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

Appeal Nos. : 697-732/ATVAT/2013
Date of Judgment: 07/09/2022

M/s. ABB India Limited,
E-5, Shyam Nagar,
Okhla Inds. Estate, Phase III,
New Delhi-110019. .....Appellant

v.

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

Counsel representing the Appellant : Sh. A. K. Bhardwaj
Counsel representing the Revenue : Sh. C. M. Sharma

## JUDGMENT

1. Dealer-appellant-a limited company engaged in the business of re-sale of industrial motors etc. and execution of works contracts, is feeling aggrieved by order dated 08/08/2013 passed by learned OHA- Special Commissioner–1, whereby its objections u/s 74 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act 2004) against additional demands by way of assessments of tax, interest and penalty, framed u/s 32 and 33 of DVAT Act, have been disposed of.

2. Following were the additional demands raised by the Assessing Authority:

| Period to which objection relates & Amount in Dispute | Period 2007-08 | Tax + intt | Penalty |
|---|---|---|---|
| | May 2007 | 42,74,016/- | 20,24,658/- |
| | Sept 2007 | 3,13,64,613/- | 2,63,67,948/- |
| | Dec 2007 | 3,73,75,100/- | 3,22,85,364/- |
| | Jan 2008 | 15,81,413/- | 13,78,700/- |
| | Feb 2008 | 17,49,107/- | 15,39,143/- |
| | Mar 2008 | 3,98,06,413/- | 3,53,58,364/- |
| | **2008-09** | | |
| | Apr 2008 | 30,714,640/- | 238,44,749/- |
| | May 2008 | 8,653,379/- | 54,23,157/- |
| | June 2008 | 22,134,587/- | 172,02,401/- |
| | Jul 2008 | 10,367,726/- | 75,50,225/- |
| | Aug 2008 | 22,626,702/- | 51,39,108/- |
| | Sept 2008 | 31,352,072/- | 134,82,666/- |
| | Oct 2008 | 22,006,927/- | 63,03,307/- |
| | Nov 2008 | 22,128,310/- | 142,57,268/- |
| | Dec 2008 | 14,508,056/- | 271,92,699/- |
| | Jan 2009 | 25,294,779/- | 128,00,353/- |
| | Feb 2009 | 62,278,713/- | 485,60,981/- |
| | Mar 2009 | 83,192,781/- | 831,44,356/- |

## ASSESSMENT

## MAY 2007

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Expenses not relatable to Labour & Services added in WCT sale @12.5% ITC on bills pertaining to older periods and retail invoices disallowed.
Further, E1 sale to NDPL is disallowed. Details are given in Annexure '1' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 24,94,305/-."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods.
Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed."

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 732020451 | 25/MAY/07 | NDPL RG-24 | 102,732.00 |
| 732020401 | 09/MAY/07 | NDPL RG-24 | 336,618.00 |
| 732020402 | 09/MAY/07 | NDPL RG-24 | 36,883.00 |
| **Total sale against C+E1 form during May 2007** | | | **476,233.00** |

## SEPTEMBER 2007

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC on bills of Crane hire charges, generator charges, disallowed.
Further, E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 3,13,64,614/-
."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed."

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 730000131 | 29/Sep/07 | NDPL-Delhi | 2,448,700.80 |
| **Total sale against C+E1 form during Sep. 2007** | | | **2,448,700.80** |

## DECEMBER, 2007

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC on bills of Crane hire charges, generator charges, disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%.
Invoice No. 730000915 dated: 31-12-2007 issued to CPWD not declared in VAT returns, as result VAT of Rs. 1,64,786/- less paid. Details are given in 'Annexure' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 3,73,75,100/-
."

## JANUARY 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Expenses not relatable to Labour & Services added WTC sale @12.5%.
Further, E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 15,81,413/-."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed."

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830700000 | 31/Jan/08 | NDPL-Ghevra Savdha | 2,042,400.00 |
| **Total sale against C+E1 form during January 2008** | | | 2,042,400.00 |

## FEBRUARY2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC on bills of Crane hire charges, generator charges, disallowed.
Expenses not relatable to Labour & Services added WTC sale @12.5%.
Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 17,49,106/-."

## MARCH 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:

ITC on bills of Crane hire charges, generator charges, disallowed.
Expenses not relatable to Labour & Services added WTC sale @12.5%.
E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act 2004 is disallowed & taxed @12.5%.
Besides the dealer made direct sale to NDPL from its other locations outside Delhi and claimed exemption u/s 7(a) of the DVAT Act, 2004 not shown in the return. Details are given in 'Annexure' attached with the assessment order.
The dealer is hereby directed to pay tax of an amount of Rupees 3,98,06,413/-
."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it

is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed.

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830000556 | 28/Feb/08 | NDPL-GHEVRA SAVDHA | 3,263,030.00 |
| 830700005 | 28/Mar/08 | NDPL-GHEVRA SAVDHA | 42,000.00 |
| **Total sale against C+E1 form during March 2008** | | | **3,305,030.00** |

Besides above the dealer has made direct sales to NDPL from its other locations outside Delhi which has been claimed exempt u/s 7(a) of the Delhi Value Added Tax Act, 2004 and has not been shown in the returns, details of which is as follows:-

- NDPL- Ghevra Rs. 1,66,45,800/-
- NDPL- RG 24 Rs. 2,31,83,466/-

Documents in respect of direct sales to NDPL from other locations were not produced before the auditors for their audit therefore above turnover is liable to be taxed."

## APRIL 2008

"Whereas I am satisfied that the dealer has furnished return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on items, which are not used for purposes of taxable sale disallowed.
Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act,2004 and E1 sale of NDPL is disallowed Tax @12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 2,65,91,250/-
."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed. "

Details of C+E-1 sales during the month of April 2008 is as follows:-

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830700007 | 09/Apr/08 | NDPL- Ghevra Savdha | 2,430,000.00 |
| 830700008 | 09/Apr/08 | NDPL- Ghevra Savdha | 5,281,000.00 |
| 830700009 | 14/Apr/08 | NDPL- Ghevra Savdha | 982,800.00 |
| 830700010 | 22/Apr/08 | NDPL- Ghevra Savdha | 1,155,100.00 |
| 830700012 | 25/Apr/08 | NDPL- Ghevra Savdha | 33,000,000.00 |
| 830700014 | 29/Apr/08 | NDPL- Ghevra Savdha | 5,818,500.00 |
| **Total sale against C+E1 form during April 2008** | | | **48,667,400.00** |

## MAY 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 59,90,235/-."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) can not be applied, and exemption from payment of tax cannot be claimed. "

Details of C+E-1 sales during the month of May 2008 is as follows:-

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830000954 | 22/May/08 | NDPL- Ghevra Savdha | 1,739,795.00 |
| 830700017 | 31/May/08 | NDPL- Ghevra Savdha | 3,465,000.00 |
| 830700018 | 31/May/08 | NDPL- Ghevra Savdha | 1,470,000.00 |
| **Total sale against C+E1 form during May 2008** | | | **6,674,795.00** |

## JUNE 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 1,88,18,562/-
."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed. "

Details of C+E-1 sales during the month of June 2008 is as follows:-

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830700019 | 25/Jun/08 | NDPL- Ghevra Savdha | 505,000.00 |
| 830700020 | 26/Jun/08 | NDPL- Ghevra Savdha | 1,000,000.00 |
| 830700021 | 26/Jun/08 | NDPL- Ghevra Savdha | 1,143,490.00 |
| 830700023 | 28/Jun/08 | NDPL- Ghevra Savdha | 750,000.00 |
| 830700022 | 28/Jun/08 | NDPL- Ghevra Savdha | 2,329,910.00 |
| 830700026 | 30/Jun/08 | NDPL- Ghevra Savdha | 622,500.00 |
| 830700027 | 30/Jun/08 | NDPL- Ghevra Savdha | 750,000.00 |
| 830700028 | 30/Jun/08 | NDPL- Ghevra Savdha | 807,000.00 |
| 830001225 | 30/Jun/08 | NDPL- Ghevra Savdha | 45,000.00 |
| 830700029 | 30/Jun/08 | NDPL- Ghevra Savdha | 700,000.00 |
| 830700030 | 30/Jun/08 | NDPL- Ghevra Savdha | 190,000.00 |
| **Total sale against C+E1 form during June 2008** | | | **8,842,900.00** |

## JULY 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31& returns is less than the tax shown in the invoice.
ITC claimed on crane/generator hire charges& ITC claimed on items which are not used for purpose of taxable sale is disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 81,79,410/-."

## AUGUST 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice.
Tax invoice No. 830001550 dt.29-08-08 of Rs. 2,24,106/- (tax Rs. 8,964/-) issued to Guru Gobind Singh IP University is not declared in DVAT-31 and VAT return.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 55,12,808/-."

## SEPTEMBER 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on crane/generator hire charges.
ITC claimed on retail invoices & ITC claimed on items which are not used for purpose of taxable sale is disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 1,43,20,052/-
."

## OCTOBER 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on crane/generator hire charges.
ITC claimed on retail invoices & ITC claimed on items which are not used for purpose of taxable sale is disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 66,27,827/-."

## NOVEMBER 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on crane/generator hire charges.
ITC claimed on retail invoices & ITC claimed on items which are not used for purpose of taxable sale is disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 1,48,39,928/-
."

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed."

Details of C+E-1 sales during the month of November 2008 is as follows:-

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 830700039 | 07/Nov/08 | BSES Rajdhani Power Ltd. | 2,070,998.80 |
| 830700040 | 14/Nov/08 | BSES Rajdhani Power Ltd. | 2,203,000.50 |
| **Total sale against C+E1 form during November 2008** | | | **4,273,999.30** |

## DECEMBER 2008

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on crane/generator hire charges is disallowed.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.

The dealer is hereby directed to pay tax of an amount of Rupees 2,80,15,310/-
."

## JANUARY 2009

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
ITC claimed on crane/generator hire charges is disallowed.
Sale shown as @4% is taxed @12.5% being works contract turnover.
Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 1,30,51,684/-
."

**"Tax charged for sale @4% instead of Works Contract taxable @12.5%**

As per section 4(1)(d) of the Delhi Value Added Tax Act, 2004, rate of tax in respect of goods involved in the execution of works contract is 12.5% except in respect of declared goods used in the same form on which VAT @4% is applicable.

**Details of *local sale* taxed @4%**

| Invoice No. | Invoice Date | Name of the Purchaser | Sale @4% |
|---|---|---|---|
| 930000084 | 31/Jan/09 | BSES Rajdhani Power Limited | 2,307,246.33 |
| 930000085 | 31/Jan/09 | BSES Rajdhani Power Limited | 866,346.00 |
| **Local sale taxed @4% during the year 2008-09** | | | **3,173,592.33** |

However, the contract with BSES is a work contract and not contract for sale, therefore, tax @12.5%, i.e. the tax rate applicable on works contract should be levied."

## FEBRUARY 2009

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons:
Turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged along with interest. Details are given in the Annexure attached.

The dealer is hereby directed to pay tax of an amount of Rupees 4,89,98,917/-

## E-1 sale

"In case of works contracts, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied, and exemption from payment of tax cannot be claimed."

Details of C+E-1 sales during the month of February 2009 is as follows:-

| Invoice No. | Invoice Date | Name of the Purchaser | Sale against C+E1 Form |
|---|---|---|---|
| 930700006 | 17/02/2009 | BSES Rajdhani Power Ltd. | 291,000.00 |
| 930700007 | 17/02/2009 | BSES Rajdhani Power Ltd. | 525,000.00 |
| 930700008 | 25/02/2009 | BSES Rajdhani Power Ltd. | 33,010,000.00 |
| 930700009 | 27/02/2009 | BSES Rajdhani Power Ltd. | 1,255,666.00 |
| 930700011 | 27/02/2009 | BSES Rajdhani Power Ltd. | 1,399,000.00 |
| 930700012 | 27/02/2009 | BSES Rajdhani Power Ltd. | 425,458.00 |
| 930000206 | 28/02/2009 | BSES Rajdhani Power Ltd. | 562,000.00 |
| 930700010 | 28/02/2009 | BSES Rajdhani Power Ltd. | 23,300.00 |
| **Total sale against C+E1 form during February 2009** | | | **37,491,424.00** |

## MARCH 2009

"Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons: ITC claimed on crane/generator hire charges & ITC claimed on retail invoices & ITC claimed on items which are not used for purpose of taxable sale is disallowed.

Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed.
Further sale of Rs. 4,17,06,162/- made @4% to GGSIPU is taxed @12.5%.
High sea sale of Rs. 29,02,55,841/- is disallowed and other direct sales made from other locations outside Delhi on which exemption have been claimed u/s 7(a) of the DVAT Act 2004 and not shown in the returns are taxes @12.5% along with interest. Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 8,30,11,476/-."

**Objections before Learned OHA and their disposal**

3. Feeling aggrieved by the above said assessments, dealer-assessee filed objections before learned OHA, u/s 74 of DVAT Act.

**Remand of matter concerning sales to DMRC**

4. It may be mentioned here that learned OHA, while disposing of the objections remanded the matter to learned Assessing Authority as regards transactions with DMRC, while observing in the manner as:

"Taking into account the above analysis of assessing authority there is a need to examine the contract documents critically. In respect of DMRC a detailed exercise is required at the level of Ld. AA with this objective since the cited orders of Hon'ble High Court have been delivered after the assessments for Ay 2006-07 and 2007-08 were framed. It is to be examined whether the contracts with the DMRC on the basis of which the present assessments have been made are identical to the contracts on the basis of which the cited orders of Hon'ble High Court of Delhi have been passed. Only on basis of such comparisons would the AA be able to decide the admissibility of relief sought in respect of transactions with DMRC. Thereafter the Assessing Authority may evaluate the tax liability against sales made to DMRC and reframe the assessments and orders for levy of penalty after considering all submissions. To that limited extent the objections are referred back to the Ld. AA on this issue."

**Disposal of Objections**

5. Learned OHA, vide common order disposed of the said objection and other objections pertaining to tax period May 2007, September 2007, December 2007, January, February, March – 2008, April 2008 to March 2009.

6. Feeling dissatisfied with the impugned order by Learned OHA, the dealer has filed present appeals.

**No challenge by the dealer-appellant**

7. **(a) As regards sales to DMRC**

It may be mentioned here that the above remand order passed by learned OHA as regards sales made to DMRC has not been challenged by dealer-appellant.

**(b) Turnover of Rs. 13,18,290.00, pertaining to tax period December 2007**

It may be mentioned here that while referring to the said turnover pertaining to the said tax period, learned counsel for the dealer-appellant submitted in the course of arguments that levy of tax as regards the said turnover is not being challenged by the dealer and that the dealer has deposited the tax as per demand.

8. The turnovers made basis for assessments, after audit, can be divided into three categories:

(A) Inter-state Direct Sales;

(B) Inter-state Transit Sales;

(C) High Sea Sales.

9. The above categories are taken up one by one for discussion.

**(A) Inter-state Direct Sales**

**10. Inter-state Sale (Direct Sales stated to be from outstation units of the dealer-appellant)**

| Months | NDPL/BSES/GGSIUP/L & T – for DIAL |
|---|---|
| | Turnover |
| | |
| March'08 | 3,98,29,266.00 |
| | |
| March'09 | 13,72,83,595.00 |
| | |
| **Total** | **17,71,12,861.00** |

Learned Assessing Authority levied tax @ 12.5% with interest on other direct sales amounting to Rs. 49,24,182/- made from other locations outside Delhi. Assessing Authority observed that exemption was claimed on these direct sales u/s. 7(a) of DVAT Act, but same were not shown in the returns.

**Direct Sales to NDPL**

As per assessment summary issued by the Learned Assessing Authority, other direct sales amounting to Rs. 1,59,94,999/- were stated to have been made to NDPL by the assessee from its other locations outside Delhi, and in respect there of exemption

was claimed u/s. 7(a) of DVAT Act, but the said sales had not been shown in the returns.

**Direct Sales to BSES**

Other direct sales amounting to Rs. 1,90,13,512/- were stated to have been made to BSES by the assessee from its other locations outside Delhi, and in respect there of exemption was claimed u/s. 7(a) of DVAT Act, but the said sales had not been shown in the returns.

**Direct Sales to L & T for DIAL**

Other direct sales amounting to Rs. 9,73,50,902/- were stated to have been made to L & T by the assessee from its other locations outside Delhi, and in respect there of exemption was claimed u/s. 7(a) of DVAT Act, but the said sales had not been shown in the returns.

**Direct Sales to GGSIPU**

As per record, some items were supplied to GGSIPU by way of direct sales from the out-station units of the dealer-appellant.

## 11. Observations by OHA –as regards Inter-state Sales made by thedealer-appellant to NDPL, BSES, GGSIPU and DIAL through L & T

Learned OHA while dealing with the point of inter-state sales upheld the assessments made by Learned Assessing Authority while observing in the manner as:

> "It is noteworthy that the items supplied by the objector against these three companies are such which are not consumer specific and specifications could be common to many other operators involved into similar business.
>
> Perusal of the contract documents also indicates that the responsibility of the supplier was extended upto fabrication, installation and operationalization of equipments. In case of any damage or loss of property the supplier has been made responsible. The Ld. Assessing Authority has rightly held that the items were handed over to the beneficiary at site after installation and commissioning. The clauses for inspection are quite different from the provisions made in case of DMRC.
>
> The list of suppliers as provided by DMRC in cited case has not been shown in respect of other three contractee organizations.
>
> It has been noted that the items supplied are not such that only the contractee organizations could have utilized and thus there was feasibility for diversion.
>
> It is further added that in the case of DMRC drawings &certification were provided by DMRC in respect of their purchases. No such arrangement were found to have been provided to objector in case of sales made to NDPL, BSES and DIAL thereby indicating that privity of contract between the supplier and the user is not firmly established.
>
> The contractee in these cases had not been specified the suppliers and objector had not been specifically asked to make the procurements from outstation suppliers. Possibility of diversion of goods cannot be overruled in such eventuality.
>
> Goods dispatched on behalf of ABB were also found to be received after inter-State movement by ABB itself which was responsible for insurance and security at site till operationalisation. Therefore, the inter-State sales were for all practical purposes from ABB to ABB and the goods passed on to the final user at the time of execution of works contract.

Ld. AA has rightly compared this case to the similarly situated case of Binani Bros. Vs Union of India (1974) 33 STC 254 (SC) wherein the Apex Court had held that the sales made by M/s Binani Bros to the DGS&D did not occasion the import of the goods, but it was the purchases made by the Binani Bros from the foreign sellers which occasioned the import of goods.

