, re-assessments having been framed as regards the 1st, 2nd& 3rd quarters on 31/3/2018, same were beyond the prescribed period of limitation, whereas the assessment relating to the 4th quarter, framed on 8/5/2018 is within limitation.

19. At this stage, it would be appropriate to refer to relevant portion of order dated 3.6.2022 to emphasise as what the Appellate Tribunal observed while discussing this point, at the time of disposal of applications filed on the point of pre-deposit and maintainability of appeals. Same reads as under:

> "In reply to the argument on the point of limitation in framing of reassessment, learned counsel for the Revenue has submitted that these matters pertain to assessment order 2013-14 and as per amendment in section 34(1), w.e.f. 1/4/2013, limitation of four years has been prescribed for making of reassessment u/s 32 of the Act and the same is to be calculated from the end of the year comprising of one or more tax periods for which the person furnished a return u/s 26 or 28 of this Act or from the date on which the Commissioner made an assessment of tax for the tax period, whichever is earlier.
>
> The contention is that in view of this amendment, the assessments initially made on 31/3/2018 can safely be said to have been framed within the prescribed period of limitation. Further submission of learned counsel for the Revenue is that

since the decisions relied on by learned counsel for the appellant i.e. in Samsung India's case (supra) and K.R. Anand's case (supra) pertain to the period prior to the said amendment u/s 34 of the Act, same do not come to the aid of the applicant.

Record reveals that earlier the matter was remanded by learned OHA to the Assessing Authority so as to provide opportunity of being heard to the dealer and that too in view of the submission of the dealer itself.

Remand order was passed by Learned OHA setting aside the previous assessments.

In case, the dealer was aggrieved by the remand order for any reason whatsoever, it could file appeal before the Appellate Tribunal. Undisputedly, the dealer did not challenge the previous order i.e. the remand order passed by Learned OHA.

Learned OHA who has passed the impugned order, was not sitting in appeal over the previous remand order and as such could not consider the validity of the remand order.

Undisputedly, K.R. Anand's case (supra) pertained to the tax period 2010-11 and Samsung India's case (supra) pertained to the tax period from April, 2009 to March, 2010.As regards, decision in M/s. Deepali Designs & Exhibits case (supra), by this Appellate Tribunal in that case the tax period was 2009-10 and 2010-11 i.e. prior to the amendment in the provisions of section 34 of the Act. Similarly decision in M/s. Ases Security (P) Ltd.'s case (supra), by this Appellate Tribunal, matter

pertained to 4th quarter of 2012-13 i.e. prior to the amendment in section 34.

Here, the question arises as to how a dealer can challenge the previous assessments on the ground that the same were barred by limitation, especially when same were set aside by Learned OHA who remanded the matter to the Learned Assessing Authority and that too while accepting the submission raised on behalf of the dealer that it required reasonable opportunity of being heard, and furthermore when the dealer accepted that order passed by Learned OHA and participated in the proceedings before Learned Assessing Authority.

So the dealer shall have to explain the things as regards this question involved in these appeals, at the time of arguments on merits."

20. Case of Revenue is based on decision in Shaila Enterprises case, on which reliance was also placed by the OHA while passing the impugned order and in observing that as per said decision by our own Hon'ble High Court in case of remand, fresh assessment has to be framed within one year as per provisions of Section 34(2) of DVAT Act.

Shaila Enterprises's case was a case having peculiar facts and circumstances where counsel for the petitioner-dealer himself submitted that assuming, without admitting that power to remand exists with an OHA, in any event the Assessing

Officer was required to pass an order within a maximum period of one year after the date of passing of the OHA.

Hon'ble High Court found that in the said case that neither fresh assessment was passed nor an order of refund was passed within one year of the date of the order of the OHA. Accordingly, Hon'ble Court found that the time within which the matter regarding assessment could have been reopened had long being crossed in respect of the month of January 2008.

Here, the Assessing Authority framed fresh assessment after providing opportunity to the dealer of being heard, and that too within one year's period calculated from the date of remand by Learned OHA.

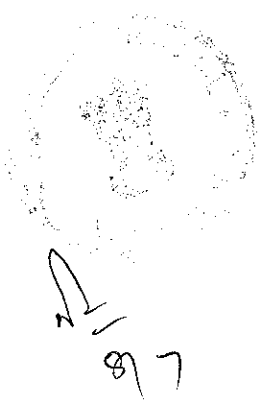
Shaila Enterprises's case (supra) is a significant decision by our own Hon'ble High Court on the aforesaid point particularly in a case based on almost same facts, where during hearing on objections the dealer claims that assessing authority had not given sufficient authority to submit relevant documents, and keeping in view the said submission of the objector, learned OHA deems it appropriate that in the interest of natural justice another opportunity be afforded to the objector.

