

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

Appeals Nos.: 408,408A, 408B & 408C/ATVAT/17

Date of Judgment: 03/10/2022

M/s Philips India Ltd.,  
9<sup>th</sup> Floor, DLF Tower, DLF-9B,  
DLF Cyber City, DLF Phase-III,  
Gurugram-122002.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. Shammi Kappor.

Counsel representing the Revenue : Sh. P. Tara.

**JUDGMENT**

1. By way of present four appeals, dealer-assessee has challenged assessments of tax, interest and penalty, relating to the tax period 2009-10 and 2010-11.
2. Assessment dated 18-07-2014 was framed by learned Assessing Authority in respect of tax period - **March** 2010 by observing in the manner as:-

- i. **Project Name:** Re-modeling and up-gradation of major Dhyan Chand National Stadium for Common Wealth Games, 2010 (SH: Sports Lighting for play field area-I) New Delhi.



*Narinder Kumar*  
3/10/22

Work contract awarded by Executive Engineer (E), CPWD, Major Dhyan Chand National Stadium of RS.4,64,20,169/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work. Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoice No. 9515751260 dated 01-08-2009 and charged tax @4% on amounting to Rs. 21,16,200/- during 2009-10.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting.

Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 21,16,200/- is now taxed @12.5% instead of 4% and differential tax amount is recovered after giving benefit of 4% already charged along with interest @15%p.a. Resultant tax deficiency also attracts penalty u/s 86(12) of DVAT Rules, 2005.

ii. **Project Name:** Supply and fixing of sport lighting of weight lifting stadium at Lodhi Road, New Delhi.





Work contract awarded by M/s Nagarjuna Construction Company Limited of Rs. 1,76,00,000/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work. Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices amounting to Rs. 73,64,976/- during 2009-10 on which no tax has been charged. The details of such invoices issued in 2009-10 are (i) Retail Invoice no. 9515752897 dated 26-09-2009 of Rs. 9,14,173/- (ii) Invoice no. 9515755066 dated 28-11-2009 of Rs. 5,83,712/- (iii) Invoice No. 9515755067 dated 28-11-2009 of Rs. 29,46,921/- (iv) Invoice no. 9515756969 dated 30-01-2010 of Rs. 6,97,587/- (v) Invoice no. 9515758075 dated 05-03-2010 of Rs. 22,28,583/-. The dealer executed above referred work contract order which as of composite nature and includes both supply and fixing of sport lighting.

Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute.

Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.



2  
3/10

Hence amount of Rs. 73,64,976/- is now taxed @12.5% instead of 0% along with interest @15%p.a.

iii. **Project Name:** Sports Lighting works for indoor cycling Velodrome at Indira Gandhi Stadium Complex, New Delhi for Common Wealth Games 2010.

Work contract awarded by M/s J.M.C Projects (India) Limited of Rs. 3,30,00,000/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices amounting to Rs. 19,75,020/- during 2009-10 on which no tax has been charged. The details of such invoices issued in 2009-10 are (i) Retail Invoice no. 9515755802 dated 24-12-2009 of Rs. 15,93,600/- (ii) Invoice no. 9515757037 dated 02-02-2010 of Rs. 1,16,190/- (iii) Invoice No. 9515757038 dated 02-02-2010 of Rs. 11,130/- (iv) Invoice no. 9515756020 dated 18-12-2009 of Rs. 2,54,100/-.

The dealer executed above referred work contract order which as of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute.

Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in





respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 19,75,020/- is now taxed @12.5% instead of 0% along with interest @15%p.a. For the convenience of creating demand, all discrepancies are clubbed and taken in to account of March-2010 period.

3. Vide separate assessment framed on the same day in respect of tax period March 2011, learned Assessing Authority furnished the following reasons:-

- i. **Project Name:** Supply, Installation, Testing & Commissioning of Sports lighting package for S.P. Mukherjee Swimming Complex at New Delhi for Common Wealth Games Project.

Work contract awarded by M/s Ahluwalia Contracts India Limited of Rs. 4,08,00,000/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoice No. 9515763495 dated 01-07-2010 and charged tax @5% on amounting to Rs. 21,16,200/- during 2009-10.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish



that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 7,16,988/- is now taxed @12.5% instead of 5% and differential tax amount is recovered after giving benefit of 5% already charged along with interest @15%p.a.