There was no privity of contract between the DGS&D and the foreign seller who did not enter into any contract by themselves or through the agency of the petitioner to the DGS&D and the movement of goods from the foreign country was not occasioned on account of the sales by the petitioner to the DGS&D. It concluded that even if the contracts envisaged the import of goods and their supply to the DGS&D from out of the goods imported, it did not follow that the movement of goods in the course of import was occasioned by the contracts of sale by the petitioner with DGS&D. Rationale of the said decision of the Apex court can be applied to the present case also since the facts are similar.

The final conclusion is that these transactions also did not satisfy the conditions highlighted by the Hon'ble High Court of Delhi in the case of objector dealer for the DMRC related transactions for the period of 2005-06.

Obviously the factors cited above are not individually determinative or decisive, but the net conclusion, which emerges on taking a holistic view by appreciation of all ingredients, is that the requirements of Section 3 of CST Act are not satisfied in respect of these transactions.

It can be clearly inferred that the objector dealer is not entitled to exemption under section 7(e) of DVAT Act read with section 3 of CST Act in respect of works contract executed for vendors other than DMRC since the sales do not qualify as such. Hence disallowance of the exemptions on the interstate sale/import is upheld and the contention of the objector dealer that the present case is covered by the cited judgments is not found sustainable."

**Contention on behalf of appellant**

12. Learned Counsel for the dealer-appellant opened arguments on this point pertaining to direct sales to NDPL, BSES, GGSIPU and DIAL.

While challenging the observations made by Learned OHA that the terms of the contract are not exactly the same as were the terms of contract between the appellant and DMRC, on behalf

of the appellant it has been submitted that the terms of the contract between BSES and NDPL are exactly the same as were the terms of the contracts between the dealer-appellant and DMRC.

Grievance of the assessee-appellant is that the Assessing Authority wrongly framed assessments regarding direct sales to the above-named persons, as said sales being Inter-state Sales could not be subjected to tax under DVAT Act, in view of provisions of section 3(a) of CST Act and section 7 of DVAT Act.

While referring to Section 3(a) of CST Act, Learned Counsel for the appellant has submitted that since these sales originated from outside Delhi, their turnover was not to be reflected in returns under DVAT Act. Further, it has been submitted that CST was paid on the said sales in the concerned States from where the sales originated and as such the sales of said goods were not exigible to tax under DVAT Act.

Further, the contention raised by Learned Counsel for the appellant is that whereas in a case of taxation of works contract, the 'deemed sale' is of the 'property in goods involved in the execution of the contract', in the case of transactions of transfer of property in the nature of Inter-state sale or sale in the course of import, such turnover cannot be taxed as provided under the provisions of Section 7 of DVAT Act.

In support of this contention, learned counsel has referred to an earlier decision in **ABB Ltd. v. The Commissioner, Delhi Value Added Tax**, ST.APPL. 51/2012 & others, decided by our own Hon'ble High Court on 28/09/2012.

13. Learned counsel for the appellant has contended that said transactions were in the nature of Inter-state sales from the originating State and they are not required to be reflected in the returns for the State of Delhi under the provisions of DVAT Act or the CST Act and were shown in the return for the States from where the movement of goods originated. The benefit being claimed by the appellant was not by way of exemption but a claim depending on the jurisdictional issue i.e. the State legislature did not have the legislative competence to impose tax on goods being imported to the State solely for the purpose of execution of the works contract.

**Arguments on behalf of Revenue**

14. One of the arguments advanced on behalf of the Revenue is that works contract occasioning sale in the course import/interstate sale is not out of the purview and jurisdiction of the DVAT Act and that there is no merit in the contention raised on behalf of the appellant that indivisible works contract cannot be subjected to tax, the reason being that as tax is levied on goods used in execution of the contract.

Learned Counsel for the Revenue has contended that dealer cannot escape from liability of tax on the ground that one agreement is for sale and other is for labour. In this regard, reference has been made to deduction of tax at source which helps in tracing the contract and leaves no doubt or ambiguity about exigibility of works contract transactions to tax.

15. Learned counsel for the Revenue has contended that in suchlike transactions whole amount of the consideration has to be taken into consideration as provided under the Act. Reference has been made to the definition of "sale price" which means the amount paid or payable as valuable consideration for any sale including clause (vii) which means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract.

At the same time, it has been contended that in the case of turnover rising from execution of a works contract, charges towards labour, services and other like charges are to be excluded subject to such conditions as may be prescribed. Reference has also been made to proviso which stipulates that where the amount of charges towards labour, services and other like charges is not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated at the prescribed percentages.

15. It has been argued that self contradictory arguments have been advanced on behalf of the appellant. For example, on one side, it has been argued on behalf of the appellant that it is contract scenario; labour oriented works contract but on the other hand, it has been argued that it is a sale contract simpliciter; that at the same time, it has been argued that the goods belong to the contractee but still the whole contract does not involve supply of goods and as such is not taxable.

Reference has been made to the provision of Section 11A of DVAT Act.

On behalf of the Revenue, it has further been argued that if the transfer of property of goods takes place by way of execution of contract, it is no longer material whether the goods are sold in interstate or it is crafted like a second sale by C form+E1.

**Discussion**

**Inter-state sales**

16. Section 3 of CST Act postulates as to when a sale or purchase of goods said to take place in the course of inter-State trade or commerce.

According to clause (a) of Section 3, an inter-State sale or purchase is one which occasions the movement of goods from one State to another.

According to clause (b) of Section 3, an inter-State sale or purchase is one if the sale or purchase is effected by a transfer of documents of title to the goods during their movement from one State to another.

17. It is well settled that a sale occasions the movement of goods from one state to another within section 3 (a) of the CST Act, when the movement is the result of a covenant or incident of the contract of sale.

**As to when does a sale take place within the State**

Here, reference to this provision is also relevant to understand the correct interpretation of provisions of section 3 of CST Act. As per section 4(2) of the Central Sales Tax Act, a sale or purchase of goods shall be deemed to take place inside the State *if the goods are within the State*:-

> *(a) In the case of specific or ascertained goods, at the time the contract of sale is made; and*
>
> (b) In the case of unascertained or future goods, at the time of appropriation of contract of sale by the seller or by the buyer, whether the ascent of the other party is prior or subsequent to such appropriation.
>
> *Explanation:* Where there is a single contract of sale or purchase of goods situated at one or more than one places, the provisions of this sub section shall apply as if there were separate contracts in respect of the goods at each of such places.

Relevant part of Section 8 of CST Act reads as under:

> (1) "Every dealer, who in the course of inter-State trade or commerce, sells to a registered dealer goods of the description referred to in sub-section (3), shall be liable to pay tax under this Act, which shall be two per cent*of his turnover or at the rate applicable to the

sale or purchase of such goods inside the appropriate State under the sales tax law of that State, whichever is lower: Provided that the Central Government may, by notification in the Official Gazette, reduce the rate of tax under this sub-section.

(2) The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1), shall be at the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State.

Explanation. —For the purposes of this sub-section, a dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the appropriate State, notwithstanding that he, in fact, may not be so liable under that law."

## Certain sales not liable to tax - Section 7 of DVAT Act

18. Relevant part of Section 7 of DVAT Act reads as under:

"Nothing contained in this Act or the rules made there under shall be deemed to impose or authorize the imposition of tax on any sale of goods when such sale takes place -

(a) in the course of inter-State trade or commerce; or

(b) outside Delhi; or

(c) in the course of import of the goods into or export of the goods out of, the territory of India.

Explanation. - Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 (74 of 1956) shall apply for determining whether or not a particular sale takes place in the manner indicated in clause (a), clause (b) or clause (c) of this section".

Relevant part of Section 11 A reads as under :

"No tax shall be payable under this Act by a contractor on the amount representing the value of the goods supplied by the contractee to the contractor in the execution of works contract in which the ownership of such goods remains with the contractee under the terms of the contract and the amount representing the value of the goods supplied by the contractee to the contractor does not form part of the contract and is not deductible

from the amount payable to the contractor by the contractee for the execution of the works contract."

**Important Decisions**

19. Let's see as to what are the significant decisions on the point involved and under discussion here.

20. In **Larsen and Toubro Ltd. v. The State of Bihar (now Jharkhand) and Ors.**, CWJC No. 3731 of 1998, 2/11/2007, Hon'ble Court arrived at the following conclusions: -

> "51(1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale)which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.
>
> (2) The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29A)(b).
>
> (3) While defining the expression sale in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29A)(b) but it is not permissible for the State Legislature to define the expression sale in a way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.
>
> (4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute the measure for imposition of the tax.
>
> (5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works

contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning, designing and architects fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (vii) other similar expenses relatable to supply of labour and services; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article."

21. In **Commissioner of Sales Tax, UP v. Bakhtawar Lal Kailash Chand Arhti,** (1992) 87 STC 196, Hon'ble Apex Court explained the scope of section 3(a) by observing as under:

"According to clause (a) of Section 3, an inter-State sale or purchase is one which occasions the movement of goods from one State to another. In other words, the movement of goods from one State to another must be the necessary incident - the necessary consequence - of sale or purchase. A case of cause and effect - the cause being the sale/purchase and the effect being the movement of the goods to another State, what is important is that the movement of goods and the sale must be inseparably connected."

22. In **I.D.L. Chemical Limited v. State of Orissa,** (2007) 10 VST 644, Hon'ble Apex Court observed that if the contract triggered the inter-state movement of goods, it amounted to inter-state sale.

23. Reference may also be made to decision in **State of Orissa vs. K.B. Saha and Sons Industries (P) Ltd.,** (1976) 32 STC 629, wherein Hon'ble Apex Court, after referring to the various cases, on interpretation of provisions of section 3(a) of CST Act, observed as under –

> "In order to decide whether a sale is an inter-State it is sufficient that the movement of goods should have been occasioned by the sale or should be incidental thereto.
>
> What is important is that the movement of goods and the sale must be inseparably connected. It is not necessary that there should be an existence of contract of sale incorporating the express or implied provision regarding inter-State movement of goods. Even if hypothetically it is stated that such a requirement is necessary in the facts of the present case such implied stipulation does exist."

There need not be an express covenant or stipulation in the contract; and also that if it can be clearly inferred from the contract that both the parties contemplated the inter-state movement of goods consequential to or as an incident of the contract, section 3(a) is attracted.

24. In **Oil India Ltd. v. The Superintendent of Taxes and Others,** [1975] 35 STC 445 (SC), Hon'ble Apex Court held as under:

> "No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another" is a sale in the course of inter-State trade". The inter- state movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the

contract. It is not necessary that the sale must precede the inter State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-state trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."

25. In **English Electric Company of India Ltd. v. The Deputy Commercial Tax officer and Others,** [1976] 38 STC 475 (SC), Hon'ble Apex Court held as under:

"When a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to dispatch the goods direct to the buyer and the goods are sent to the buyer under those instructions it would not be sale between the factory and its branch.

If there is a conceivable link between the movement of the goods and the buyer's contract, and if in the course of inter-State movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have taken place in the course of inter State trade or commerce as such a sale or purchase occasioned the movement of goods from one State to another. The presence of an intermediary, such as the seller's own representative or branch office, who initiated the contract may not make the matter different. Such an interception by a known person on behalf of the seller is the delivery State and such person's activities prior to or after the implementation of the contract may not alter the position."

26. In **South India Viscose Ltd. vs. State of Tamil Nadu,** [1981] 48 STC 232 (SC), Hon'ble Apex Court held that if there is a "conceivable link" between a contract of sale and the movement of goods from one State to another in order to discharge the obligation under the contract of sale, it must be held to be an inter-State sale and that character will not be changed on account of an interposition of an agent of the seller who may temporarily intercept the movement.

27. In **M/s ABB Ltd. vs. State of Karnataka**, SPA No.23/2010, it was admitted case of the assessee that since there were no suppliers, complying with the qualifying requirements, available in the State the assessee had to approach the KPTCL and seek their permission as mentioned earlier to procure the goods from outside the State. In view thereof it was contended on behalf of the revenue that the Contract (General Conditions) did not stipulate for movement of goods from outside the State. In other words, it was submitted that movement of goods from outside the State was not a result of the contract or incidental to the contract, since the General Conditions of Contract did not mention about inter-State vendors and, therefore, it cannot be stated that the goods were moved in pursuance of the contract.

In the given facts and circumstances, Hon'ble High Court of Karnataka observed that the movement of goods from one State to another may or may not be as a result of a covenant but definitely it was an incident of the contract.

28. In **State of Maharashtra vs. Enbee Corporation,** [1997]107 STC 196, it was observed that the word 'sale' defined in Section 2(g) of the Central Act and employed in Section 3 and other sections of the Central Act would embrace not only completed contract but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provided for movement of goods or movement of goods is not incident of contract of sale. Hon'ble Apex Court observed as under:-

"31.1 It is now well settled that if a contract of sale contains a stipulation for such movement, the sale would, of-course, be a inter-State trade. But it can also be inter-State sale even if the contract of sale does not itself provide for movement of goods from one State to another but such movement would be result of a covenant in the contract of sale or is an incident of such contract. (See Union of India Vs. Khosla and Company).

It is true, in the instant case, the contract of sale did not require or provide that goods should be moved from other States to the State of Karnataka at Bijapur.

But it is not true to say that for the purpose of Section 3(a) of the Central Act it is necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale.

A sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in goods passes.

It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement, and it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself.

It would be sufficient if the movement was in pursuance of and incidental to the contract of sale. In the present case, the movement of goods from one State to another may or may not be as a result of a covenant but definitely it was an incident of the contract."

Reference may also be made to decision in **State of Kerala v. M/s Metso Minerals India (P) Ltd.**, OT.Rev.No.143 of 2017, by Hon'ble High Court of Kerala at Ernakulam on 19th of June, 2020.

So, a sale in the course of inter-State trade has three essential ingredients :

(i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods;

(ii) the goods must actually move from one State to another pursuant to such contract of sale; the sale being the proximate cause of

movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes places independent of a contract of sale would not fall within the meaning of inter-State Sale.
For reference, decision in **State of A. P. vs. N.T.P.C. Ltd.**, AIR 2002 SC 1895.

Following factors are also of much significance in this regard:

1. There should be an agreement to sell which contains a stipulation (express or implied) regarding movement of goods from one State to another.
2. Movement of goods and the sale must be inseparably connected. For reference, decision in **CST, UP v. Bakhtawar Lal Kailash Chand Arhti**-(1992)87STC196. The movement or despatch of goods from one State to another should be under a covenant or incident of contract of sale with the buyer. (For reference, decision in **Tata Iron and Steel Co. (TISCO) v. SR Sarkar**-(1960)11STC 655(SC).
3. Even if buyer takes delivery from the seller, it can be inter-State sale if movement of goods to other State is a necessary part of transaction. For reference, decision in **Mohanlala Hargovandas v. State of MP**-(1955) 6 STC 687(SC).

## Inter-state sales and Works contract- Interse relation

"Works contract" has been defined in section 2 (1) (zo) of DVAT Act and the same reads as under :

> "Works contract" includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, creation, installation, fitting out, improvement, repair or commissioning of any movable or immovable property."

## Sale – its definition as regards works contract

As per sub-clause (v) of Section 2(1) (zc) of DVAT Act, sale includes transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

Sub-clause (b) of Article 366 (29A) of the Constitution of India and (section 2(1) (ze)(v) of the DVAT Act) have been formulated to impose a tax on transfer of property in goods involved in the execution of a works contract. These cover those contracts which are composite in nature and segregated by fiction of law so that tax can be levied on transfer of goods involved. By definitions, these pre-suppose the existence of an agreement.

Works contract, in simple terms, is a contract for carrying out certain works on any movable or immovable property of others.

In a works contract, the contractor promises to carry out some obligations like the construction of a building, fabrication of machinery, etc., in consideration of the employer promising to pay a certain amount either in cash or in the form of some other valuable consideration.

**Distinction between works contract and contract of sale**

**Where there is an agreement of sale or contract**

Whether a contract or agreement is a works contract or a sale contract or an agreement to sell, can be gathered from the intention and objects of the parties to the contract, circumstances, place of execution and usual conditions of the agreement.

**In case of an Invoice**

So far as an invoice is concerned, the question, whether sales tax is leviable in respect of a given transaction, cannot be determined from the invoice issued by the person, which simply entitled a person to receive money as per the terms of the contract, and rather this question may be determined only from the terms of the contract.

**Decisions – On the controversy, if an activity is a transaction of sale or that of works contract?**

In this regard reference may be made to the following guidelines laid down by Hon'ble Supreme Court in the case of **Hindustan Shipyard Ltd. v. State of A.P.,** (2000) 119 STC 533 (SC). The Hon'ble Court observed as under :

> a. It is difficult to lay down any rule or inflexible rule applicable alike to all transactions so as to distinguish between a contract for sale and a contract for work and labour.
>
> b. Transfer of property in goods for a price is the linchpin of the definition of 'sale'. Whether a particular contract is one of sale of goods or for work and labour depends upon the main object of the parties determined from an overview of the terms of the contract, the circumstances of the transactions and the custom of the trade. It is the substance of the contract document(s), and not merely the form, which has to be looked into. The Court may form an opinion that the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale, then it is a sale. If the primary object of the contract is the carrying out of work by bestowal of labour and services and materials are incidentally used in execution of such work then the contract is one for work and labour.
>
> c. If the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then

it is a sale. If "A" transfer property for a price in a thing in which "B" had no previous property then the contract is a contract for sale. On the other hand where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour.

**d.** The bulk of material used in construction belongs to the manufacturer who sells the end product for a price, then it is a strong pointer to a conclusion that the contract is in substance one for the sale of goods and not one for work and labour. However, the test is not decisive. If the major component of the end product is the material consumed in producing the chattel to be delivered and the skill and labour are employed for converting the main components into the end products, the skill and labour are only incidentally used and hence the delivery of the end product by the seller to the buyer would constitute a sale. On the other hand if the main object of the contract is to avail the skill and labour of the seller though some material or components may be incidentally used during the process of the end product being brought into existence by the investment of skill and labour of the supplier, the transaction would be a contract for work and labour.

Hon'ble Apex Court further opined, as under :-

"A simple illustrations may be given to demonstrate applicability of the above-said principles. A customer goes to a tailoring shop accompanied by a suit length in his hands and entrusts the same to the tailor for stitching a suit for him as per his measurements. The tailor by devoting his skill and labour stitches the suit and delivers the same to the customer. In this process the tailor utilises lining, buttons and threads of his own. The transaction would remain a contract for work and labour. The stitched suit delivered by the tailor to the customer is not a sale. It would not make any difference if the customer would have selected a piece of cloth of his own choice for a price to be paid or paid and having purchased the suit length left it with the tailor for being stitched into a suit. The property in the suit length had passed to the customer and physical possession over the suit length by the tailor thereafter was merely that of a bailee entrusted with the suit length. However, if the tailor promises to stitch and deliver the suit for a price agreed upon, investing his own cloth and stitching materials such as lining, buttons and threads, and utilising his own skill and labour then though the customer might have chosen the piece of cloth as per his own liking as to the texture, colour and quality and given his own instructions in the matter of style, the transaction would remain a contract for sale of goods, that is, a stitched suit piece in as much as the object of the contract was to transfer property in the stitched suit piece along with delivery of the suit by the tailor to the customer, all investments, whether of material or of

skill and labour having been made by the tailor incidental to the fulfilment of the contract."