Here too, as noticed above and admittedly, matter was remanded by previous learned OHA vide order dated 01/08/2018 taking into consideration the plea put forth by the objector itself that sufficient opportunity had not been afforded by the Assessing Authority.

The dealer did not feel aggrieved by the said order of remand. It also did not prefer any appeal against the order of remand before Appellate Tribunal and rather opted to participate in the proceedings before learned Assessing Authority. The reason for not challenging the remand order appears to be that before Learned OHA, dealer alleged that actually due to mistake of the accountant of the dealer, local purchases made by the branches of the dealer located outside Delhi were shown in the column meant for central purchases. On the basis of this plea, dealer wanted to have fresh assessment. This very plea, the dealer took up also during reassessment proceedings after remand.

While dealing with this ground, earlier this Appellate Tribunal observed in the stay order dt. 3.6.2022 in the manner as:

"Mistake on the part of Accountant



As regards the other submission i.e. mistake on the part of the accountant in depicting local sales as central sales, learned counsel for the Revenue has pointed out that nowhere it has been alleged by the applicant as to when this mistake came to the

notice of the dealer. He further points that the applicant never took any steps for rectification of the returns. Question arises as to what prevented it from filing of return for the others. In reply to these submissions, learned counsel for the applicant has not put forth in submission in the course of arguments. But these are the questions involved here, which need to be addressed by the dealer at the time of final arguments."

21. In this way, even if in K.R. Anand's case before the Hon'ble High Court and the two previous decisions by this Appellate Tribunal, the view taken was that provisions of section 34(2) of the Act do not extend the period of limitation on remand by OHA, only after hearing both the sides on merits, and considering all the established facts and circumstances, it can be decided if this is a case where the dealer wanted to eat the cake and have it too, when the dealer himself sought remand to establish a particular plea raised before OHA or that reassessment was still required to be framed within four years period as provided under section 34(1) or that provisions of section 34(2) of the Act do not come into application. Only on merits, it can be determined if the facts of the ASES's case decided by the Appellate Tribunal on merits were same or if the case was distinguishable on facts.

In K. R. Anand's case, Hon'ble High Court observed that while disposing of miscellaneous application the Hon'ble Court could not have extended the period of limitation and

respondents were to take recourse in accordance with law. That was not a case of remand by OHA on the basis of any submission on behalf of assessee.

Furthermore, at the time of final arguments, applicant shall have to explain as to why, on remand by OHA and that too on its request, the dealer did not produce original bills, which according to the Assessing Authority must have been in possession of its branches. Only thereafter, this Appellate Tribunal shall be able to finally and completely adjudicate the dispute and the issues involved, including the one on limitation.

After all, while disposing of application under section 76(4) of DVAT Act for the purposes of pre-deposit for entertaining appeal, observations made in order on such application never have effect on the decision of the appeal on merits.

Decision in M/s SREI Equipment Finance Ltd. v. Commissioner, VAT Appeal 2/2017 by our own Hon'ble High Court cited by counsel for the applicant is distinguishable on facts as that was a case of non service of notice or hearing and order of assessment was framed on system generated pre-determined order. That was not a case of passing of fresh assessment after remand of matter by OHA

and that too when the dealer itself sought opportunity of being heard.

In view of the above peculiar facts and circumstances and learned OHA keeping in view the decision in Shaila Enterprises's case similar to the facts of present matters, it cannot be said that the order dated 3.6.2022 suffers from any mistake or error on face of record.

As a result, prayer in the applications for review of the order dated 3.6.2022 on the grounds discussed above, is hereby rejected.

22. However, keeping in view the factum of claim of refund of Rs.50 lacs pending disposal with the department since long and the consequences, in case said claim is ultimately allowed, the applicant to deposit by 18.7.2022 by way of pre deposit 10% of the disputed demand towards tax and interest.

~~22.~~ Compliance to be submitted and the Registry and counsel for the Revenue to be apprised regarding compliance well in time, so that on the next date i.e. 20/7/2022, appeals are taken up for final arguments.

23. These review applications are disposed of accordingly.

24. 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 : 8/7/2022

Narinder Kumar 8/7/2022

(Narinder Kumar)
Member (J)

Review Application No. - 492-495/22
In stay Application No. - 397-400/22 | 4994-02

Dated: 08/07/22

Copy to:-

(1) VATO (Ward- 63)
(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