- ii. **Project Name:** Supply and fixing of sport lighting of weight lifting stadium, New Delhi. Work contract awarded by M/s Nagarjuna Construction Company Limited of Rs. 1,76,00,000/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices no. 9515850509 dated 01-07-2010 amounting to Rs. 72,600/- during 2010-11 on which no tax has been charged.

The dealer executed above referred work contract order which as of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute.

Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT





Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 72,600/- is now taxed @12.5% instead of 0% along with interest @15%p.a.

iii. **Project Name:** Sports Lighting works for indoor cycling Velodrome at Indira Gandhi Stadium Complex, New Delhi for Common Wealth Games 2010.

Work contract awarded by M/s J.M.C Projects (India) Limited of Rs. 3,30,00,000/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices no. 9515759273 dated 08-04-2010 amounting to Rs. 50,79,650/- during 2010-11 on which no tax has been charged.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute.

Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.



Hence amount of Rs. 50,79,650/- is now taxed @12.5% instead of 0% along with interest @15%p.a. Also, On scrutiny of bills raised for the execution of this project, it is noticed that dealer has raised retail invoices amounting to Rs. 1,23,79,373/- during 2010-11 on which @5% tax has been charged. The detail of such invoices are i) Retails invoice no. 9515769119 dated 04-10-2010 in which goods of Rs. 1,06,16,937.96/- was charged @5% ii) Invoice No. 9515769534 dated 20-10-2010 of Rs. 96,429/-. iii) Invoice no. 9515772188 dated 30-11-2010 of Rs. 16,66,006.24/-.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 1,23,79,373/- is now taxed @12.5% instead of 5% and differential tax amount is recovered after giving benefit of 5% already charged along with interest @15%p.a.

- iv. **Project Name:** Re-modeling & up-gradation of J.N. Stadium for Common Wealth Games, 2010 (SH: SITC of façade lighting for J.L. Nehru Stadium) Work contract awarded by Executive Engineer (E) Common Wealth Games Electrical, Div-I, CPWD of Rs. 7,97,21,610/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.





Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices no. 9515770535 dated 01-11-2010 amounting to Rs. 1,93,117/- during 2010-11 on which no tax has been charged @5%.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 1,93,117/- is now taxed @12.5% instead of 5% along with interest @15%p.a.

- v. **Project Name:** Construction of Indoor Stadium for Table Tennis for Common Wealth Games, 2010 at Yamuna Sports Complex, (SH: Supply, Installation, Testing & Commissioning Internal light fixtures and sport light fixtures of Rs. 2,10,12,686/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005. On scrutiny of bills raised for execution of this project, it is noticed that dealer



has raised retail invoices no. 9515764855 dated 27-07-2010 of Rs. 2,33,663/- and retails invoice No. 9515764982 dated 30-07-2010 of Rs. 1,54,750/-, total of both invoices amounts to Rs. 3,88,413/- during 2010-11 on which tax has been charged @5%.

The dealer executed above referred work contract order which was of composite nature and includes both supply and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under involved in the execution of work contract, rate of tax is 12.5%.”

Hence amount of Rs. 42,50,127/- is now taxed @12.5% instead of 5% and differential tax amount is recovered after giving benefit of 5% already charged along with interest @15%p.a.

- vi. **Project Name:** Lighting work at Shivaji Stadium. Work contract awarded by M/s Integrity Projects & Technologies (I) Pvt. Ltd. of Rs. 1,58,91,141/-.

Looking at various terms and conditions of the contract, it is absolutely clear that intention between both the parties is to execute the work contract. . Nowhere it is written that there are two separate contracts, one for supply of goods and another for labour and services i.e. installation work.

Therefore, the contract shall be assessed as a work contract and turnover shall be computed in accordance with Rule 3 of DVAT Rules, 2005.

On scrutiny of bills raised for execution of this project, it is noticed that dealer has raised retail invoices no. 9515765227 dated 03-08-2010 in which material of Rs. 24,00,603/- has been charged @5% during 2010-11.

The dealer executed above referred work contract order which was of composite nature and includes both supply



22/3/10



and fixing of sport lighting. Dealer has taken exemption on charges towards labour and services provided for installation by raising separate invoices, which is not in dispute. Thus the invoices issued for supply of material/goods in favour of Contractee clearly establish that the material/goods was transferred/used in the execution of work contract and the rate of tax on material transferred cover under the definition of Section 4(1)(d) of DVAT Act, 2004. Section 4(1)(d) of DVAT Act, 2004 states "in respect of goods involved in the execution of work contract, rate of tax is 12.5%.