In L & T vs. State of Orissa (supra), Hon'ble High Court observed that merely because the component parts were brought from different places outside Orissa and assembled in Orissa, it could not be said that it was an intra-State sale and that a colourable device was deployed to avoid paying sales tax under the OST Act. The documents placed on record clearly showed that components either manufactured in the Petitioner's own facilities outside Orissa or brought from outside Orissa were transported to Orissa for erection, testing and commissioning of the 100 TPD Rotary Kiln.

Hon'ble Court further observed that:

> "There was no occasion for the Tribunal to have gone into a lengthy discussion whether it amounted to a works contract when the focus ought to have been on whether it was an intra-State sale as contended by the State. The goods were indeed supplied in course of inter-State rate, and received by TRL in Orissa. The movement of the goods originated from outside the State. This was not an intra-Sate sale by any stretch of imagination."

29. In **Bharat Heavy Electrical Limited v. Union of India**, AIR 1996 SC 1854, Hon'ble Supreme Court examined the question whether the sales were Intra- state sales.

Hon'ble Supreme Court disagreed with the view of the Tribunal that the transaction was not an inter-State sale on the ground that the goods sent (by rail or road) did not answer the description of the goods mentioned in the annexure to the EOI/supply contract. Hon'ble Court observed as under:

"Obviously, the annexure mentions only the major items of machinery and equipment. These major items cannot be transported as such; transport has to be effected in sections and parts and assembled at the spot. For that reason, it cannot be said that the goods transported are not the goods agreed to be supplied. It is nobody's case that BHEL supplied some other goods than the goods agreed upon. Having thus erroneously excluded Section 3 of the Central Sales Tax Act, the Tribunal went to Section 4 and held that in the circumstances, the sales must be held to have taken place inside the State of Orissa. The discussion about endorsement of goods by NALCO to BHEL in Orissa and so on is rather ambiguous."

30. In **ABB Limited Vs. Commissioner of Delhi, Value Added Tax**, [2012] 55 VST 1 Delhi, as per claim of the appellant on the bona fide understanding of applicable provisions of law, the appellant submitted its return under the Delhi VAT for the tax period 01.04.05 - 31.04.05, whereby it claimed exemption from payment of VAT in respect of sale effected in the course of import (covered under Section 5(2) of the Central Sales Tax Act r/w Section 7(c) of the Delhi VAT Act) and interstate sale of Goods (subject to CST and exempted from levy of VAT under Section 3 read with Section 7(a) of the Delhi VAT Act).

The Assessing Officer, by order dated 25.11.2005 rejected the referenced exemptions claimed by the appellant and imposed Rs.45,18,484/- as VAT, Rs.3,32,258/- as interest and also imposed Rs.1,20,56,196/- as penalty.

The appellant filed an appeal under Section 74 of the DVAT and the same was rejected by an order dated 11.03.08. Aggrieved, the appellant filed appeals, under Section 76(1) of the DVAT Act to the Tribunal constituted under the Act. The appellant filed similar appeals (40 in total) in respect of demand of VAT

and imposition of penalty in respect of different assessment periods.

In ABB's case (Supra), various conditions in the contract and other related covenants between DMRC and the appellant revealed that:

(1) Specifications were spelt out by DMRC;

(2) Suppliers of the goods were approved by the DMRC;

(3) Pre-inspection of goods was mandated;

(4) The goods were custom made, for use by DMRC in its project;

(5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC;

(6) The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;

(7) DMRC issued a Certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea etc. from whom the goods were to be procured.

(8) Packed goods were especially marked as meant for DMRC's use in its project.

On the point of interpretation of section 3(a) of CST Act, Hon'ble High Court observed in the manner as :

"It was repeatedly held that the contract between the parties (DMRC and the appellant) ought to have envisaged inter-state movement of goods consequential to or as an incident of such contract. If the interstate movement of goods was within the contemplation of the parties and if a reasonable presumption can be drawn that to fulfill of the contract, such interstate movement of goods is necessary, it would fall under Section 3(a) of the Act.

Here, inter-state movement of goods was within the knowledge of DMRC, as there is a total ban of setting up/operation of heavy industry in Delhi, hence the goods can only be manufactured outside Delhi and supplied in Delhi. Furthermore, importantly, it approved 13 plants from within the country

where the equipments and goods were to be supplied. These also included the appellant's premises and factories."

In ABB's case, Hon'ble High Court further observed:

".....The present case, there can be no manner of doubt that there was a live and conceivable link between the sale and movement of goods; DMRC was aware that the goods were to be sourced from the appellant's factories, which were outside Delhi. The reference to specific locations, in the list issued by DMRC, in respect of particular equipments, which were integral to the contract, establishes that movement of those goods was clearly in the contemplation of the parties. Moreover, as noticed earlier, the goods were custom made. The only conclusion that could reasonably have been drawn was that the character of the transaction was that of inter-state sale, necessitating movement. Specific instructions, or allusions in the contract, or lack of such facts, can hardly be decisive; the intention of the contract, as gleaned from the document compels the court to draw the conclusion that inter-state sales were involved in the present case, as to attract Section 3 of the Central Sales Tax Act.

28.In exercise of its powers under Article 286(2) Parliament enacted the Central Sales Tax Act, 1956. Section 3 of the Act prescribes that a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase (a) occasions the movement of goods from one state to another; or (b) is effected by a transfer of documents of title to the goods during their movement from one state to another. Section 5(1) states that a sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or it effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. In terms of Section 3 (2), a sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India if the sale or purchase either occasions such ST. APPL. 51/2012 to 70/2012 Page 24 import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

Hon'ble High court also observed:

"In the opinion of this court, the Tribunal fell into error in assuming that no attract section 3(a) of the Act, the agreement has to expressly stipulate for inter-State movement of goods, and the fact that the performance of the contract, the appellant would have to move the goods from other States to Delhi would not suffice. In this context, in Oil India Ltd. (1975) 35 STC 445 (SC) where it was very pertinently held that "It is also not necessary for a sale

to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of an incidental to the contract of sale".

When the ABB's case came up before Hon'ble Apex Court, it was observed as under –

"Such movement of goods was within the knowledge of DMRC because there was total ban on setting up/ working of heavy industries in Delhi and the DMRC had approved 18 places within the country from where the equipments and goods had to be supplied. These included the premises and factories of the respondent also".

Hon'ble Apex Court held:

"On facts, therefore, it was rightly held by the High Court that the inter-state movement of goods was within the contemplation of the parties and it can be reasonably presumed that such movement was to fulfill the terms of the contract and therefore the transaction was covered by Section 3(a) of the CST Act.

The law on this issue was also considered by the High Court in correct perspective after noticing the case of **Tata Iron and Steel Co. Ltd. v. S.R. Sarkar** that where the goods moved from one state to another as a result of a covenant in the contract of sale it would be clearly a sale in the course of inter-state trade. The conclusion of the High Court on this issue also finds ample support from the following case laws which were noticed by the High Court:

(1) Oil India Ltd. v. The Superintendent of Taxes and Ors. (1975) 35 STC 445 (SC);

(2) English Electric Company of India Ltd. v. The Deputy Commercial Tax Officer and Others (1976) 38 STC 475 (SC) ;

(3) South India Viscose Ltd. v. State of Tamil Nadu (1981) 48 STC 232 (SC);

The salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as noticed earlier, leave us with no option but to hold that the movement of goods by way of imports or by way of inter-state trade in this case was in pursuance of the condi[illegible] an incident of the contract between the assessee and DMRC."

31. In **Tata Iron and Steel Co. Ltd. v. S.R. Sarkar & Others**, Hon'ble Supreme Court held that where the goods are moved from one State to another as a result of a covenant in the contract of sale, that would be clearly a sale in the course of inter-state trade; that even a movement of goods from one State to another, which is merely incidental to, and which is not part of the contract of sale, is also brought within the fold of Section 3(a) of the Central Act.

**Decisions – on the point of determination of terms of a Works Contract for levy of tax**

32. In **M/s. Indian Hume Pipe Co. Ltd. vs. The State of Rajasthan and Ors.**, Civil Appeal No. 9879 of 2017 decided by Hon'ble Apex Court on 28/08/2017, the question before Hon'ble Court was as to whether Works contract given to the assessee was divisible in nature, in the facts of the case, and whether the imposition of tax and penalty made under Section 7AA of the Rajasthan Sales Tax Act, 1954 was justifiable and sustainable in law.

Therein, the dispute had arisen on the following facts:

> "On August 23, 1988, a work order was issued by PHED in favour of the assessee and the assessee, under the contracts/agreement dated January 11, 1989, agreed to provide PSC pipes manufactured by it and had entered into the contracts with PHED for providing and laying of pipelines.
>
> (5) On June 28, 1989, a notification inserting Rule 10B in the Rajasthan Sales Tax Rules, 1955 granting exemption to Works contract came to be issued with retrospective effect from May 28, 1987. Another work order was placed by the respondent in favour of the assessee on July 10, 1989. Pursuant

to this, another notification dated March 04, 1992 came to be issued by the respondent wherein it exempted tax on Works contract relating to dams and canals.

The respondent issued another work order dated August 10, 1992 in favour of the assessee for commission of pipeline in a dam. Meanwhile, the assessee filed an application dated September 17, 1992 before the Commercial Tax Officer seeking exemption from paying tax. However, the same was rejected by the Commercial Tax Officer vide his order dated September 26, 1994 making it clear to the assessee that the pipes manufactured and supplied by it fall within the definition of 'sale of goods' and that the contract is divisible in nature. 75% value of the contract was treated as consideration for sale of goods.

(6) The appellate authority, Single Judge as well as the Division Bench of the High Court of Rajasthan, after dealing with merits of the case, affirmed the order passed by the Commercial Tax Officer holding that the assessee is not entitled to claim exemption under Section 7AA for supply of pipelines as that was termed as 'sale'."

Before the Hon'ble Apex Court, main thrust of the arguments advanced by counsel for the appellants was that the contract in question was a single, composite contract for laying pipelines for supply of water from dams and canals to certain cities and towns in the State of Rajasthan and it could not be treated as divisible contract. In other words, the submission on behalf of the appellants was that the contract being a single indivisible contract, it was not permissible for State to extract divisibility component therein and impose sales tax on the purported sale of goods.

Hon'ble Apex Court observed that when on the facts it was found that the works contract executed by the assessee was a divisible contract, the argument of the assessee that it was to be treated as one single and composite contract was to be rejected.

On the given facts, Hon'ble Apex Court was of the opinion that decision in **M/s Kone Elevator India Private Limited v. State of Tamil Nadu**, (2014) 7 SCC 1 was not applicable.

It was further observed by Hon'ble Apex Court in **M/s. Indian Hume Pipe Co. Ltd.'s** case that undisputedly the contract in question was a works contract and that in **M/s Larsen and Toubro Limited and Another v. State of Karnataka and Another**, (2014) 1SCC 708, the Hon'ble Court had already made it clear that the works contract is an indivisible contract, but, by legal fiction, is divided into two parts, one for the sale of goods and the other for supply of labour and services. The said dicta in **M/s Larsen and Toubro Limited's** case (supra), was affirmed by the Hon'ble Court in **M/s Kone Elevator India Private Limited's** case while summarising the legal position in the following manner:

> "37. Having dealt with the aforesaid authorities, as advised at present, we shall refer to certain authorities as to how the term "works contract" has been understood in the contextual perspective post the constitutional amendment. In Hindustan Shipyard Ltd., the Court observed that the distinction between a contract of sale and a works contract is not free from difficulty and has been the subject-matter of several judicial decisions. It is further observed that neither any straitjacket formula can be made available nor can such quick-witted tests devised as would be infallible, for it is all a question of determining the intention of the parties by culling out the same on an overall reading of the several terms and conditions of a contract. Thereafter, the two-Judge Bench set out three categories of contracts and explained the contours, namely, (i) the contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; (ii) it may be a contract for work in which the use of the materials is necessary or incidental to the execution of the work; and (iii) it may be a contract for supply of goods where some work is required to be done as incidental to the sale. Thereafter, it opined that the first contract is a composite contract consisting of two

contracts, one of which is for the sale of goods and the other is for work and labour; the second is clearly a contract for work and labour not involving sale of goods; and the third is a contract for sale where the goods are sold as chattels and the work done is merely incidental to the sale.

38. Commenting on the said decision in Larsen and Toubro, a three-Judge Bench opined that after the Forty-sixth Amendment, the thrusts laid down therein are not of much help in determining whether the contract is a works contract or a contract for sale of goods. We shall elaborate the perception as has been stated in Larsen and Toubro at a later stage.

xx xxxx

69. Considered on the touchstone of the aforesaid two Constitution Bench decisions in Builders' Assn. and Gannon Dunkerley (2, we are of the convinced opinion that the principles stated in Larsen and Toubro as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29-A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract."

33. In the case of **State of Karnataka and Others v. Pro Lab and Others**, (2015) 8 SCC 557, decision in **M/s Kone Elevator India Private Limited's** case was discussed and taken note of, in the following manner:

"22. It was also argued that photograph service can be exigible to sales tax only when the same is classifiable as works contract. For being classified as works contract the transaction under consideration has to be a composite transaction involving both goods and services. If a transaction involves only service i.e. work and labour then the same cannot be treated as works contract. It was contended that processing of photography was a contract for service simpliciter with no elements of goods at all and, therefore, Entry 25 could not be saved by taking shelter under clause (29-A) of Article 366 of the Constitution. For this proposition, umbrage under the judgment in B.C. Kame case was sought to be taken wherein this Court held that the work involving taking a photograph, developing the negative [illegible] other photographic work could not be treated as contract for sale of goods. Our attention was drawn to that portion of the judgment where the Court held that such a contract is for use of skill and labour by the photographer to bring about desired results

inasmuch as a good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, it also reflects his skill and labour.

23. Such an argument also has to be rejected for more than one reasons. In the first instance, it needs to be pointed out that the judgment in Kame case was rendered before the Forty-sixth Constitutional Amendment. Keeping this in mind, the second aspect which needs to be noted is that the dispute therein was whether there is a contract of sale of goods or a contract for service. This matter was examined in the light of law prevailing at that time, as declared in Dunkerley case as per which dominant intention of the contract was to be seen and further that such a contract was treated as not divisible. It is for this reason in BSNL and Larsen and Toubro cases, this Court specifically pointed out that Kame case would not provide an answer to the issue at hand. On the contrary, the legal position stands settled by the Constitution Bench of this Court in Kone Elevator India (P) Ltd. v. State of T.N. Following observations in that case are apt for this purpose: (SCC p. 31, para 44)

> "44. On the basis of the aforesaid elucidation, it has been deduced that a transfer of property in goods under clause (29-A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.One thing is significant to note that in Larsen and Toubro, it has been stated that after the constitutional amendment, the narrow meaning given to the term 'works contract' in Gannon Dunkerley (1) no longer survives at present. It has been observed in the said case that: (Larsen and Toubro case, SCC p.750, para 72)
>
> > '72. ... even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract, [for] the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract."
>
> It has been further held that: (Larsen and Toubro case , SCC p. 750, para 72)
>
> > '72. ... Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term "works contract" [because] nothing in Article [illegible](b) limits the term "works contract" to contract for labour and service only.'"

In para 20 of the decision in **Pro Lab's** case, Hon'ble Apex Court summarised the legal position as under:

> "20. To sum up, it follows from the reading of the aforesaid judgment in Larsen and Toubro case that after insertion of clause (29-A) in Article 366, the works contract which was indivisible one by legal fiction, altered into a contract, which is permitted to be bifurcated into two; one for "sale of goods" and the other for "services", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a sequitur, that by virtue of clause (29-A) of Article 366, the State Legislature is now empowered to segregate the goods part of the works contract and impose sales tax thereupon. It may be noted that Entry 54 of List II of Schedule VII to the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter of the State List, the State Legislature has the competency to legislate over the subject."

As per decision in **M/s. Indian Hume Pipe Co. Ltd.'s** case, by virtue of the Forty Sixth amendment to the Constitution, a single and indivisible contract is now brought on par with a contract containing two separate agreements. Therein, the Assessing Authority, after scrutinising the agreement in question between the assessee and the State Government, returned a finding of fact that manufacture and supply of PSC pipes, jointing material specials, valves, anchor blocks, etc. did not fall within the scopes of buildings, bridges, dams, roads and canals. It was also held that the agreement was clearly in two parts, namely, (i) sale and supply of PSC pipes, jointing material specials, valves, anchor blocks, etc. and (ii) the remaining part being supply of labour and services.

It is noteworthy that therein, admittedly, the assessee had no grievance against the finding that supply of pipes was nothing but the sale of pipes involved in the execution of the contracts and, therefore, it was exigible to sales tax. Hon'ble Apex Court upheld the findings recorded by the authorities below and observed that element of sale of goods shall apply to jointing material specials, valves, anchor blocks, etc. as well.

34. In **State of Karnataka vs. ECE Industries Ltd.,** [2006] 144 STC 605, Hon'ble Court observed as under –

> "The respondent-company engaged in the business of manufacture, supply and installation of lifts and elevators had its branch office at Bangalore procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory at Uttar Pradesh according to the design and specifications of the customers and the manufactured items after being tested were dismantled and dispatched to the customers place in the State of Karnataka by way of stock transfers.
>
> The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers place. After receipt of the report from intelligence wing the assessing authority reopened the assessment for the assessment years 1990-91 and 1991-92 and passed reassessment orders under section 12-A of the Karnataka Sales Tax Act, 1957 and levied penalty u/s 12-A(1-A) of the Act. The returns filed by the respondent for the years 1994-95, 1995-96 and 1996-97, were rejected and best judgment assessment was made under section 12(3) of the Act read with rule 18(1) of the Karnataka Sales Tax Rules, 1957. The respondent aggrieved by those orders filed appeals before the appellate authority but they were rejected by a common order dated December 26, 2000.
>
> Where the description of the goods is clear and the goods of that description are dispatched then the goods so dispatched can be taken as appropriated to the contract unconditionally and dispatches from one State to another to an indentified customer results inter-State sale.

Merely, because the goods are installed and commissioned in the State, it cannot be said that it is a local sale exigible to levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore, the Tribunal was justified in the coming to the conclusion that the transaction in question was not eligible to levy of tax under section 5 B of the Act."

35. Learned counsel for the appellant has referred to decision in **Centrodorstroy v. The Commissioner of Trade & Tax, UP Lucknow**, 2019-VIL-376-ALHM/s and **M/s Lasrsen& Toubro Ltd. v. State of Orissa, ST Rev. No.469 of 2008,** decided on 1.9.2021 by Hon'ble High Court of Orissa at Cuttack and **M/s. Swaraj Equipments (P) Ltd. vs. The State of Kerala**, 2018 VIL 318 Ker.

In Centrodorstroy case (supra), Hon'ble High Court of Allahabad while dealing with eligibility for the benefit of sections 3,4 and 5 of the CST Act, 1956 with respect to the deduction of turnover of cement and bitumen, purchased in the course of inter-state trade, solely for the purpose of execution of works contract inside the State, held that the benefit that was being claimed by the assessee was not by way of exemption but a claim depending on the jurisdictional issue i.e. the state legislature did not have the legislative competence to impose tax on goods being imported to the State solely for the purpose of execution of the works contract.

On same point, learned counsel for the appellant has simply referred to decision in **M/s. Swaraj Equipments (P) Ltd. vs. The State of Kerala**, 2018 VIL 318 Ker. In M/s. Swaraj

Equipments (P) Ltd.'s case, following questions cropped up before the Hon'ble High Court for consideration:

> "1. Whether the dealer who is engaged in installation and commissioning of water and sewage treatment plant, is liable to pay tax within the State, for the goods incorporated in the works contract when the said goods are transported inter-state pursuant to the contract entered into by the awardee situated within the State of Kerala?"

Therein, as per admitted facts, the dealer was engaged in installation and commissioning of water and sewage treatment plant. The dealer entered into contract with various clients, inter-alia within the State of Kerala and the work order indicated the scope of the work; which consists of design, civil, electrical and mechanical works, erection, testing and commissioning of the Effluent treatment plant and handing over the plant on a turn key basis as per the equipment/materials and technical specification. The contracts were entered into by various clients and in pursuance to the same, the dealer who had its office in Chennai, transported the materials from Chennai to the work site of the client and installed such treatment plants as also facilitate commissioning of the same.

Therein, the concerned officer took into account the various works contracts executed by the petitioner, within the State and initiated proceedings under the respective enactments for penalty.

Hon'ble High Court answered the question framed in favour of the out-of-state contractor-respondent therein and the petitioner in one of the cases.

Hon'ble High Court relied upon decision in **Builders Association of India v. UOI**, (1989) 73 STC 370, wherein it was observed that the "46th amendment does no more than making it possible for the State to levy sales tax on the price of goods and materials used in works contract as if there was a sale of such goods and materials". When there is an inter-state works contract the sale occurs only when there is an incorporation in the works. If the transfer of goods, which are incorporated in the works, are those brought from the other State, it has all the characteristics of an inter-state sale.

Reliance was also placed on decision in **Hyderabad Engineering Industries v. State of Andhra Pradesh**, (2011) 4 SCC 705.

In M/s Larsen & Toubro Ltd. v. State of Orissa's case (supra), Sales Tax Tribunal had held that the three separate contracts for supply, design and erection of 100 TPD Rotary Kiln by the Petitioner to M/s. Tata Refractories Ltd. (TRL) amounted to works contract and an intra-State sale exigible to sales tax at 4% notwithstanding that the Petitioner had paid Central Sales Tax (CST) on the same transaction.

Therein, the Petitioner and TRL entered into three separate contracts on 25th August, 1992. One was for supply of indigenous equipment including all accessories for the 100 TPD Rotary Kiln. The second was for erection, testing and commissioning of the Rotary Kiln. The third was for the system

engineering and design of the 100 TPD Rotary Kiln including all auxiliary equipment. The Rotary Kiln was to be set up in Belpahar in Orissa and the equipment was to be supplied from outside the State of Orissa. Some of the equipments were to be manufactured by the Petitioner at its factory in Maharashtra and some of them were brought from other manufacturers located outside Orissa and dispatched to TRL by way of transfer of documents with the title to the goods passing when the goods were in transit.

The STO rejected the above contentions and came to the conclusion that when the component materials and equipments were dispatched from outside the State, the property in the complete equipment had not passed yet to the buyer. It was held that the transaction fell "squarely outside the Section 3(a) of the C.S.T. Act". It was further held that the property in the Rotray Kiln passed only after successful its commissioning.

The Tribunal proceeded to discuss while discussing Section 6(2) of the CST Act and its applicability concluded as under:

> "In the absence of documentary evidence, it is established that M/s. L&T has taken delivery of goods from the common career in Orissa in course of 1st inter-State movement of goods, thereby bringing such movement to an end and thereafter delivered the goods to M/s.TRL who in his turn delivered the goods to M/s. L&T to assemble and erect the 100 Rotary Kiln and such assembly, erection etc of the equipments in a phased manner amounts to works contract and is exigible to sales tax at the rate of 4% the rate of tax applicable for goods deemed to have been sold in course of execution of works contract."

**The Controversy involved here**

Let's proceed to decide the controversy having regard to the established facts and while applying the settled law.

**Contract with BSES Rajdhani Power Limited**

36. As regards BSES Rajdhani Power Limited, it is case of the appellant that BSES Rajdhani Power Ltd. had placed purchase orders dated 18.07.2008 and 31.01.2009 respectively on the appellant. The purchaser orders contemplated design, engineering, manufacture, shop-testing, inspection, packing, supply/dispatch, loading at manufacturer's works and transportation to BRPL/BYPL site/stores of equipment required for 33/11KV/66/11 Substation at PushpVihar, BSES Rajdhani Power Ltd., New Delhi/Sonia Vihar, BSES Yamuna Power Ltd., New Delhi site/stores.

37. In the impugned assessment, Assessing Authority has observed as under:

> "7.2 Observations
>
> In view of the above purchase order and work contract order, it appears that all the above three orders are inter connected and is a work contract transaction.
> The delivery of the goods has been taken by ABB project manager at site in respect of the Invoices raised by the dealer on BSES in respect of E-1 sale as well as in respect of local sale."

38. While referring to clause 3 of the purchaser orders, it has been submitted that the purchaser order was for supply by the

appellant of such materials, manufacturing process, testing, preparation for shipment, delivery, documentation, etc.

Reference has also been made to Clause 7 of the purchase order which provides that the equipment was only to be accepted subject to receipt of material dispatch clearance certificate.

Then reference has been made to Clause 14 of the purchase order to submit that as per this Clause the equipment to be supplied by the petitioner to BSES was to be inspected by BSES and no material was to be dispatched before receipt of the material dispatch clearance certificate.

While referring to clause 16 of the purchase order, it has been submitted that the transit insurance was to be arranged by BSES.

**Relevant terms of Purchase order dated 18/7/2008 between BSES and Appellant.**

39. As per purchase order dated 18/7/2008 by BSES, scope of work was as follows :-

"As per commercial terms and conditions -

1.7 Goods shall mean all items to be provided under purchase order whether materials and equipment, as applicable.

3.1 This purchase order is for the supply by seller of such materials, manufacturing processes, testing, preparation for shipment, delivery, and documentation, as are necessary to ensure the supply of goods as detailed within the Material Registration (MR).

4.1 The contract delivery date for the goods covered under this purchase order shall be 28/2/2009. Delivery shall mean delivery at BRPL-New Delhi Stores/site.

**6.0 Delivery term & Address.**

6.1 The goods shall be delivered at site/stores on for destination basis. On the invoice the material should be consigned as mentioned in MDCC.

6.2 LR/GR shall be in the name of BSES Rajdhani Power Ltd.

**7.0 Acceptance of goods.**

7.1 Goods shall be accepted subject to receipt of material despatch clearance certificate (MDCC).

9.1 Excise duty inclusive.

10.1 Vat/Central Sales Tax is inclusive against C-Form. In case the sale of goods is covered under sale on transfer of documents (section 6(2) of CST Act, 1956).

10.2 Buyer shall furnish Form-C for the above transaction.

10.3. CST No. of BSES Rajdhani Power Ltd. – LC/89/ 8000254583/07/02, Tin No. of BSES Rajdhani Power Ltd. – 07670254583.

11.10 Octroi / Entry Tax is not applicable.

13.1 Taxes & Duties on raw materials & bought out components used for manufacture of equipment and material supplied under the scope of this PC fare included in order value and are not subject to any escalation on variation for any reason whatsoever."

**Work order dated 19/07/2008**

40. As per work order dated 19/7/2008, it was agreed between BSES and the Appellant as under :-

> "In accepting this work order, contractor agrees to furnish the goods/ do work specified in full accordance with all conditions set forth herein and / or attachments hereto. All drawings, designs, specifications and other data prepared by owner and related thereto are the property of the owner and must be returned to owner upon completion by contractor of the obligations under this work order. The information contained herein is not to be released or disclosed for any other use or purpose other than for the execution of this work order. It is important that contractor signs and returns the work order copy within three (3) days of receipt. No other form of order acceptance will be accepted. Failure to return the order acceptance does not diminish the responsibilities as set forth herein, but may result in delay to any payment(s) that may be due and may be the cause for termination of this work order."

It is significant to note that department nowhere expressed doubt about the contracts arrived at between the parties. Department also nowhere expressed that it doubted the movement of goods in the case of direct sales. At no point of time, department found that there was any collusion between the dealers to evade tax.

In view of the material on record, it has rightly been submitted on behalf of the appellant that the equipments procured under the contract were of particular technical specification and quality and that said certificate was issued by the inspecting agency of the buyer.

Invoices were also issued in the name of the contractee in respect of transactions of equipments - switch board, transformer, cable, capacitor, insulator, isolator, etc. which are designed and according to the requirements of the Sub-Station.

Therefore there is merit in the contention there was no possibility of any diversion of goods to any other party.

**Result**

As a result, there is merit in the contention is the direct sales of equipments under the Contract with BSES attract the provisions of Section 3 (a) of CST Act and therefore the same stand exempted from imposition of any tax under DVAT Act by virtue of Section 7 (a) thereof.

**Contract between appellant and NDPL**

41. As per terms of the contract between appellant and NDPL, the latter had also placed a purchase order dated 28.11.2007 on the appellant and the scope of the same pertained to design, manufacturing, testing and supply of equipment for 66/11KV Grid Sub-station at Ghevra Savdha, Delhi.

42. Learned Counsel for the appellant has submitted that as in case of BSES Contract, NDPL Contract also contemplated supply of equipment with particular specifications. In this regard, reference has been made to Clause 40 of the contract. Reference has also been made to Clause 36 of the contract which provides for pre-inspection and supply of equipment only against written Dispatch Clearance Certificate.

**Observations by Assessing Authority**

43. In the impugned assessment, Learned Assessing Authority observed in the manner as:

> "6.2 Observations
>
> In view of the above Purchase Orders, Schedule of items/quantities/rates, completion/major milestone schedule, general conditions of contract and special conditions of contract, it is observed that -
>
> - Payment clause is directly related with "mechanical completion of erection" and "completion of Acceptance Test"
> - Taking Over of the complete systems specified in the enquiry and after reconciliation & adjustment of payments, if any, towards Quantities of materials issued from purchaser's stock and consumed by the contractor.
> - Major items ordered for supply are specific goods and not standard goods, which are to be manufactured on the design and specification given by the NDPL.
> - "Material Dispatch Clearance Certificate" issued by NDPL is having the following specific clause:
>
> "The MDCC is issued as per requested quantities; however final accepted quantities shall be as utilized at site and certified by NDPL's Engineer –in-charge.
>
> The above certificate should accompany invoice for the purpose of payment and does not absolve the contractor of his responsibilities as per terms of the contract."
>
> - The goods were received at site by the ABB Site Store In charge and not by NDPL.

That in view of the above, it is a single work contract transaction and not separate transaction of (a) supply of goods and (b) erection and commissioning."

44. As per Annexure-IV, second terms and conditions of the contract arrived at between **NDPL, Delhi and the dealer** – appellant read as under :

1. **"Scope of work.**

The term supplier, vendor, contractor carry the same meaning and shall be hereinafter referred to as 'Associate'. The Associate shall satisfy himself fully with the details of the works as listed in the schedule of quantities and conditions, under which same is to be performed and they may visit site to equip themselves with all the information required for the execution of the work. Unless otherwise stated in the order.

The scope of work shall also include -

(a) supplies of such of the items required for due performance of the entire contract to NDPL's satisfaction

(b) unloading at site, storage, preservation, security and handling of items at work places till handing over,

(c) obtaining statutory clearances like electrical inspectorate, local bodies etc. in respect of execution & handing over of the works

(d) all risks comprehensive insurance for entire works for total contract value plus cost of all free issue items till handing over.

2. **Prices / Rates.**

As per CST notification NO. GSR 588€ dated 16/9/2005, it is required that declaration in **form C** shall be furnished to prescribed authority within three months after the end of the period to which the declaration or the certificate relates.

3. **Assignment or Subcontracting**

Associates shall not assign in part or otherwise any portion of this contract. No work shall be subcontracted without NDPL Engineer-in-Charge's prior written approval.

4. **Issuance of Materials etc.**

The material issued to the Associate shall be in the custody of the Associates who shall be fully responsible for the same. After completion of the works, the Associates will reconcile the material. Any cost of material which is short or damaged/ lost will be deducted from Associates bill/ deposits.

5. **Inspection**

The company reserves the right to depute their representative for inspection before dispatch. No material shall be dispatched without written material dispatch clearance certificate (MDCC) from NDPL.

6. **Test Certificates**

Supplies will be tested and five sets of duly attested/ certified copies of test certificates for respective items shall be submitted for approval and issuing MDCC. Associates, if so required by the company shall submit specified copies of test certificates and / or material analysis certificates and / or radiographic reports etc. at no extra costs. Testing agency shall be subject to NDPL's acceptable to NDPL without any extra claim on this account, otherwise suitable penalty shall be charged for non-compliance.

7. **Consignee**

Materials shall be consigned to stores-in-charge, NDPL, Keshavpuram, opposite C-2 Block, New Delhi, unless otherwise stated in the order together with copies of bills complete in all respects, challans, copies of order, packing lists, MDCC etc.

8. **Specifications**

All general & specific requirements shall be as per NDPL's tender/ enquiry documents along with Technical Specifications including any other details subsequently agreed, which shall form an integral part of the order. All specifications and drawings shall continue to be exclusive property of the company. Any copying, disclosure to other parties or use thereof for manufacturing other than this order is not permitted. All drawings and GTPs submitted for NDPL approval shall be duly approved/ commented latest within 15 days receipt."

In view of the terms and conditions of contract and other material on record, Learned Counsel for the appellant has rightly submitted that this is a case where supply was of the goods manufactured but the manufacturing site of the appellant was not in Delhi, and as such it can safely be said that the parties contemplated Inter State movement of goods.

It is significant to note that department nowhere expressed doubt about the contracts arrived at between the parties. Department also nowhere expressed that it doubted the movement of goods

in the case of direct sales. At no point of time, department found that there was any collusion between the dealers to evade tax.

In view of the material on record, it has rightly been submitted on behalf of the appellant that the equipments procured under the contract was of particular technical specification and quality and that said certificate was issued by the inspecting agency of the buyer.

Invoices were also issued in the name of the contractee in respect of transactions of equipments which are designed and according to the requirements of the Sub-Station.

Therefore there is merit in the contention there was no possibility of any diversion of goods to any other party.

Neither at the time of audit nor at the time of framing of assessments or hearing of objections, there was any material to suggest that any of the said three companies complained so or that any item was found to have actually been diverted.

**Result**

As a result, there is merit in the contention is that as noticed above in the case of contract with BSES, the direct sales of equipments under the Contract with NDPL also attract the provisions of Section 3 (a) of CST Act and therefore the same stand exempted from imposition of any tax under DVAT Act by virtue of Section 7 (a) thereof.

**Contract with Guru Gobind Singh Inder Prastha University**

45. Case of the dealer-appellant is that tender was accepted vide letter dated 18/03/2008 and formal agreement was executed between the appellant and GGSIPU on 16/06/2008, after the appellant submitted bid vide letter dated 22/11/2007.

Counsel for the appellant has submitted that as per terms and conditions of the contract appellant was to perform/carry out Electrical Substation works, Supply & installation of transformers, VCB panels, DG Sets, Cabling and Earthing work, Testing & Commissioning of entire installation.

As per contract, the work to be carried out under the contract included all labour, materials, tools, plants, equipment and transport which may be required in preparation of and for and in the full and entire execution and completion of the works.

As per relevant terms of the contract, payments were to be made as under:

> "85% after delivery of material at site and initial inspection on pro rata basis;
>
> 10% after installation on pro rata basis;
>
> 5% after testing, commissioning & handing over."

As regards payment of taxes, clause 15 of the contract provides that VAT purchase tax, turnover tax or any other tax on material, service tax in respect of this contract shall be payable

by the contractor and GGSIPU will not entertain any claim whatsoever in respect of the same.

Learned Assessing Authority, while framing assessment, observed in the manner as:

**March 2008**

"Besides above the dealer has made direct sales amounting to Rs. 49,24,182/- during the year to GGSIU from its other locations outside Delhi which has been claimed exempt u/s 7(a) of the Delhi Value Added Tax Act, 2004 and has not been shown in the returns.

Documents in respect of direct sales to GGSIU from other locations were not produced before the auditors."

**March 2009**

46. In respect of the turnover of Rs. 4,17,06,163.00/- of the month of March 2009, dealer – appellant has alleged wrong charging of tax.

As regards assessment pertaining to tax period March'2009, Learned Assessing Authority, vide Notice of Default Assessment of Tax and Interest, u/s. 32 of DVAT Act framed assessment on 18/20-09/2010 disallowed exemption claimed u/s. 7(a) & (e), in respect of sale of Rs. 4,17,06,162/- made @ 4% by the dealer-assessee to Guru Govind Singh Indra Prastha University (GGSIPU) was subjected to tax @12.5%. In this regard, Assessing Authority has observed in the assessment as under:

"It is clear from the above that the dealer has received the work contract order for supply and erection. As per section 4(1)(d) of the Delhi Value Added Tax Act, 2004, rate of tax in respect of goods involved in the execution of works contract is 12.5% except in respect of declared goods used in the same form on which VAT @ 4% is applicable.

In the above said works contract order electrical goods like generator, transformer, etc. are to be supplied and erected.

During the month of March 2009 the dealer has issued Bill No. 930000378 dated 31/03/2009 to Guru Govind Singh Indra Prastha University for Rs. 4,17,06,162.64 (basic) on which tax @ 4% amounting to Rs. 16,68,246.51 is charged instead of VAT @ 12.5%. Differential tax @ 8.5% comes to Rs. 35,45,023.82 which has been short paid by the dealer. The same is recoverable with interest and penalty."