Hence amount of Rs. 24,00,603/- is now taxed @12.5% instead of 5% and differential tax amount is recovered after giving benefit of 5% already charged along with interest @15%p.a. For the convenience of creating demand, all discrepancies are clubbed and taken in to account of March-2011 period.

4. Vide impugned order Learned OHA disposed of objections filed by the dealer- objector in respect of the four assessments i.e. for the tax periods- March 2009-10 (Tax & Interest); March 2009-10 (Penalty); March 2010-11 (Tax & Interest) and March 2010-11(Penalty).

While dealing with the objections raised by the Objector as regards Tax & Interest, Learned OHA observed in the manner as:



"From the perusal and analysis of the definition of Works Contract (as stated above), it is clear that erection, installation or commissioning etc., of any moveable or immovable property under an agreement for cash or for deferred payment or for valuable consideration, shall be construed as "Works Contract" activity. In such cases as per the definition of "sale"

(as stated above), the transfer for property in goods/ material (whether as goods or in some other form) involved in the execution of a work contract, shall be considered as and part of sale of the dealer. In the present case, the objector dealer made agreement/ contract for erection, installation and commissioning of sports lightings along with supply of material/ goods under the Common Wealth Projects and therefore, there is no iota of doubt that the nature of the contract/ agreement entered into by the objector dealer was in the nature of works contract covered under the definition of Section 2 (zo) of DVATAAct-2004. The intention of the contracts/ agreements entered into by the objector dealer are relevant to be seen. The objector dealer was assigned the contract for complete installation of sports lightings including the supply of lights and other material under CWG Projects. Therefore, the contention of the objector dealer that both the activities are separable and therefore, cannot be considered as works contract does not hold good. The objector dealer also could not produce any kind of agreements proving his contentions. The ground taken that the objector has raised separate invoices for the supply of goods and supply of services and also paid service tax on the supply of services, has no merit and cannot be taken as defense since the nature of activity undertaken by the objector dealer is clearly works contract under DVAT Act and the same is liable to be taxed @ 12.5% in accordance with the provisions of Section 4(1) (d) of DVAT Act on the value of taxable turnover to be calculated in accordance with the provisions of Section 4(1)(d) of DVAT ACT on the value of taxable turnover to be calucated in accordance with the provisions of Section 5 of DVAT Act and Rule3 of DVAT Rules-2005."

"Further, the objector dealer has argued that a deduction of 20% on the value of work contract towards labor and services is not allowed by the Assessing Authority. In this regard it is observed and found that "supply and fitting of electrical goods, supply and installation of electrical equipments including transformers" are covered under serial number 11 of



2h  
3/10



the table under Rule 3 of DVAT Rules which provides 15% deduction on the value of works contract towards labor and other services. Therefore, the argument of the objector dealer regarding deduction of 20% on the value of contract is not as per law. Moreover, the objector dealer can claim the deduction only when the same is claimed in the periodical returns filed by the objector dealer and this deduction towards labor and other services cannot be claimed at this stage as it was not claimed in the periodical returns.”

5. As regards imposition of penalty, Learned OHA observed in the manner as:

“Further, the argument of Ld. Advocate on imposition of penalty without providing opportunity does not hold good in this case because the Assessing Authority has imposed consequential penalty in both the cases, after imposition of tax and interest, in accordance with the provisions of Section 33 of DVAT Act-2004. The objector dealer was given due opportunity of hearing at the time of assessment. Further, a reference may be made to the provisions of Section 33 of DVAT Act-2004 and especially sub-section (1) of Section 33 which clearly provides that where the Commissioner has reason to believe that a liability to pay a penalty under this Act has arisen the Commissioner, after recording the reasons in writing, shall make and serve on person a notice of assessment of the penalty that is due under this Act. Further, an Explanation is also given under Section 33 which provide that a person may, if he disagrees with the notice of assessment, file an objection under Section 74 of this Act. Therefore, the provisions of the Act nowhere provide a separate notice for imposition of consequential penalty. It clearly provides that the reasons should be recorded in writing and if a person disagrees with the notice of assessment of penalty an objection under Section 74 of the Act may be filed. Therefore, the hearing under Section 74 is not a post decisional hearing but a hearing in completion of



the assessment. Hon'ble Delhi High Court judgment dated 07.12.2012 in the matter of Sales Tax Bar Association vs. Govt. of NCT of Delhi and others in CWP No. 4236/2012 and three other Writ Petition is also considered on this issue.

Therefore, the Assessing Authority has rightly imposed penalty under Section 86(12) of DVAT Act-2004 since tax deficiencies have arisen in both the financial years. The contention of the objector dealer that there was no willful evasion of payment of tax has not merit as the objector dealer was under obligation to pay the due amount of tax and interest to the VAT Department in accordance with the provisions of the law and non-adherence to the provisions of law has rightly attracted penalties as prescribed in the law."

Ultimately, Learned OHA dismissed the objections filed by the Dealer-Objector.

6. Hence, these appeals.
7. Arguments heard. File perused.

**Whether assessment for the Tax Period 2009-10 is barred by limitation?**

8. One of the grounds raised by the appellant, as regards assessment<sup>are</sup> for the Tax Period 2009-10 is that same <sup>are</sup> is barred by limitation. <sup>is</sup>

Learned Counsel for the appellant has referred to monthly returns for the Tax Period- 2009-10 which depict the date(s) of their furnished.





The contention is that the Assessing Authority could frame assessments for the said tax periods only up to 28-04-2014, but herein the assessments were framed on 18-07-2014.

9. In support of this argument, Learned Counsel has referred to following decisions and submitted that the assessments having not been framed within the prescribed period of four years, deserve to be set aside:

1. **Samsung India Electronics Private Limited vs. Government of NCT of Delhi and Ors**, MANU/DE/0826/2016;
2. **ITD-ITD CEM JV vs. Commissioner of Trade & Taxes**, MANU/DE/0760/2016; and
3. **Lark Laboratories (India) Ltd. vs. Commissioner, Trade & Taxes, Delhi and Ors**, MANU/DE/2870/2015.

10. On the other hand, Learned Counsel for the Revenue has contended that this point was never raised by the dealer before the Objection Hearing Authority and as such appellant cannot be allowed to raise this ground for the first time in this appeal pertaining to the Tax Period 2009-10.

11. Learned Counsel for the Revenue has further submitted that this is a case of works contract but the dealer-appellant, while furnishing returns claimed it to be a case only of supply of goods and not that of works contract.

The contention is that the dealer-appellant did not furnish material particulars in the returns correctly, and as such Learned Assessing Authority was justified in framing of the



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assessments pertaining to the tax period 2009-10 within six years, in view of provisions of Section 34 and further that the assessment of tax and interest having been framed on 18/07/2014 is within limitation.

**Tax period 2009-2010 and 2010-2011**

**Whether these are cases of works contract or of supply of goods with services as ancillary parts thereof?**

12. The contention raised on behalf of the appellant is that in view of the terms of the 14 contracts entered into by the dealer-assessee with Commonwealth Games Committee, same were for supply of poles, lights and installation services in respect thereof, but the Revenue Authorities have wrongly held that the contracts were works contract.

Further, it has been submitted that supply of services in the form of installation of the poles and lights, was only miniscule part of the contracts.

13. As regards assessments of tax and interest, pertaining to the tax period 2010-11, the contention raised by Learned Counsel for appellant is that the Assessing Authority has framed the assessments on the basis that contracts entered into between the appellant and the buying dealers were "Works Contracts" and that provisions of Rule 3 of DVAT Rules, 2005 were applicable, but actually the contracts entered into by the



22  
3/10



appellant were not "Works Contract" and rather this is a case of supply of goods by the dealer to the buying dealer. Further, it has been contended that supply of labour and service was only incidental to the supply of goods and the Assessing Authority erred in levying taxes at the rate of 12.5%.

14. In the memorandum of appeal, the dealer alleged in paragraphs 5 and 5.1 that two contracts were purely for supply of goods and remaining 12 contracts included supply of service which were incidental and ancillary to supply of said goods, but the Assessing Authority erred in not granting deductions as claimed in the returns, in respect of said two contracts which were purely for supply of goods.