**Contentions on behalf of appellant**

In the course of arguments, Learned Counsel for the dealer-appellant has pointed out that as regards the objections pertaining to **GGSIPU**, Learned OHA has not dealt with any of the objections filed against the assessment.

Learned Counsel for the Revenue has candidly admitted that there is no discussion in the impugned order passed by the Learned OHA as regards turn over pertaining to sales by the dealer to GGSIPU.

In this situation, this Appellate Tribunal has to find out if the assessment framed on these aspects is in accordance with law or deserves to be set aside.

47. As regards contract with GGSIPU, the submission put forth by learned counsel for the appellant is that the Genset was purchased by the dealer from Jammu to carry out the work under the above said contract and as such it is a case of inter-

state sale but the dealer wrongly deposited tax @ 4% with the Department of Tax, Jammu.

Further, it has been submitted that as regards payment of tax already made @ 4%, dealer-appellant is not claiming any refund.

The submission is that this contention has been raised only feeling necessity of a finding from this Appellate Tribunal that it being an inter-state transaction, appellant was not liable to pay any tax on the Genset and as such the assessment framed and the impugned order upholding the same deserve to be set aside.

48. In support of his contention, learned counsel for the appellant has referred to decision in **Thyseenkrupp Elevator (India) Private Ltd. vs. Assistant Commissioner of Commercial Taxes and Commissioner of Commercial Taxes**, W.P. Nos.13607/2017 decided by Hon'ble High Court of Karnataka on 24/04/2018.

49. In Thyseenkrupp Elevator (India) Private Ltd.'s case (supra), the petitioner was engaged in supply, erection and commissioning of lifts and elevators all over India. The petitioner was registered under the Karnataka Value Added Tax Act, 2003 ['KVAT Act', for short] and Central Sales Tax Act, 1956. The petitioner entered into several agreements for supply, erection and commissioning of lifts and elevators with several customers during the assessment period in question. The petitioner also

provided free maintenance service for the elevators supplied and installed at the customer's premises for a period of twelve months. The agreement/contract was split into two components i.e., [a] supply of elevator and other spare parts [b] installation, testing and commissioning of elevators.

Therein, prescribed Authority concluded the re-assessment proceeding rejecting the returns filed by the petitioner for the tax periods in question and levied tax along with consequential penalty and interest treating the transaction as works contract exigible to tax under the Karnataka Value Added Tax Act, 2003 ['KVAT Act', for short]. Aggrieved by the same, these petitions are filed.

The questions that arose for consideration in that petition were:

[a] Whether the reassessment order passed under Section 39[1] of the KVAT Act is without jurisdiction?

[b] Whether the movement of goods occasioned from Thane, Maharashtra for executing the works contract in the State of Karnataka would be construed as local sale exigible to levy of tax under the KVAT Act?

In that case, tax invoice was raised by the manufacturing unit at Thane in respect of the sale of elevator and components. The goods were moved from Thane, Maharashtra to the purchaser directly. Consignment documents placed on record substantiates the same. It was only towards the work order, payments were made to the petitioner-assessee. In this background, whether the movement of the goods from Thane, Maharashtra to Bangalore would be construed as inter-State sale

Hon'ble High Court observed as under:

> "In view of amendment to the provisions of the CST Act by Act No.20 of 2002 with effect from 11.05.2002, the States are now empowered to levy tax on inter-State works contract. However in the present case, the purchase orders are placed by the contractees/purchasers with the manufacturing unit at Thane for the purchase of lifts and elevators. Further on documentary evidence viz., specimen copy of the purchase order, supporting transporter challans, delivery documents and the tax invoice all reflect that the goods are manufactured/procured from Maharashtra and movement of goods occasioned from Maharashtra to Karnataka pursuant to issue of purchase order. From the aforesaid, it is discernable that the supply of elevators/lifts and components in the manufacturing unit at Thane, Maharashtra falls within the ambit of Section 3(a) of the CST Act i.e., occasioning movement of goods from one State to another. If so, such inter-State sales are beyond the competence of the State VAT Authorities, or in other words against the spirit of Articles 265 and 286 of the Constitution of India."

50. As already noticed, department nowhere expressed doubt about the contracts arrived at between the parties. Department also nowhere expressed that it doubted the movement of goods in the case of direct sales. At no point of time, department found that there was any collusion between the dealers to evade tax.

In view of the material on record, it has rightly been submitted on behalf of the appellant that the equipments procured under the contract were of particular technical specification and quality.

Invoices were also issued in the name of the contractee in respect of transactions of equipments which were designed according to the requirements of the University.

Therefore, there is merit in the contention there was no possibility of any diversion of goods to any other party.

**Result**

As a result, there is also merit in the contention is that the direct sales of goods under the Contract with GGSIPU also attract the provisions of Section 3 (a) of CST Act and therefore do not call for levy of tax under DVAT Act by virtue of Section 7 (a) thereof.

Assessing Authority to do the needful in accordance with law.

**Sale of Genset**

As regards the Genset, on behalf of the appellant it has been submitted that this was purchased by the dealer from a dealer carrying on business in Jammu, to carry out the work under the above said contract and as such it is a case of inter-state sale but the dealer deposited tax @ 4% with the Department of Tax, Jammu, even though wrongly. Further, it has been submitted that the dealer-appellant used "C" form issued by the dealer. The contention is that in the given facts and circumstances, assessing Authority has framed wrong assessment levying tax as regards the transaction of sale of Genset to GGSIPU.

In support of his contention, he has placed reliance on decision in **M/s. Asea Brown Boveri Ltd. v. The State of Karnataka**, STA 23/10, decided on 19/3/2014, by Hon'ble High Court of Karnataka.

In M/s. Asea Brown Boveri Ltd.'s case (supra), Hon'ble High Court referred to the decision in **Gunnon Dunkerley and Company v. State of Rajasthan** (1993) 88 STC 204 (SC).

As observed by the Supreme Court in **Gunnon Dunkerley**, if the legal fiction introduced by Article 366(29-A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract when the contract is divisible into, one for sale of goods and the other for supply of labour and services. State legislature has power to impose tax on transfer of property in goods involved in the execution of a works contract in view of Article 366(29A)(b) of the Constitution. But, it is subject to the powers under Article 286(1) of the Constitution, which prohibits the State from making a law imposing or authorizing the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. As a result of the said provision, the legislative power conferred under Entry 54 of the State list does not extend to imposing tax on a sale or purchase of goods which takes place outside the State. It is, therefore, beyond the competence of the State legislature to make a law imposing or authorizing the imposition of a tax on transfer of property which takes place in the course of inter-State trade and commerce. The State Legislature, therefore,

cannot impose any tax on such transaction, as is clear from bare perusal of Section 5-B of the Act and the definition of "taxable turnover".

**Result**

In view of the settled law, finding merit in the contention on behalf of the appellant, the assessment framed by the Assessing Authority as regards these goods i.e. the Genset, under DVAT Act, deserves to be set aside. It is ordered accordingly.

Assessing Authority to do the needful in accordance with law, but keeping in view the submission put forth by learned counsel for the appellant that the dealer-appellant shall not claim refund of the amount of tax already paid on the said goods.

**Agreement between Larsen & Toubro and the appellant**

51. Larsen & Toubro Limited entered into agreement with ABB India Limited – dealer – appellant on 18/04/2008 in which the former was represented as contractor and appellant as a Subcontractor. As per agreement, it was to commence on the receiving of the written consent by the contractor from the employer i.e. DIAL. This subcontract was also to come into existence immediately upon execution between the Contractor and the Employer of any agreement, and receipt from the Employer's Representative of any Design Order or Change Order, necessary to implement any deviation(s) from the Main Contract herein.

As per para 5 of the sub-contract, the Contractor agreed to pay the Sub-contractor the amount due and carry out its duties in accordance with the said sub-contract.

As per Appendix 5 which pertains to prices, rates and taxes, parties agreed as under:

"App5.1.4 The Subcontractor pays all other taxes, duty and like Government impositions arising from this Subcontract, and indemnifies the Contractor and the Employer against same.

For Indian Customs Duty upon Plant and Materials imported into India for the subcontract works:

1.4.1 prior to Subcontract Key Date T3-07-03.02, the Subcontractor provides to the Contractor a priced list of the Plant and Materials to be imported into India for the subcontract works, being consistent with Appendix 5 s.App5.7

1.4.2 within 6 Business Days of any such Plant and/or Materials leaving the port of shipment, the Subcontractor provides to the Contractor all of the following documents for that shipment:

1.4.2.1 Clean (on board) Bill of Lading

1.4.2.2 Commercial Invoice

1.4.2.3 Packing List

1.4.2.4 Certificate of Origin, properly authenticated at source

1.4.3 within 12 Business Days of the Subcontractor having complied with s.App5.1.4.2 in relation to a shipment:

1.4.3.1 the Contractor and the Employer execute a "high seas purchase contract" for that shipment pursuant to MCoC30.1.1, at the price shown on the Subcontractor's Commercial Invoice plus a Loading Fee Margin

1.4.3.2 the Contractor provides to the Subcontractor such documentation from the Employer as is needed for the Subcontractor to import that

shipment into India, and pay the Indian Customs duty thereon, as the agent of the Employer

1.4.3.3 should the Employer have established with all Relevant Authorities its entitlement to any concessional rate of Customs duty regarding any such shipment, but not otherwise, the Contractor provides to the Subcontractor such additional documentation from the Employer as is needed for the Subcontractor to import such shipment at such concessional rate of Customs duty

1.4.4 within 3 Business Days of the Subcontractor receiving the documentation in s.App5.1.4.3.2:

1.4.4.1 the Subcontractor verifies that such documentation from the Employer is in all respects complete and correct for importing that shipment upon payment of Customs duty at the rate asserted by the Employer - and if not, forthwith so notifying the Contractor and taking reasonable action with the Contractor and the Employer to rectify same in accordance with all Applicable Law

1.4.4.2 the Subcontractor files an Advance Bill of Entry for that shipment, as the agent of the Employer

1.4.4.3 should the Loading Fee Margin exceed 2.5% of the price shown on the Subcontractor's Commercial Invoice, then the Employer provides to the Subcontractor, through the Contractor at the Project Site, a Demand Draft payable to the Customs Dept. Government of India for the Customs Duty payable upon such Loading Fee Margin in excess of 2.5%

1.4.5 the Subcontractor pays the Indian Customs duty upon that shipment and clears it through Indian Customs, as the agent of the Employer; subject to all additional Employer's documentation regarding any concessional rate of Customs duty as App5.1.4.3.3 complying with all Applicable Law;

1.4.5.1 the Subcontractor pays only that concessional rate of Customs duty upon that shipment

1.4.5.2 the Total Value of the Subcontract is reduced by the amount of Customs duty so saved

1.4.6 subject to s.App5.1.4.3, and to s.App5.1.4.4.3 if applicable, the Subcontractor remains responsible for the timeliness, cost and risk of the shipment's delivery to the Project Site and of the subcontract works as a whole

App5.1.5 The Subcontractor provides to the Contractor for the Employer details of procurements made within Delhi showing the Value-Added Tax ("VAT") paid on such purchases. The Subcontractor provides CENVAT invoices to the Contractor for the Employer.

App5A.1.6 The Subcontractor complies with MCoC 30.1.2. The Subcontractor marks the Contractor (Larsen & Toubro Limited) as the Consignee on all export documents, for instance, the Bill of Lading, Invoice etc."

52. In the assessment framed, learned Assessing Authority as regards other direct sales amounting to Rs. 9,73,50,902/- observed that the same were stated to have been made **to L & T** by the assessee from its other locations outside Delhi, and in respect there of exemption was claimed u/s. 7(a) of DVAT Act, but the said sales had not been shown in the returns.

Learned Assessing Authority observed as under:

"Documents in respect of direct sales to NDPL (sic) from other locations were not produced before the auditors for their audit therefore above turnover is liable to be taxed.

Vide letter No. 6023 dt. 17/03/2010 the dealer was given an opportunity to offer comments and explanation on the above observations of the Auditors but the dealer vide its letter dated 01/04/2010 submitted in the office on 08/04/2010, simply stated that the views expressed by the Learned Auditors are redundant as under any circumstances they are subject to the order of Hon'ble VAT Tribunal.

The dealer further stated that on the other issues, they have no comments to offer and they would respond to them as and when the Department adopts the said observations of the auditors.

Since the dealer has not offered any explanations/comments in the matter despite of opportunity given to them, I have no option but to rely upon the report of the auditors."

In respect of the above said turnover of Rs. 9,73,50,902/-, pertaining to March 2009, it has been contended on behalf of the appellant that these sales were shown by the units of the dealer in the returns furnished at Nasik and as such were not required to as such shown in Delhi.

53. So far as said turnover of the dealer-appellant is concerned, it is stated to be based on tripartite agreement between the dealer-appellant, Larson &Turbo and Dial.

**Contentions**

54. Learned Counsel for the dealer-appellant has submitted that the status of the dealer-appellant was of a sub contractor in relation to Larson and Turbo i.e. is the contractor and the third party to the agreement, namely, DIAL was the employer.

Learned Counsel for the appellant has submitted that this is a case of indivisible contract whereby the dealer-appellant was to import goods specified therein from ABB China and accordingly the dealer-appellant imported the said goods, but in the bill of entry, name of DIAL was recorded in the relevant column as the importer; and that inspection of the goods to be imported was done in China, and as such the dealer-appellant was entitled to exemption in view of provision of Section 7(a) of DVAT Act and Section 5(2) of CST Act.

55. In support of his contentions, Learned counsel has referred to the decision in **M/s. Vellanki Frame Works v. The Commercial Tax Officer, Visakapatnam** in Civil Appeal No. 1322-1323 of 2019 decided by Hon'ble Apex Court on 13/01/2021.

In **M/s. Vellanki Frame Works v. The Commercial Tax Officer**, Visakhapatnam, all the transactions for supply of timber from a foreign country and were alleged to have been executed in similar fashion. The supplier (party number 1) sold the goods in question to the first buyer (party number 2) and delivered them at the port of shipment. Thereafter, while the goods were in transit on high seas, party number 2 transferred the goods to the appellant (who was invariably party number 3 in these transactions) by endorsing the bill of lading in favour of the appellant. Further to this and while the goods were on high seas, the appellant allegedly transferred them to the end-buyer (party number 4) by endorsing the bill of lading in favour of the end-buyer. However, in each of these transactions, when the goods in question reached the port at Visakhapatnam (also known as Vizag), the appellant carried out the proceedings envisaged by the Customs Act, 1962 and filed a bill of entry for warehousing and thereafter, filed another bill of entry for home consumption (ex-bond). Accordingly and on the basis of such bills of entry, the appellant was duly assessed for customs duty. The appellant later on raised debit notes on the end-buyers.

With reference to the aforementioned transactions and the high seas sale agreements, the case of appellant was that it had only acted as an agent of the end-buyers, while filing the bills of entry; and the sales of the goods in question to the end-buyers, being the sales taking place in the course of import of goods into the territory of India, were eligible for exemption from payment of sales tax by virtue of section 5(2) of the CST Act. However, in the assessment orders dated 20/1/2010 and 18/5/2010, the CTO denied the benefit of exemption to the appellant, particularly for the reason that the appellant cleared the goods from the customs after filing the bills of entry and later on raised debit notes, showing sales to the end-buyers. The CTO held that the goods in question had crossed the customs frontiers of India when the bills of entry were filed by the appellant and the goods were assessed to customs duty and hence, the sales effected by the appellant to the end-buyers could not be said to be high sea sales.

The question before the Hon'ble Apex Court was if the appellant therein had acted merely as an intermediary or name-lender through whom the import was effected or merely acted as an agent for and on behalf of the Indian importer that is, the end buyer.

Hon'ble Apex Court observed that as per facts in relation to the goods in question, only the appellant filled the bill of entry for warehouse as also the bill of entry for home consumption and was assessed to customs duty. There was no suggestion before

the Custom Authorities that the goods in question had already been transferred on high seas, to the alleged real importer.

Hon'ble Apex Court, while narrating the process of import, observed in the manner as :

> "Significantly, in the process of importation, the importer, in relation to any goods, includes any owner or any other person holding himself to be the importer but, only between the time their importation and their clearance for him consumption.
>
> In other words, the net result of the expanded definition of the expression "importer" is that while any person who imports goods into India wo0uld be an importer but, the owner of the goods or a person holding himself to be an importer would also be regarded as an importer during the period between importation of goods and their clearance for home consumption.
>
> This crucial period would generally be that period when the goods have been warehoused after importation and fare cleared from warehouse by a person other than the person who actually imported the goods. That being the position, in our view, the High Court has rightly said that this definition of importer cannot be used to usurp the identity of an importer from the person who filed the bill of entry. In other words, the person in whose name the bill of entry is filed does not cease to be an importer and, if that person claims to be not the owner or importer, the onus would be heavy on him to establish that someone else is the owner or importer of goods."

In para 32.1 Hon'ble Apex Court observed that though the appellant had suggested that the bills of lading were endorsed in favour of Radha (and other end-buyers) when goods were in high seas but this bald assertion was not corroborated by any of the official documents which form the part of the process of importation, warehousing and clearance of goods. There, Hon'ble High Court had found that in the bill of entry, the name of appellant alone was shown as the importer who cleared the

goods from customs with the assistance of the Customs House Agent.

Hon'ble Apex Court, in the given facts, observed that if the goods were at all sold to Radha (and other end buyers) on high seas, the name of such end-buyer would have appeared as importer and not that of the appellant.

While dealing with the question as to whether sale had occasioned the imports of goods, Hon'ble Apex Court referred to observation made by CTO, and that the overall dealings indicated that the attempt on the part of the appellant had only been to distort the facts and by alleging multiple transactions, to somehow avoid the operation of law relating to Central Sales Tax.

56. Here, in the case at hand, in the bill of entry ultimately name of DIAL was recorded even though the appellant was shown as the original importer. In the given facts and circumstances of this case, and applying the settled law, the department has wrongly levied tax as regards the transaction of high sea sales.

**Whether import and supply of goods integral part or otherwise?**

57. In **Indure Limited Vs. C.T.O. and Ors.,** 2010 (9) SCC 461, the questions that fell for consideration of Hon'ble Supreme Court were as to whether import of MS Pipes by the respondents was pursuant to term of contracts between appellant No. 1 and National Thermal Power Corporation Limited (for short

"NTPC"), and as to whether import of said M.S. Pipes and supply thereof by appellant No. 1 to NTPC constituted integral and inseparable part of contracts between them.

Hon'ble Apex Court held that there was no reason why it was denied in respect of MS Pipes. Therein it was observed that import had been occasioned only on account of the covenant entered into between the assessee and NTPC and the imported pipes were used exclusively for erection and commissioning of the plant; and further that the revenue, in that case, had failed to establish that those pipes were not used in the plant of NTPC.