In support of this contention, learned CA has placed reliance on the following decisions:

1. **Bharat Heavy Electricals Ltd. Vs. The State of Maharashtra**, MANU/MH/3386/2017;
2. **Sentinel Rolling Shutters and Engineering Company (Pvt.) Ltd. Vs. The Commissioner of Sales Tax**, AIR 1978 SC 1747;
3. **M/s Hindustan Shipyard Ltd. vs. State of Andhra Pradesh**, AIR 2000 SC 2411;
4. **Commissioner of Income Tax-TDS vs. Glenmark Pharmaceuticals Ltd.**, (2010) 231CTR (Bom) 105;
5. **State of Karnataka v. Transglobal Power Ltd.**, MANU/KA/3355/2014; and
6. **Minda Sai Ltd. Vs. Income Tax Officer**, (2015) 167 TTJ (Del) 689.



### **Contention on behalf of Revenue**

15. On the other hand, Learned Counsel for the Revenue has contended that no agreements/contracts were made available by the dealer-assessee to the Revenue Authorities. In this regard, attention has been drawn to the observations made by Learned OHA that the objector-dealer could not produce any kind of agreements proving its contentions.
16. While arguing that these are cases of works contract and not only of supply of goods with services as ancillary part thereof, Learned Counsel for the Revenue has submitted that the dealer-assessee has not placed on record copy of the contracts arrived at between the dealer-appellant and Commonwealth Games Committee.

Further, the submission is that the agreements/contracts were not produced even before Learned OHA, as finds mentioned in the impugned order.

Learned Counsel for the Revenue has further submitted that in the paper book pertaining to the tax period 2009-2010, dealer has placed on record at Page Nos. 53-55, copy of letter dated 22/07/2008 from the Executive Engineer, Commonwealth Games Electrical Division addressed to the dealer-assessee intimating that its tender for remodelling and upgradation of Major Dhyan Chand National Stadium for Commonwealth Games 2010 was accepted, and accordingly,



22/3/10



it was called upon to take further steps like furnishing of guarantee etc.; copy of document depicting record measurement as regards the above said work of remodelling and upgradation of the National Stadium.

Learned Counsel has submitted that the agreements between the parties have not been filed even before this Appellate Tribunal.

### **Tax period – Assessment Year 2010-11**

*(Additional arguments on behalf of the Revenue )*

17. Learned Counsel for the Revenue has drawn attention of the Tribunal to some of the pages of the documents submitted on behalf of the appellant in the form of paper book pertaining to this tax period. The submission is that from the said documents, it can safely be said that this is a case of works contract and not a case only of supply of goods including services as miniscule part of the contracts.

### **Discussion**

### **Time Barred**

18. Section 34 of DVAT Act, as in force during the relevant period, read as under:-



“(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from

(a) the date on which the person furnished a return under section 26 or sub-section (1) of section 28 of this Act; or

(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

PROVIDED that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person."

19. In Samsung India's case (supra), our own Hon'ble High Court observed as under:-

"30. Section 34 of the DVAT Act spells out the maximum period within either an assessment or, where the circumstances so warrant, a reassessment under Section 32 of the DVAT Act can be made. The outer limit for either is four years from 'the end of the year comprising of one or more tax period for which the person furnished a return under Section 26 or 28 of the Act or the date on which the Commissioner made an assessment of the tax for the tax period whichever is earlier"

20. In ITD-ITD Cem Jv's case (supra), it was observed by our own Hon'ble High Court that therein limitation of four years for making the default assessment for the period 2009-10 expired on 31/03/2014.

3/10





21. In Lark Laboratories (India) Ltd's case (supra), our own Hon'ble High Court held that the impugned assessment of tax, interest and penalty, having been issued beyond the statutory period, the same could not be sustained. Accordingly, those assessments were quashed.

22. The ground / objection that the assessment pertaining to the tax period 2009-10 is barred by limitation is a legal ground / objection.

Had it been a question of law and fact, it would have been a different matter, but here the issue has been raised on the basis of returns submitted by the dealer with the dates ~~and~~ <sup>of</sup> their furnishing. ✓

I do not find any merit in the contention raised on behalf of the Revenue <sup>in peculiar situation of this case</sup> that this objection/ground cannot be raised before this Appellate Tribunal for the first time.

23. Returns for the tax period 2009-10 were furnished by the dealer on the following dates:

Return Id	Tax Period	Filing Date
785852	01-04-2009 TO 30-04-2009	20-05-2009
806403	01-05-2009 TO 31-05-2009	22-06-2009
842878	01-06-2009 TO 30-06-2009	22-07-2009
919461	01-07-2009 TO 31-07-2009	24-08-2009
934183	01-08-2009 TO 31-08-2009	20-11-2009
934194	01-09-2009 TO 30-09-2009	20-11-2009



935338	01-10-2009 TO 31-10-2009	23-11-2009
954131	01-11-2009 TO 30-11-2009	22-12-2009
993035	01-12-2009 TO 31-12-2009	21-01-2010
3435704	01-01-2010 TO 31-01-2010	24-02-2010
3587447	01-02-2010 TO 28-02-2010	27-03-2010
1129166	01-03-2010 TO 31-03-2010	23-04-2010

24. In view of the provisions of Section 34, for the said tax period assessments could be framed lastly by 24/04/2014, but herein the assessments were framed on 18/07/2014.
25. It is true that as per proviso to Section 34(1), the period for framing of assessment shall stand extended from 4 years to 6 years for the reasons given in the said proviso, but here, the Assessing Authority has nowhere observed in the assessments that he had any reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully materials on the part of the person. Such reasons are required to be specifically recorded in case of applicability of the said proviso extending the period of limitation to six years. In absence of any such reason given in the assessment pertaining to the tax period 2009-10, it cannot be said that the period of limitation prescribed for framing of the assessment stood <sup>automatically</sup> extended to six years.
26. In view of the provisions of Section 34(1) of DVAT Act as applicable prior to the amendment of 2013, the assessments

2/3/10





could be framed within four years from the date on which the dealer furnished return under Section 26 or sub-section (1) of Section 28 of DVAT Act, but herein having been framed on 18/07/2014, the assessment for the purpose of tax and interest is held to be barred by limitation and ~~is~~ accordingly deserves to be set aside. ✓

For the same reasons, assessment of penalty framed by the Assessing Authority on 18/07/2014 is held to be barred by limitation and ~~is~~ accordingly deserves to be set aside. ✓

### **Works Contract/Supply of Goods**

27. "Works contract" as defined in Section 2 (zo) 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, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property.

28. Clause (v) of Section 2 (zc) of DVAT Act, defines "sale" as under:-

**"Sale"** with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and include-

27/3/10



(v) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

29. Case of the dealer is that various contracts were entered into between the assessee and Commonwealth Games Committee and same were for supply of poles, lights and installation services in respect thereof, but Revenue has levied tax and interest considering the said contracts as works contract and thereby rejected the aforesaid claim of the assessee.

30. It is true that copy of order dated 22/07/2008 submitted by the appellant in the form of paper book, is only a letter informing the appellant that its tender for the work – remodelling and upgradation of Major Dhyan Chand National Stadium for Commonwealth Games 2010 (Sports Lighting for play field arena-I) had been accepted. Further, as per this letter, previous two letters dated 30/05/2008 and 18/07/2008, furnished by the appellant, were to form part of the agreement. The said two letters do not form part of this paper book. However, as per document under the heading “Record Measurement”, the job items were described as under:

S. N o.	BOQ Item No.	Description of Items	Measure ments	Unit	QTY.	Rema rks
1	1.1	Supply, Installation, testing and Commissionin g of 1000 w	1	Each	1	



2/3/10



		TUNGSTO N HALOGEN Flood light .....as per required. OG- 4 High mast.				
2	3.1	Supply & Laying of Following sizes of 1.1 kv XPLE insulated power cable with Aluminium conductor, pvc inner sheathed armoured, as per latest IS code...				
	3.1.3	4C x 16 sq mm cable laying for S.E.(C), CWGED-2 Office from substation upto main DB.	15+15+12	mtr	42	

31. As pointed out by Learned Counsel for the Revenue documents depicting abstracts of the job work, are lying annexed to letter dated 06/11/2009 from Executive Engineer (Electrical), Commonwealth Games Electrical, Division-I, C.P.W.D. New Delhi. He further submit<sup>- that</sup> that the job work pertained to supply, installation, testing and Commissioning of the goods mentioned therein. Similarly, another letter dated 18/11/2009 from Executive Engineer (Electrical),



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Commonwealth Games Electrical, Division-I, C.P.W.D. New Delhi to the appellant has Annexures to depict revised schedule of work. As per this revised schedule of work supply, installation, testing and Commissioning of the items described therein were the items to be supplied and installed.

In **M/s Larsen and Toubro Limited and Another v. State of Karnataka and Another**, (2014) 1SCC 708, the Hon'ble Court 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 accessory 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.

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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."