58. Here, in this case, keeping in view, the contracts between the three parties i.e. appellant, L&T and DIAL and the contents of Bill of Entry dated 19/12/2008, it can safely be said that this is a case of High Sea Sales where in terms of the contract the appellant as an agent imported the subject goods and those goods were meant for DIAL, even though the appellant acted as sub-contractor of L&T.

Movement of goods throughout was integrally connected with the contract for their supply.

Department has not disputed the agreements of sale relied on by the appellant. Factum of import is also not in dispute. It is also not in dispute that the transactions as per agreements occasioned import of the goods.

In the given facts and circumstances, as the transactions occasioned import of these goods for DIAL, it stands established that the transaction of these goods took place in the course of import of the goods into the territory of India, attracting provisions of Section 5(2) of CST Act.

Consequently, the observation made by Assessing Authority that the high seas sales were in relation to a consolidated works contract order and payment terms were related with erection and commissioning, clearing of goods deserve to be set aside.

In view of the terms of condition of the contracts and contents of Bill of Entry, it cannot be said that this is a case of an arrangement made by the parties against the provisions of law. Rather the appellant was entitled to, and it has taken, advantage of the provisions of CST Act. Neither in the assessments framed nor in the impugned order, it has been opined to be a case of collusion between the parties.

In the given facts and circumstances, it cannot be said that the property in goods covered by the entire works contract was to pass only during the course of execution of work contract and not at any earlier stage.

**Result**

As a result, observations made by Learned Assessing Authority while framing assessment in this regard are set aside.

**Direct Sales - Discussion on additional common points**

As noticed above, learned OHA has dealt with the point of inter-state sales (Direct) by observing that the items supplied by the objector to the three companies, named above, were not consumer specific and specifications could be common to many other operators involved into similar business and as such, in the opinion of OHA, there was feasibility for diversion.

On these observations of Learned OHA, record reveals that the goods supplied by the appellant-assessee to the 3 companies were specific.

Neither at the time of audit nor at the time of framing of assessments or hearing of objections, there was any material to suggest that any of the said three companies complained so or that any item was found to have actually been diverted.

Contracts were arrived at between the parties. Relevant terms of contracts have been reproduced above, for ready reference. Certificates were issued regarding supply of the items in terms of the contracts and purchase orders. Invoices were issued in the name of the respective buying company. There is nothing to suggest that the audit team noticed that any item agreed to be supplied was not supplied to the companies.

When the supplier-appellant had also agreed for fabrication, installation and operationalization of equipments, same ruled out possibility of diversion of any of the goods. Provision regarding

grant of damage by the supplying dealer in case of loss of property cannot be said to be a ground for rejecting the contracts between the parties or supply of goods in performance thereof.

Even if Assessing Authority is said to have observed that the items were handed over to the beneficiary at site after installation and commissioning, it cannot be said that no such transaction of supply of goods and installation thereof at the site did take place. There is nothing on record to suggest that none of the goods, which were subject matter of the contracts, was supplied by the dealer-appellant to the three companies. No material regarding any kind of litigation between the appellant and the buying dealers was produced or brought to the notice of Assessing Authority or OHA.

The findings recorded by Learned OHA that there was no evidence regarding issuance of certificate is not based on record. Record reveals that specific terms were there for issuance of certificates by the buying dealers in case of sales made to NDPL, BSES and DIAL.

In view of the contracts, noticed above, opinion of OHA that privity of contract between the supplier and the user was not firmly established, is against record.

As regards the observation by OHA that the contractees in these cases had not been specified the suppliers, and/objector had not been specifically asked to make the procurements from

outstation suppliers, and as a result of possibility of diversion of goods could not be overruled, suffice it to say that in view of the settled law as per the decisions cited above, procurement of goods from outstation suppliers was incidental. Department has not brought on record any material to suggest that any of the items procured from outstation suppliers was available with the dealer in Delhi or that the appellant procured the same from outstation suppliers for the purposes of evasion of tax under DVAT Act. It is also significant to note that none of the terms of contract(s) provided that the goods ordered were to be procured only from Delhi. No material has been placed on record by the department to suggest that any of the three buying dealers ever complained that any of the goods supplied was not in consonance with the terms of the contract or as per orders placed or that any of the goods was returned by them to the dealer on this ground.

As regards observation of Learned OHA that the goods dispatched on behalf of ABB were also found to be received after inter-State movement by ABB itself, and his having arrived at the conclusion that the inter-State sales were for all practical purposes from ABB to ABB, simply from factum of receipt of any such item by the appellant at the site, no such finding could be recorded, particularly when the goods admittedly arrived at the site(s) from other states and were installed there in the performance of the contracts.

No material was relied on by the department to suggest or observe at the time of framing of assessments or while deciding the objections that at any point any of the three companies lodged any complaint or grievance with the dealer-appellant that such and such item ordered by them was not installed in terms of the contract(s).

In view of
~~From~~ the material available on record, OHA did not arrive at correct finding when he observed that that any of these transactions did not satisfy the conditions highlighted by the Hon'ble High Court of Delhi in the case of ABB i.e. of the appellant which related to transactions with DMRC, for the period of 2005-06.

As regards application of the provisions of DVAT Act and rule 3 of DVAT Rules qua works contract, there is merit in the submission put forth by counsel for the appellant that a works contract, where ultimately there is change in the shape/form of the goods before their installation, would be distinguishable from a works contract where there is no change at all in the shape or form of the goods sold before their incorporation in the works contract.

For example, in a case of civil works contract for construction of a wall, when bricks and other material is sold to 'A', for the purpose of assessment of valuation the relevant time is the time of incorporation of the goods in the works contract i.e. when the

wall is built. Such a case would be a case of change in the form or shape of the goods sold, as regards a civil works contract.

This is a case of Instate-sales where goods were procured by the appellant from its own units situated out of Delhi and sold to the companies situated in Delhi, in terms of the contract, which also provided for work of installation of the goods as directed by the contractees.

Furthermore, this is not a case where department has come up with the version that any change took place in the form or shape of the goods after their purchase or sale and before their incorporation in the works contract.

In the given facts and circumstances, in view of applicability of provisions of CST Act, provisions of DVAT Act or rule 3 of DVAT Rules do not come into application.

In view of the facts established and applying the settled law referred to above, Learned OHA fell in error while holding that the requirements of Section 3 of CST Act were not satisfied in respect of these transactions.

**Result**

As a result, the impugned order whereby Learned OHA upheld the assessments inferring that the objector dealer was not entitled to exemption under section 7 of DVAT Act read with section 3 of CST Act for vendors (other than DMRC ) and

approved disallowance of the exemptions on the inter state sale, deserves to be set aside. I order accordingly. Assessing Authority to take steps in accordance with law.

**Inter-state Transit Sales (u/s 3[b] of DVAT Act)**

59. Dealer – appellant has described the following turnover of transactions which are stated to have taken place in the course of inter-State trade or commerce, as under:

| Months | NDPL/BSES E-1 Sales-3[b] |
|---|---|
| | Turnover |
| | |
| May'07 | 4,76,233.00 |
| Sept'07 | 24,48,701.00 |
| Jan'08 | 20,42,400.00 |
| March'08 | 33,05,030.00 |
| | |
| April'08 | 4,86,67,400.00 |
| May'08 | 66,74,795.00 |
| June'08 | 88,42,900.00 |
| Nov.'08 | 42,73,999.00 |
| Feb.'09 | 3,74,91,424.00 |
| | |
| **Total-07-08/-8-09** | **11,42,22,882.00** |

***Observations made by Learned OHA on the point of Transit sales***

Learned OHA while disposing of objections on this aspect observed as:

"Certain transit sales were also made by the objector dealer for NDPL/ BSES. The contentions of the counsel that these were in pursuance of the contract with the NDPL was examined. It was observed that delivery of the goods was taken by the objector dealer itself and transit sale transaction was not complete as property in goods was effected by transfer of documents of title of the goods while the goods were not in transit.

It was already predetermined that the goods were to be transferred to NDPL/BSES. Hence the transfer of goods by transfer of documents was predetermined and not effected in course of transit.

In case of works contract the title of goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods while the goods are in transit from one state to another, unless the property in goods passes by transfer of document of title to the goods, provisions of section 3(b) cannot be applied. The conditions are not satisfied in this case. In view of the above the rejection of exemption by the AA is upheld on this account."

**Contentions on behalf of the parties**

60. Counsel for the appellant has submitted that the sales made by the dealer – appellant by transfer of documents of title during transit are supported by C-forms+E1 forms; that these items were purchased by the dealer – appellant from the seller outside Delhi and sold in transit by issuing invoice directly in the name of the contractees – NDPL &BSES – Electrical Generation Companies and declared in the returns filed under DVAT Act and CST Act; that since there was privity of contract, an inextricable link between the supply and use of the goods in the works contract by way of inter-State sale, these transactions of transit sales against C+E1 forms were exempt from tax as provided u/s 7 of the DVAT Act.

61. Learned counsel for the appellant has submitted that deductions claimed in the return on account of sale in transit u/s 3(b) of CST Act has been wrongly disallowed and further that even learned OHA has wrongly upheld the assessment framed in this regard. Reference has been made to the provisions of section 3(b) of CST Act to point out that for the applicability of this provision, the dealer was required to prove that it was a case of inter-State movements of goods and the goods were transferred, by way of transfer of documents of title, while the goods were still in movement from one State to other, and the dealer established the same.

Learned counsel for the appellant has contended that whereas the Assessing Authority was of the view that this is a case where *property in goods passed when the goods were used in the works contract*, learned OHA observed that property in the goods was transferred while the goods were *not in transit*.

Learned counsel has further contended that since it was a case of inter-State movement of goods, as provided u/s 7(a) of DVAT Act, these goods could not be subjected to VAT under DVAT Act.

62. Learned counsel for the dealer-appellant contended that the disputed demand has been raised by the revenue by adding/ calculating turnover pertaining to "supply of goods" which is

not exigible to tax as per provisions of Section 7(a) of DVAT Act and Section 3(b) of CST Act.

Learned counsel has further submitted that the disputed turnover taken into consideration by the revenue, pertains to sale by transfer of documents of title in the course of inter-State trade, and as such exempted from tax, but the revenue has illegally levied tax on this turnover.

63. While referring to the observations made by learned OHA in the impugned order that the transfer of goods by way of transfer of documents was predetermined and not effected in the course of transit, learned counsel for the dealer-appellant has submitted that it is a case of two separate transactions, and not of only single transaction and that as regards turnover for "supply of goods" against 'C' Forms, dealer-appellant was entitled to exemption from tax.

On behalf of the appellant, it has been contended that even though it is case of the appellant that there were two separate contracts i.e. one for supply and the other for services, the theory of accretion is not relevant or applicable even in a case of works contract; and further that accretion theory may be applicable in case of work contract where ultimately there is change in the shape/form of the goods, not in a case like the present one where there was no change in the form or shape of the goods after their purchase.

In support of this contention learned counsel has referred to decision in **Builders Association of India and Ors. v. Union of India (UIO) and Ors**, 73 STC 370; **M/s Kone Elevator India Private Limited v. State of Tamil Nadu**, (2014) 7 SCC 1; **State of Kerala v. M/s. Metso Minerals India (P) Ltd.**, OT.Rev.No.143 of 2017, decided by Hon'ble High Court of Kerala on 22/06/2020; **M/s Swaraj Equipments (P) Ltd. vs. The State of Kerala, Represented by Secretary to Government, Department of Commercial Taxes, Secretariat, Thiruvananthapuram**, 2018-VIL-318-KER, decided by Hon'ble High Court of Kerala.

Ultimately, Learned Counsel for the appellant has urged that in view of the above decisions the turnover of the subject transactions as regards supply of goods was not exigible to tax on the ground that in case of work contract property passes only at the time of incorporation of the goods in the works contract.

**Contention on behalf of Revenue**

64. On the other hand, learned counsel for the revenue has contended that this is a case of indivisible and single works contract, and learned OHA has rightly upheld the assessments made by the Assessing Authority.

***Per Contra***

In reply, learned counsel for the appellant has contended that even if it be assumed to be a case of works contract, and not

divisible one, the dealer – appellant was not liable to pay any tax in view of the provisions of section 6 (2) of CST Act.

**Discussion**

***(As regards Inter-state Transit sales to NDPL and BSES)***

In the assessment framed, learned Assessing Authority has observed that dealer supplied various goods to NDPL on E-1 sales basis but it was found that delivery of goods was taken at the site by ABB itself and that payment terms were directly linked with erection and installation. As further observed by the Assessing Authority, even sale transaction was not complete as property in the goods was not transferred by transfer of goods while goods were in transit.

In this regard, Assessing Authority referred to the provisions of Section 3(b) of CST Act, which stipulate that any sale effected by transfer of document of title of the goods, while goods are in transit from one state to another is also an inter-state sale and exempt from payment of tax under section 6(2) of the CST Act.

But, as regards contract with **NDPL & E-1 sales**, learned Assessing Authority observed as under:

> "However, in case of works contract, the property in goods passes as and when goods are used in works contract. Section 3(b) of the CST Act provides for passing of property in goods by transfer of document of title of the goods. Unless, the property in goods passes by transfer of document of title to the goods, while it is in transit from one state to another, the provision of section 3(b) cannot be applied and exemption from payment of tax cannot be claimed."

65. As regards E-1 sales by the dealer-appellant to **BSES**, learned Assessing Authority observed in the assessment framed that:

"In respect of E-1 sale, the documents like invoice, GR etc. Does not have any proof that the property in goods have been transferred to BSES during the movement of the goods. On GR' stamps and signature of ABB Limited project manager clearly shows that the delivery of goods has been taken by ABB Limited and not by BSES.

For Example in respect of ABB sales invoice No. 930700008 dated 25/02/2009 for Rs. 3,30,10,000/- ABB Limited purchased the goods from Voltamp Transformers Ltd. Vadodara vide Invoice No. 09/R2550 dated 13/02/2009 and goods were dispatched from Vadodara through Delhi HowraRoadlinesPvt. Ltd.

It is clear from the reverse side of GR No. 2341 dated 13/02/2009 of M/s Delhi Howra Roadlines Pvt. Ltd, in respect of above sale transaction, one Mr. Ritesh Kumar Sharma site Incharge of ABB Limited, has received the goods.

Another stamp_

"*Material received & handed over to M/s ABB Limited for erection*
For BSES"

does not bear any signature of BSES officials.

In the fact and circumstances it cannot be said that it is a sale by transfer of document as per section 3 of CST Act."

**Observations by Assessing Authority**

As noticed above, the Assessing Authority observed while framing assessment on this point of transit sales between the dealer-appellant and NDPL as well as BSES that delivery of the goods was taken by the objector dealer itself and transit sale transaction was not complete as property in goods was effected by transfer of documents of title of the goods while the goods were not in transit.

Another ground put forth by the Assessing Authority for rejection of this claim of the dealer was that it was already predetermined that the goods were to be transferred to NDPL/BSES and as such the said transactions could not be said to have been effected in course of transit

**OHA upholds the assessment**

While upholding the impugned assessment on this point, learned OHA further observed that in case of works contract the title of goods passes as and when goods are used in works contract, and as such that in this case provisions of section 3(b) of CST Act were not applicable.

**Discussion**

66. Relevant part of Section 6 (2) of CSTAct reads as under:

> "Notwithstanding anything contained in sub-section (1) or sub-section (1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods,-
>
> (A) to the Government, or
>
> (B) to a registered dealer other than the Government, if the goods are of the description referred to in sub-section (3) of section 8,
>
> shall be exempt from tax under the Act."

67. In view of provisions of Section 3 of CST Act, a sale or purchase shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-

> (a) occasions the movement of goods from one State to another; or
> *(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.*

Explanation 1 to Section 3 of CST Act provides that where the goods are delivered to a carrier or other bailee for transmission, the movement of the goods, for the purpose of clause (b) above,

shall commence at the time of delivery and shall terminate when delivery is taken from such carrier or bailee.

Explanation II to Section 3 of the CST Act provides that merely the goods passing through some other State, if the delivery commences and terminates in the same State, shall not amount to inter-State sale.

Expression **"occasions the movement"** appearing in Section 3(a) of CST Act means goods moved by reasons of sale and it shall be associated with the transfer of property from seller to the buyer, as defined in the Sale of Goods Act.

So, it is necessary that the goods should have moved from one State to another in pursuance to a contract of sale (**Indian Oil Corporation vs. U.O.I.**, (1981) 47 STC 001 (SC)). It is not necessary that movement of the goods must be specifically in accordance with the terms of contract. In other words, it may be even implied (**U.O.I. vs. K.G. Khosla & Co.**, (1979) 43 STC 457 (SC)).

In **Balabhadas vs. State of Orissa**, (1976) 37 STC 207 (SC), Hon'ble Apex Court pointed out following conditions to treat a sale as an inter-State sale:

> "(a) There is an agreement to sell which contains a stipulation, express or implied regarding the movement of the goods from one State to another;
>
> (b) In pursuance of the said contract, the goods in fact moved from one State to another; and

(c) Ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods moved."

As noticed above, expression **"occasions the movement"** appearing in Section 3(a) of CST Act means goods moved by reasons of sale and it shall be associated with the transfer of property from seller to the buyer, as defined in the Sale of Goods Act.

68. Herein, even if Assessing Authority is said to have observed that the items were handed over to the beneficiary at site after installation and commissioning, it cannot be said that no such transaction of supply of goods and installation thereof at the site did take place. There is nothing on record to suggest that none the goods, which were subject matter of the contracts, was supplied by the dealer-appellant to the two companies-NDPL and BSES. No material regarding any kind of litigation between the appellant and the buying dealers on this aspect, was produced or brought to the notice of Assessing Authority of OHA.

In view of the terms and conditions of contract and other material on record, Learned Counsel for the appellant has rightly submitted that this is a case where supply was of the goods manufactured by companies situated outside Delhi and the manufacturing site was not in Delhi, and as such it can safely be said that the parties contemplated Inter-State movement of goods.

It is significant to note that department nowhere expressed doubt about the contracts arrived at between the parties. Department

also nowhere expressed that it doubted the movement of goods on sale by the supplying dealers from out of Delhi, to Delhi. At no point of time, department found that there was any collusion between the dealers to evade tax.

Invoices were also issued in the name of the contractee in respect of transactions of goods which were designed according to the requirements of the Sub-Stations.

In the given situation, possibility of any diversion of goods to any other party stood ruled out.

Even otherwise, neither at the time of audit nor at the time of framing of assessments or hearing of objections, there was any material to suggest that any of the said two companies complained so or that any item was found to have actually been diverted.

On the point of controversy about the time of exigibility of inter-state sales transactions to tax, particularly in a case of Works contract, at this stage, reference may be made to decision in **State of Karnataka vs. ECE Industries Ltd.,** [2006] 144 STC 605 (supra), wherein Hon'ble Court observed as under –

> "The respondent-company engaged in the business of manufacture, supply and installation of lifts and elevators had its branch office at Bangalore procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory at Uttar Pradesh according to the design and specifications of the customers and the manufactured items after being tested were dismantled and despatched to the customers place in the State of Karnataka by way of stock transfers.

The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers place. After receipt of the report from intelligence wing the assessing authority reopened the assessment for the assessment years 1990-91 and 1991-92 and passed reassessment orders under section 12-A of the Karnataka Sales Tax Act, 1957 and levied penalty u/s 12-A(1-A) of the Act. The returns filed by the respondent for the years 1994-95, 1995-96 and 1996-97, were rejected and best judgment assessment was made under section 12(3) of the Act read with rule 18(1) of the Karnataka Sales Tax Rules, 1957. The respondent aggrieved by those orders filed appeals before the appellate authority but they were rejected by a common order dated December 26, 2000.

Where the description of the goods is clear and the goods of that description are dispatched then the goods so dispatched can be taken as appropriated to the contract unconditionally and dispatches from one State to another to an indentified customer result in inter-State sale.

Merely, because the goods are installed and commissioned in the State, it cannot be said that it is a local sale exigibleto levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore, the Tribunal was justified in the coming to the conclusion that the transaction in question was not eligible to levy of tax under section 5 B of the Act."

In **Centrodorstroy v. The Commissioner of Trade & Tax, UP Lucknow**, 2019-VIL-376-ALHM/s Hon'ble High Court of Allahabad, while dealing with eligibility for the benefit of sections 3,4 and 5 of the CST Act, 1956 with respect to the deduction of turnover of cement and bitumen, purchased in the course of inter-state trade, solely for the purpose of execution of works contract inside the State, held that the benefit that was being claimed by the assessee was not by way of exemption but a claim depending on the jurisdictional issue i.e. the state legislature did not have the legislative competence to impose

tax on goods being imported to the State solely for the purpose of execution of the works contract.

On same point in **M/s. Swaraj Equipments (P) Ltd. vs. The State of Kerala**, 2018 VIL 318 Ker following questions cropped up before the Hon'ble High Court for consideration:

> "1. Whether the dealer who is engaged in installation and commissioning of water and sewage treatment plant, is liable to pay tax within the State, for the goods incorporated in the works contract when the said goods are transported inter-state pursuant to the contract entered into by the awardee situated within the State of Kerala?"

Therein, as per admitted facts, the dealer was engaged in installation and commissioning of water and sewage treatment plant. The dealer entered into contract with various clients, inter-alia within the State of Kerala and the work order indicated the scope of the work; which consists of design, civil, electrical and mechanical works, erection, testing and commissioning of the Effluent treatment plant and handing over the plant on a turn key basis as per the equipment/materials and technical specification. The contracts were entered into by various clients and in pursuance to the same, the dealer who had its office in Chennai, transported the materials from Chennai to the work site of the client and installed such treatment plants as also facilitate commissioning of the same.

Therein, the concerned officer took into account the various works contracts executed by the petitioner, within the State and initiated proceedings under the respective enactments for penalty.

Therein, Hon'ble High Court answered the question framed in favour of the out-of-state contractor-respondent therein and the petitioner in one of the cases.

Reference may also be made to decision in **ABB Ltd. v. The Commissioner, Delhi Value Added Tax**, ST.APPL. 51/2012 & others, decided by our own Hon'ble High Court on 28/09/2012.

69. Applying the above decisions to the admitted and proved facts of present case, as noticed above, it can safely be said that these transactions termed by the appellant as "transit sales" actually fall within the ambit of "inter-state sales" i.e. under section 3(a) of CST Act, and as such provisions of DVAT Act dealing with transactions of Works contract do not apply.

I find merit in the submission put forth by counsel for the appellant that a works contract where ultimately there is change in the shape/form of the goods before their installation, would be distinguishable from a works contract where there is no change at all in the shape or form of the goods sold before their incorporation in the works contract.

As already illustrated above, in a case of civil works contract for construction of a wall, when bricks and other material is sold to 'A', for the assessment of valuation the relevant time is the time of incorporation of the goods in the works contract i.e. when the wall is built. Such a case would be a case of change in the form or shape of the goods sold, as regards a civil works contract.

But the transactions being discussed under this heading are not such where any change in the form or shape of the goods sold or supplied by the appellant to the two Electricity Distributing companies took place before the same were installed at the site(s).

In view of the above discussion, the transactions -subject matter of discussion under this heading, are of Interstatesales where goods were procured by the appellant from the suppliers situated out of Delhi and sold to the companies situated in Delhi, in terms of the contract, which also provided for work of installation of the goods as directed by the two contractees.

Furthermore, this is not a case where department has come up with the version that any change took place in the form or shape of the goods after their purchase or sale and before their incorporation in the works contract.

Therefore, provisions of DVAT Act or DVAT rules pertaining to works contract and valuation of the goods as the same were at the time of incorporation of goods in the works contract do not apply to the present transactions.

**Not a case of Transit Sales under sec. 3(b) of CST Act.**

In view of the terms of the contracts between the parties i.e. BSES and NDPL and the appellant, coupled with the factum of movement of goods from outside Delhi, to Delhi, for supply to the said two companies, for being installed at the respective site

in Delhi, there is merit in the contention raised on behalf of the Revenue that this is a case of these transactions with the two companies where sale and purchase of the goods was predetermined and there was no occasion for transfer of documents of title by the appellant in favour of said two companies while the goods were in movement. In other words, these transactions cannot be termed to be transactions falling within the ambit of clause (b) of Section 3 of CST Act.

Rather, these transactions can safely be termed to be transactions of inter-state sales falling within the ambit of clause (a) of Section 3 of CST Act. Therefore, there is no merit in the claim of the appellant as regards application of provisions of section 3(b) of the Act.

**Result**

Since these transactions of sales fall under section 3(a) of CST Act, same stand exempted from imposition of any tax under DVAT Act by virtue of Section 7 (a) of DVAT Act.
Assessing Authority to do the needful accordingly, as per law.

**Agreement regarding High Seas Sales between appellant and L&T**

70. As per case of the dealer – appellant, turnover of High Sea Sales has been tabulated as under:

| Months | L&T-HIGH SEAS SALES |
|---|---|
| | Turnover |
| March'09 | 29,02,55,841.00 |
| | |
| | |
| Total-07-08/-8-09 | 29,02,55,841.00 |

On this point, Learned Assessing Authority observed in the manner as :

> "The dealer has shown sales amounting to Rs. 29,02,55,841/- on the basis of high seas sale during the period 2008-09.
>
> The above said high seas sales are in relation to a consolidated works contract order, payment terms of which are also related with erection and commissioning, clearing of goods and payment of custom duty is done by ABB Limited (the dealer has contended that the payment of duty is made as an agent of buyer). However it is the obligation of the sub contractor (ABB) to import the material and install the same as per the terms of the contract.
>
> It is clear from the contract terms in the instant case that the property in goods covered by the entire works contract would be passed only during the course of execution of works contract and not at any earlier stage, hence the above referred high seas sales is not covered u/s 5(2) of the CST Act. This arrangement made by the parties in respect of high seas is against the provision of DVAT Act, 2004."

71. Case of the dealer-appellant is that these sales took place u/s 5 (2) of CST Act by transfer of documents of title before the goods crossed the customs frontier of India.

Learned counsel for the appellant contended that the transaction of High Sea Sales stands established from the bill of entry which was issued in the name of DIAL. The submission is that the transaction between the dealer and the contractor and between the contractor and the employer having taken place even before the goods could cross the customs frontiers of India, it was a High Sea sales transaction.

Further it has been contended that the manner in which this transaction took place, it cannot be inferred that it was a sale between L & T- the contractor and the dealer - the sub-contractor, and as such the assessment framed by the Assessing Authority deserved to be set aside.

In this regard, Learned counsel for the appellant has referred to following terms:

- Providing L&T a priced list of the Plant and materials to be imported in India for sub-contract works.
- Within 6 Business days of any such P&M leaving the port of shipment, the appellant to provide to L&T the listed documents (Bill of Lading/Commercial invoice etc.)
- Within 12 Business days of appellant having complied with submissions of documents as above. The L&T and DIAL will execute a high seas purchase agreement for the shipment at the price shown in the commercial invoice (which means the appellate will also enter into a High Seas agreement with L&T prior to that.)
- L&T to provide to the appellant such documents from DIAL as is needed by the appellant to import the shipment into India and pay the Indian Customs duty thereon as the agent of DIAL.

As contended by learned counsel for the appellant, the observations made by the Assessing Authority negate the fact of divisibility of two contacts.

**Contention on behalf of Revenue**

72. On the other hand, Ld. Counsel for the Revenue has contended that this is a case of indivisible works contract in which the Assessing Authority has rightly disallowed certain claims of the dealer-appellant seeking exemptions u/s. 3 of CST Act read with Section 7 (c) of DVAT Act in respect of sale of equipments.

In reply, Ld. Counsel for the dealer-appellant has admitted that this is a case of indivisible contract, but further submitted that Section 5(2) of CST Act provides as to in which circumstances purchase of goods is in the course of import of the goods, and the dealer-appellant established on record that the purchase occasioned such import.

73. As per record, the goods, to which the present turnover pertains, started from China on 27/11/2008. High sea sale agreement is stated 29/11/2008. As per bill of entry dated 19/12/2008, Dial was shown as the final buyer even though M/s. ABB India was the original buyer. Goods imported are stated to have been sold by appellant to M/s. L & T, which in turn were sold to DIAL. Assessing Authority observed in the impugned assessment that as per the terms of the contract, it was obligation of the sub contractor (ABB) to import the material and install the same. As

further observed by the Assessing Authority, payment of custom duty was made by ABB Limited – appellant.

74. Learned Counsel for the appellant has referred to the terms and conditions of the contract between the appellant and L&T which provided that L&T was to execute a high seas purchase agreement with DIAL for shipment at the price shown in the commercial invoice.

Reference has also been made to the term of the contract between L&T and appellant that L&T was to provide to the appellant such documents from DIAL as needed by the appellant to import shipment into India and pay the Indian customs duty as agent of DIAL.

**Discussion**

75. On perusal of Bill of Entry dated 19/12/2008 it transpires that the name of the original importer stands recorded that of ABB India-appellant and that of DIAL stands recorded as "importer." This Bill of Entry also establishes payment of customs duty. Had this payment not been made on behalf of DIAL, this Bill of Entry would not have depicted the name of DIAL as an importer.

Sec. 5(2) of CST Act reads as under:

> "A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

As noticed above, under Section 7of DVAT Act certain sale of goods have been exempted from VAT tax, when any sale of goods takes place –

(a) in the course of inter-state trade or commerce; or
(b) outside Delhi; or
(c) in the course of import of the goods into or export of the goods out of, the territory of India.

Learned OHA has upheld framing of assessment on this aspect. As observed by Learned OHA, Ld. AA rightly compared this case to the similarly situated case of Binani Bros. Vs Union of India (1974) 33 STC 254 (SC) wherein the Apex Court had held that the sales made by M/s Binani Bros to the DGS&D did not occasion the import of the goods, but it was the purchases made by the Binani Bros from the foreign sellers which occasioned the import of goods. In that case, there was no privity of contract between the DGS&D and the foreign seller who did not enter into any contract by themselves or through the agency of the petitioner to the DGS&D and the movement of goods from the foreign country was not occasioned on account of the sales by the petitioner to the DGS&D.

Learned OHA further referred to in the impugned order the conclusion arrived at by Hon'ble Apex Court that even if the contracts envisaged the import of goods and their supply to the DGS&D from out of the goods imported, it did not follow that the movement of goods in the course of import was occasioned by the contracts of sale by the petitioner with DGS&D.

Having so observed, and further that since the facts of this case and that of Binani's case (supra) were similar Learned OHA held that rationale of the said decision of the Apex court could be applied to the present case also.

76. At this stage, reference may be made to decision in ABB's case (supra), a case of sale in the course of import, wherein our own Hon'ble High Court observed that common thread of reasoning which runs through all the decisions referred to therein is that to determine whether the sale was in the course of import, the Court has to see whether the movement of goods throughout was integrally connected with the contract for their supply,

Hon'ble Court further observed that questions such as passing of title, or whether the end user has a privity of contract with the supplier, or where the consideration flows from, are not determinative or decisive of the issue.

It may be mentioned here that when a contractor awards either wholly or partially, the contractual obligation to a sub-contractor there is another agreement between the contractor and the sub-contractor which is pro tanto identical in nature with the agreement between the employer and the contractor. Therefore, there are two works contracts in existence between the three parties mentioned above for the carrying out of one and the same task.

In between the employer and the sub-contractor, the sub-contractor is an agent of the contractor. Under Section 182 of the Indian Contracts Act, 1872 an "agent" is defined to be a person employed to do any act for another.

For the reasons already given above, while dealing with the point of high-sea sales under Inter-state direct sales, this Appellate Tribunal has opined that it is a case of purchase and sale of goods in the course of import of the goods where the sale has occasioned such import for ultimate supply of the goods to DIAL through L & T. In the given situation, provisions of section 3 and 5(2) of CST Act are clearly applicable, and provisions of DVAT Act do not come into application.

**Result**

As a result, the assessment framed by Learned Assessing Authority as regards the transaction of import of the goods by the appellant ~~and~~ for sale thereof to DIAL through L & T in terms of the contract between the three parties, deserves to be set aside. At the same time, impugned order passed by Learned OHA upholding the said assessment also deserves to be set aside. It is ordered accordingly.

Assessing Authority to do the needful in accordance with law.

**Supply of Transformers and Cables – Rate of Tax**

77. While framing assessment in January, 2009, learned Assessing Authority levied tax @ 12.5% as against sale of transfers and cables, shown by the dealer – assessee with rate of tax leviable @ 4% only. The reason given by the Assessing Authority is that it was a works contract turnover.

The turnover of the month of Jan. 2009 is Rs. 31,73,592.00/-.

Learned counsel for the appellant has contended that the items having been purchased locally and keeping in view Entry No. 40 and Entry No. 218 of III Schedule available under DVAT Act, respectively, these items were exigible to tax only @ 4% and the turnover could not be treated as a works contract turnover for being subjected to tax @ 12.5%.

In support of his contention learned counsel has referred to **determination order No. 110/CDVAT/2006 dated 10/5/2006 in M/s. T & T Motors Ltd. case**.

78. As per entry at serial No. 40 in III Schedule of DVAT Act from 1/4/2005 to 29/11/2005 the industrial cables (High voltage cables, ELPE Cables, jelly filled cables, optical fibres), were covered by the schedule. However, w.e.f. 30/11/2005, the industrial cables (High voltage cables, XLPE Cables, jelly filled cables, optical fibres), were covered by this schedule.

As per item No. 218 against serial No. 86, transformers used in transmission / distribution of electricity were industrial inputs and covered by III Schedule.

In the determination order dated 10/5/2006, following question was presented for determination u/s 84 of DVAT Act:

> "Whether on the value of Lubricants used by the petitioner in the process of repairing work of the motor vehicles, the petitioner is required to charge and pay to the Department, the value added tax at the rate of 12.5% prescribed under section 4(1)(d) of the DVAT Act, 04 or at the rate of 20% or at any other rate?"

While referring to the provision of section 4 (1)(d), 2(zo), 2 (zc)(v), section 2(zd)(VII)and default in the case of **M/s. Gannon Dunkerley & Co. Ltd.** (9 STC 353) and **M/s. Hindustan Shipyard Ltd.** (119 STC 533), Ld. Commissioner was of the opinion that lubricants were supplied by the petitioner as such; that it was sale of lubricant to the client and as such taxable @ lubricants are taxed i.e. 20%.

79. Learned counsel for the appellant has contended that section 4 (1)(d) of DVAT Act is applicable in case of a composite contract and not to a divisible contract i.e. where a contract of sale can be segregated. The contention is that this being a case of divisible contract, rate of tax in respect of transformers and cables was applicable as per entry 40 and 218 respectively and the same could not be held to be exigible to tax @ 12.5%.

80. Learned counsel for the Revenue has contended that this is a case where section 4(1)(d) is applicable and that in the said provision of law, there is no mention that it would be applicable

only in case of a composite contract and not to divisible contract.

Learned Assessing Authority observed that the contract with BSES is of work contract and not a contract for sale and that is why the turnover taxed by the dealer @ 4% was actually taxable @ 12.5%.

81. Section 4(1)(d) provides that the rates of tax payable on the taxable turnover of the dealer shall be in respect of the goods involved in the execution of the works contract, @ 12.5 paisa in the rupee.

Admittedly industrial cables fall in entry No.40 of Schedule III of DVAT Act and transformers used in the transmission / distribution of Electricity fall in entry No.218 of same schedule. There is no provision in Schedule III of DVAT Act that items which fall in these entries would not be liable to or exigible to tax at the rate prescribed in this schedule when items are used in a works contract.

**Result**

In the given situation, these items were exigible to tax only at the rate notified for these items falling in entry No. 40 and entry No.218 of Schedule III of DVAT Act, the view of the department in this regard therefore deserves to be rejected. It is ordered accordingly. Learned Assessing Authority to take

consequential steps for enforcement of this decision accordingly.

**Claim regarding labour charges claimed in DVAT 31 but not shown in invoice.**

82. Learned counsel for the appellant has submitted statement of works contract depicting invoices wherein the dealer-assessee missed to claim deduction towards labour charges during the assessment year 2008-09. Contention raised by learned counsel for the appellant is that since dealer-assessee missed to claim said deduction i.e. towards labour expenses ~~to claim the same~~ in DVAT 31, Assessing Authority should have allowed this claim of the dealer.

83. A perusal of assessments pertaining to tax period May, June, July, August, September, October, November 2008, would reveal that learned Assessing Authority observed difference in tax as per invoice and as per DVAT 31 and treated the same as tax deficiency.

84. Learned counsel for parties have referred Rule 3 of DVAT Rules, 2005. Relevant operation of Rule 3 (1) reads as under:

> "(1) In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract and exclude-
>
> (i) The charges towards labour, services and other like charges; and
>
> (ii) The charges towards cost of land, if any, in civil works contracts,
>
> Subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing

payment of above referred charges to the satisfaction of the Commissioner."

85. Proviso to Sub-Rule (2) of Rule 3 of DVAT Rules stipulates that where amount of charges towards labour, services and other like charges are not ascertainable from books of accounts of the dealer the amount of such charges shall be calculated at the percent specified in the table available under said Sub-Rule.

86. In view of Sub-Rule (1) of Rule 3 of DVAT Rules charges towards labour, service and other like charges are to be excluded subject to the condition that the dealer maintains proper records such as invoices, voucher, challan or any other document evidencing payment of above referred charges to the satisfaction of the Commissioner.

Here, admittedly no such charges towards labour were shown in the invoice. There is nothing on record to suggest that other than invoice, the dealer produced any document like voucher or challan in proof of payment of labour charges. In absence thereof, learned Assessing Authority was justified in rejecting the claim of the dealer towards labour charges, for the reasons recorded in the assessment order.

**Result**

As a result, assessment framed by the Assessing Authority in this regard is upheld.

**Rejection of ITC claim**

**(i) Crane hire charges.**

**(ii) Generator hire charges.**

87. In the course of arguments learned counsel for appellant submitted statement of input tax credit that was disallowed by the Assessing Authority as regards assessment order 2007-08 and 2008-09.

As is available from the impugned assessments, learned Assessing Authority disallowed claim of tax credit raised by the dealer on the basis of bills of crane hire charges and generator charges.

88. Learned counsel for the appellant has referred to provisions of Section 9 of DVAT Act and submitted that since the dealer-appellant paid tax to the supplier of crane and generator because of transfer of right to use the same, the dealer-appellant was entitled to claim tax credit.

89. On the other hand, learned counsel for the Revenue has submitted that the crane and generators were used by the dealer-appellant for the purpose of works contract and as such the same cannot be said to have been used by the appellant directly or indirectly for the purpose of making sales which are liable to tax u/s 3 of DVAT Act, and consequently Assessing Authority has rightly rejected tax credit claim of the dealer-appellant in this regard.

90. In reply, learned counsel for the appellant has contended that the said items- crane and generator having been used in works contract, their use by the dealer is deemed to be sale which are liable to tax u/s 3 of DVAT Act.

Sub-section (1) of Section 9 reads as under:

"9. **Tax credit**

1.Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period (where the purchase arises) in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making-

(a) sales which are liable to tax under section 3 of this Act; or

(b) sales which are not liable to tax under section 7 of this Act.

*Explanation:-* Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries."

91. No doubt, as per Section 2 (zc)(vi) of DVAT Act, sale includes transfer of right to use any goods for any purpose (Whether or not for a specified period) for cash, deferred payment or other valuable consideration.

92. Keeping in view submission put-forth on behalf of the appellant, when the hirer transferred right to use the goods i.e. cranes and generators by the dealer-appellant for cash/other valuable consideration, same amounted to sale. But use of the said goods by the dealer-appellant in carrying out the works contract was not a transfer of any right to use the same so as to deem the said transactions to be a sale u/s 2 (zc) of DVAT Act. Therefore, claim of the dealer-appellant in this regard has been rightly rejected.

**Result**

93. Consequently, the assessment of tax and interest framed by Assessing Authority in this regard is upheld.

**Rejection of ITC as regards VAT paid on concession of temporary shed**

94. Claim of dealer-appellant for tax credit on this item has been declined is under challenge:

95. On the other hand, Learned Counsel for the Revenue has contended that Assessing Authority rightly rejected the claim for tax credit. On behalf of the Revenue, it has been argued that even if construction of temporary shed was not for the purpose of sale by the dealer-appellant, the same having been used in the works contract, dealer having paid VAT was entitled to claim tax credit. In this regard, reference has been made to provisions of Section 9(1) of DVAT Act.

96. As already noticed above, Section 9(1) provides for benefit of tax credit in respect of turnover of purchases in the course of activities as a dealer and use of the goods by the said dealer directly or indirectly for the purpose of making sales which are liable to tax u/s 3 of this Act or sales which are not liable to tax u/s 7 of this Act.

97. The contention raised by Learned Counsel for the appellant that on account of the use of the temporary shed in carrying out the works contract, it would amount to a case of sale, is without any merit. Such construction and its use while carrying out works contract cannot be deemed to be a sale. Therefore, claim of the dealer for tax credit on this item has been rightly rejected.

**Result**

98. Consequently, the assessment of tax and interest framed by the Assessing Authority in this regard is upheld.

Rejection of Tax credit-

**Retail Invoices**

***Non production of- Impact***

99. On the point of rejection of claim of the dealer for tax credit on the purchases of goods, it was contended on behalf of the dealer, before Learned OHA, that it was entitled to claim tax credit when the purchase invoices were recorded in the books and tax invoices is available with the dealer.

In this regard, Learned OHA referred to the provisions of Section 9(1), 9(8) and 12(1) of DVAT Act and observed in the manner as :-

> "In view of the above cited provisions of the DVAT Act it is clear that tax credit can be claimed by the dealer only on having the tax invoice for the tax period it is claimed and accounted for in the return for that tax period. Hence the argument of the objector dealer on this account does not stand scrutiny of law and the objection on this account is rejected."

100. Submission put forth by Learned Counsel for the appellant is that to claim tax credit, it is not essential to produce tax invoices and that a dealer shall be entitled to claim the same even on the basis of retail invoice, and as such Assessing Authority has illegally rejected the claim of the dealer on account of non-production of tax invoices.

Learned Counsel for the dealer has referred to decision in **Commissioner of Value Added Tax & Anr. vs. M/s J.C**

**Decaux Advertising India Private Ltd.**, VAT Appeal No. 1/2017 decided by our own Hon'ble High Court on 09/01/2017 and urged that claim of the dealer for tax credit be allowed.

101. Section 9(8) of DVAT Act provides that tax credit may be claimed by a dealer only if he holds a tax invoice at the time prescribed return for the tax period is furnished.

Here, admittedly, tax invoice was not furnished by the dealer at the time return was furnished. In **M/s J.C Decaux Advertising India Private Ltd.'s case** (supra), Assessing Authority had denied tax credit on the ground that the transactions were reflected in retail invoices, but not in the tax invoices and therefore, the claim of the dealer did not qualify for credit. Same opinion was expressed by the Objection Hearing Authority. Appellate Tribunal set aside the said findings while observing that Section 50 of DVAT Act was enacted only for administrative convenience of the Revenue.

In Para Nos. 5 and 6 of the decision, Hon'ble High Court, while interpreting the provisions of Sections 9 and 50 of DVAT Act observed that Section 9(2) is the only provision which spells a negative conditions or disqualifications for a dealer as it were in claiming credit, and further that to read the provisions of the enactment as quickly as the VATO did in that case justified the ultimate conclusion of the Appellate Tribunal, as all the

substantial and essential details existed in the document i.e. retail invoice.

102. In view of the decision in **M/s J.C Decaux Advertising India Private Ltd.'s case** (supra) and in view of the prohibitions contained in Section 9(2) as well as Section 9(7) of DVAT Act, where there is no such bar in allowing claim of tax credit in absence of a tax invoice, the claim raised by the dealer-appellant deservers to be allowed.

**Result**

103. Consequently, the Assessment framed by the Assessing Authority in this regard is set aside. Learned Assessing Authority to take consequential steps in consonance with present decision.

**Rejection of Tax Credit**

104. Claim of the dealer-appellant for tax credit on this ground is stated to have been rejected by the Assessing Authority.

Learned Counsel for the appellant submits that the dealer was undoubtedly required to claim tax credit in respect of the turnover of purchases occurring during the tax period, but it claimed tax credit subsequently only after the selling dealer actually deposited VAT and acknowledged so on 02/04/2007.

The contention is that in view of the bonafides of the dealer-appellant, Assessing Authority should not have rejected the tax credit claim.

105. On the other hand, Learned Counsel for the Revenue has submitted that since the dealer-appellant failed to claim tax credit during the concerned tax period, Assessing Authority was justified in rejecting the claim.

106. Learned Counsel for the Revenue has rightly submitted that so as to claim tax credit, it was not for the purchasing dealer to assure itself that the selling dealer had paid VAT.

Keeping in view, the provisions of sub-section (1) and sub-section (3) of Section 9, no fault can be found with the framing of the assessments in rejection of the credit claim of the dealer for tax credit for the previous tax periods.

**Result**

107. As a result, the assessment framed by the Assessing Authority in this regard is upheld.

**Assessments of Penalties**

108. As is available from record, following assessments were framed by Learned Assessing Authority u/s 33 of DVAT Act:

**"SEPTEMBER 2007**

By way of notice of assessment of penalty framed on 17.09.2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"ITC on bills of Crane hire charges, generator charges, disallowed. Further, E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order and penalty is imposed on the tax deficiency u/s 86(10) of the DVAT Act 2004. Further, penalty is imposed u/s 86(13) for non maintenance of records as required, (20% of the tax deficiency of amount Rs. 2,19,73,290/-)"

## DECEMBER 2007

By way of notice of assessment of penalty framed on 07-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"ITC on bills pertaining to Crane hire charges, generator charges, disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Invoice No. 730000915 dated: 31-12-2007 issued to CPWD not declared in DVAT-31 and VAT returns, as result VAT of Rs. 1,64,786/- less paid. Details are given in 'Annexure' attached with the assessment order and penalty is imposed on the tax deficiency u/s 86(10) of the DVAT Act 2004. Further, penalty is imposed u/s 86(13) for non maintenance of records as required, (20% of the tax deficiency of amount Rs. 2,69,04,470/-)."

## JANUARY 2008

By way of notice of assessment of penalty framed on 07-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"Expenses not relatable to Labour & Services added in WCT sale @ 12.5%. Further, E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order and penalty is imposed on the tax deficiency u/s 86(10) of the DVAT Act 2004. Further, penalty is imposed u/s 86(13) for non maintenance of records as required, (20% of the tax deficiency of amount Rs. 11,48,917/-).

The dealer is hereby directed to pay penalty of an amount of Rs. 13,78,700/-."

## FEBRUARY 2008

By way of notice of assessment of penalty framed on 07-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC on bills pertaining to Crane hire charges, generator charges, disallowed. Expenses not relatable to Labour & Services added in WCT sale @12.5%. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Details are given in 'Annexure' attached with the assessment order and penalty is imposed on the tax deficiency u/s 86(10) of the DVAT Act 2004. Further, penalty is imposed u/s 86(13) for non maintenance of records as required. (20% of the tax deficiency of amount Rs. 12,82,619/-)
> The dealer is hereby directed to pay penalty of an amount of Rs. 15,39,143/-."

## MARCH 2008

By way of notice of assessment of penalty framed on 07-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC on bills of Crane hire charges, generator charges, disallowed. Expenses not relatable to Labour & Services added in WCT sale @12.5%. E1 sale to NDPL is disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 is disallowed & taxed @12.5%. Besides the dealer made direct sale to NDPL from its other locations outside Delhi claimed exemption u/s 7(a) of the DVAT Act, 2004 not shown in the returns. Details are given in 'Annexure' attached with the assessment order and penalty is imposed on the tax deficiency u/s 86(10) of the DVAT Act 2004. Further, penalty is imposed u/s 86(13) for non maintenance of records as required. (20% of the tax deficiency of amount Rs. 2,94,65,303/-).
> The dealer is hereby directed to pay penalty of an amount of Rs. 3,53,58,364/-."

## APRIL 2008

By way of notice of assessment of penalty framed on 28-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"ITC claimed on items, which are not used for purposes of taxable sale disallowed. Further, turnover exemption claimed u/s 7(a) &7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @12.5% is charged & penalty is imposed on the tax deficiency u/s 86 (10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of the tax deficieney of amount Rs. 2,38,44,749/-)."

## MAY 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 54,23,157/-."

## JUNE 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged &penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
The dealer is hereby directed to pay tax of an amount of Rupees 1,72,02,401/-."

## JULY 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice. ITC claimed on crane/generator hire charges& ITC claimed on items which are not used for purpose of taxable sale is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 75,50,225/-."

## AUGUST 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "Difference in tax as per invoice and as per DVAT-31 is treated as tax deficiency because the tax as per DVAT-31 & returns is less than the tax shown in the invoice. Tax invoice No. 830001550 dated: 29-08-08 of Rs.224106/- (tax Rs. 8964/-) issued to Guru Gobind Singh IP University is not declared in DVAT-31 and VAT returns. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 51,39,108/-."

## SEPTEMBER 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC claimed on crane/generator hire charges, ITC claimed on retail invoices & ITC claimed on items which are not used for purpose of taxable sale is disallowed. Further, turnover exemption claimed u/s

7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.

The dealer is hereby directed to pay tax of an amount of Rupees 1,34,82,766/-."

## OCTOBER 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"ITC claimed on crane/generator hire charges & ITC claimed on items which are not used for purpose of taxable sale is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.

The dealer is hereby directed to pay tax of an amount of Rupees 63,03,307/-."

## NOVEMBER 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

"ITC claimed on crane/generator hire charges & ITC claimed on items which are not used for purpose of taxable sale is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act,2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.

The dealer is hereby directed to pay tax of an amount of Rupees 1,42,57,268/-."

## DECEMBER 2008

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC claimed on crane/generator hire is disallowed. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 2,71,92,699/-."

## JANUARY 2009

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC claimed on crane/generator hire charges is disallowed. Sale shown as @4% is taxed @12.5% being works contract turnover. Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 1,28,00,353/-."

## FEBRUARY 2009

By way of notice of assessment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "Turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 and E1 sale to NDPL is disallowed. Tax @ 12.5% is charged & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 4,85,60,981/-."

By way of notice of assesment of penalty framed on 18-09-2010, u/s 33 of DVAT Act, read with section 86(10) and 86(13), learned Assessing Authority imposed penalty due to the following reasons:

> "ITC claimed on crane/generator hire charges & ITC claimed on items which are not used for purpose of taxable sale is disallowed.
> Further, turnover exemption claimed u/s 7(a) & 7(c) of the DVAT Act, 2004 is disallowed. Further, sale of Rs. 4,17,06,162/- made @4% to GGSIPU is taxed @12.5% (2) High sea sale of Rs. 290255841/- is disallowed and other direct sales made from other locations outside Delhi on which exemption have been claimed u/s 7(a) of the DVAT Act 2004 and not shown in the returns are taxes @12.5% & penalty is imposed on the tax deficiency u/s 86(10) and penalty is imposed u/s 86(13) of the DVAT Act, 2004 for non maintenance of records properly (20% of tax deficiency). Details are given in the Annexure attached.
> The dealer is hereby directed to pay tax of an amount of Rupees 8,31,44,356/-."

109. As noticed above, Learned Assessing Authority imposed penalties, u/s 86(10) and 86 (13) of DVAT Act read with Section 33 of DVAT Act.

So far as tax liability in view of sales made to DMRC, learned OHA remanded the matter to the Assessing Authority. Consequently, matter was also remanded so far as levy of penalty qua the said transactions made by DMRC.

110. The remand order passed by learned OHA on the aforesaid two assessments and on the point of penalty levied in view of violation concerning the said two issues, has not been challenged by the dealer. Even in the course of arguments, no contention has been raised on these points.

111. Learned counsel for the appellant has contended that the point involved in the matter-assessments being debateable, Assessing Authority should not have levied penalties.

Further, it has been pointed out that in the assessments pertaining to penalty, Assessing Authority has not specified any reason to levy the same u/s 86(10) of DVAT.

The contention is that learned OHA fell in error while observing that imposition of penalty is consequential to the default of tax due.

112. While challenging the impugned order passed by learned OHA, as regards the other penalty, u/s 86(13) of DVAT Act, it has been contended that the same has been imposed on the ground of non-maintenance of records as required, but in none of the assessments on penality, Assessing Authority has described as to which of the record was not being maintained by the dealer-assessee.

**Discussion**

113. As regards observations made by learned OHA that levy of penalty is consequential/automatic, same cannot be approved in view of proviso to Section 86(2) of DVAT Act as in force during the relevant period i.e. tax period 2007-08 and 2008-09. As per said proviso, which was omitted vide DVAT (amendments) Act 2013, the penalty imposed u/s 86 could be remitted where a person was able to prove existence of a reasonable cause for the Act or omission giving rise to penalty during objection proceedings u/s 74 of DVAT Act. Therefore, it

cannot be said that levy of penalty is consequential to the framing of tax.

114. Section 86 (10) of DVAT Act reads as under:-

"Any person who-

(a) furnishes a return under this Act which is false, misleading or deceptive in a material particular or deceptive in a material Particular;

or

(b) omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular;

shall be liable to pay, by way of penalty, a sum of ten thousand rupees or the amount of the tax deficiency, whichever is the greater."

115. Section 86 (13) of DVAT Act reads as under:-

"Where a person is required under this Act to-

(a) prepare records or accounts; or

(b) prepare records or accounts in a prescribed manner; or

(c) retain prescribed or notified records or accounts;

and the person-

(i) fails to prepare the prescribed or notified records and accounts; or

(ii) fails to prepare prescribed or notified records and accounts in the prescribed manner; or

(iii) fails to retain the prescribed or notified records and accounts for the prescribed period; or

(iv) fails to retain and/or produce the prescribed or notified records at the

(v) fails to comply with a direction issued or fails to produce prescribed or notified records and accounts, or cause them to be produced, on or before the date specified in any notice served on him by the Commissioner or by an accountant or a panel of accountants or any other professional or panel of professionals nominated by the Commissioner in this behalf under sub-section (1) of section 58A;the person shall be liable to pay, by way of penalty, a sum of fifty thousand rupees or twenty per cent of the tax deficiency, if any, whichever is greater."

116. Assessments of penalties under challenge in these appeals, reveal that as regards violations of provisions of section 86(10) of DVAT Act, Assessing Authority has not recorded any finding that this is a case where the dealer furnished a return which was false, misleading or deceptive in a material particular or dealer omitted from any return furnished under the Act any material or thing without which the return was found to be false, misleading or deceptive in a material particular.

Similarly, while imposing penalty u/s 86(13) of DVAT Act, the dealer has not described any finding as to which of the records was not being maintained by the dealer. In absence of any such specification, the assessment of penalties framed by learned Assessing Authority and the impugned order passed by learned OHA upholding the same deserve to be set aside.

**Result**

117. As a result, the appeals challenging the levy of penalties u/s 86(10) and 86(13) of DVAT Act are allowed and the assessment of penalties framed by learned Assessing Authority and the impugned order passed by learned OHA upholding the same deserve to be set aside.

**Conclusion**

118. In view of the above findings, all appeals challenging the imposition of penalties are allowed whereas remaining appeals challenging levy of tax and interest are partly allowed with

modifications in the assessments framed, in the manner indicated therein.

Assessing Authority to do the needful for enforcement of this decision in accordance with law.

119. File be consigned to the record room. 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 : 07/09/2022

7/9/2022

(Narinder Kumar)
Member (J)

Appeal no. 697-732/ATVAT/13/5490-97 Dated: 13/09/2022

Copy to:-

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

REGISTRAR

APPELLATE TRIBUNAL VAT DELHI