32. In *Bharat Heavy Electricals Ltd's case* (supra), the appellant therein was engaged for designing, engineering, supplying, erection, installation and Commissioning of the Trombay-V Expansion project. Placing reliance on the decision in *M/s Kone Elevator India Private Limited v. State of Tamil Nadu*, (2014) 7 SCC 1 and *Larsen and Tourbo Ltd. v. State of Karnataka*, MANU/SC/0985/2013, Hon'ble High Court held in *BHEL's case* (supra) that the contract therein was a contract for supplying and erection of equipments supply of equipment being dominant purpose.



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33. In Sentinel Rolling shutter's case (supra), while laying guidelines to distinguish a contract of sale from a works contract, Hon'ble Supreme Court observed as under:-

"The primary test is whether 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 or it is carrying out of work by bestowal of labour and service and materials are used in execution of such work. A clear case of the former category would be a contract for supply of air conditioner where the contract may provide that the supplier will fix up the air conditioner in the premises. Ordinarily a separate charge is provided in such contract for the work of fixing up but in a given case it may be included in the total price. Such a contract would plainly be a contract for sale because the work of fixing up the air conditioner would be incidental to the sale."

In **M/s Hindustan Shipyard's** case (supra), the question that cropped up before Hon'ble Apex Court was as to whether the transactions pertaining to manufacture and supply of ships by the appellant to its customers were "sale" as defined in (n) of section 2 of the Andhra Pradesh General Sales Tax, as was held by the Hon'ble High Court, or as to whether the same were "works contract" as defined in clause (t) of section 2 of the said Act and as such not exigible to sales tax, as contended on behalf of the assessee-appellant therein.

34. In Glenmark Pharmaceutical's case (supra), Hon'ble High Court decided the matter while distinguishing contract of



22  
3/10



work from a contract of sale. It was observed that dominant interest and object of the parties in entering into the contract, as evinced by the terms of the contract, the circumstances of the contract and the custom of the trade, provide a guiding indicator.

*More* **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.

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."

35. 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.

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.



12/3/10

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.

In **Builders Association of India v. UOI**, (1989) 73 STC 370, wherein it was observed that the "46<sup>th</sup> 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".

36. In Transglobal Power Ltd.'s case (supra), contract arrived at between the appellant and the other party, for construction of power lines and erection of transmission towers, consisted of following four parts:

- a) Technical specifications for laying of stations;
- b) Supply of materials;
- c) Civil portion of the contract; and
- d) Erection Portion.

Clause 7.0 of the contract pertained to the construction of the contract. Clause 7.1 provided that notwithstanding anything stated elsewhere in the bid documents, the contract to be entered into will be treated as a divisible supply and erection contract. The supply portion of the contract will relate to the



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supply of equipment and materials and the erection portion will relate to the handling at the Site, storage, erection, construction, testing, commissioning etc. as defined in the bid documents.

From the terms of the contract, Hon'ble High Court observed that the parties therein had intended to arrive at a divisible contract and further that a clear distinction was made between supply and erection contract.

As provided in one of the contracts notwithstanding the fact that the contract was termed as Civil contract, for convenience of operation and for payment of sales tax on supply portion, the other contracts namely erection was also integral part of the Composite contract on the single source responsibility basis and the contractor was bound to perform the total contract in its entirety and non-performance of any part or portion of the contract was to be deemed to be a breach of the entire contract.

Ultimately, Hon'ble High Court held that each one of the four contracts was separate; that in respect of the contract for sale of material, taxes were paid in accordance with law, no tax was payable in respect of contract for supply of labour.

37. Herein, from the substance of the documents submitted by the dealer-assessee, this Appellate Tribunal is of the opinion that this is a case where main object of entering into the contract

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was works contract and not only a contract of transfer of property/sale of goods. It cannot be said that the job of installation, testing and commissioning was ancillary or incidental to the sale of the goods, for the purposes of re-modelling and up gradation of the stadiums in connection with Commonwealth Games. This opinion is based on the <sup>peculiar</sup> ~~the peculiar~~ definition of works contract coupled with the material <sup>placed</sup> ~~based~~ on record by the dealer-appellant. As noticed above, as per definition of works contract "**works contract**", as available under DVAT Act, such contract includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property. This definition of works contract has been so framed that the job of erection, installation, fitting out, improvement, repair or commissioning of any moveable property is clearly included in it. Admittedly, the contract arrived at between the assessee and the Commonwealth Games Committee pertain to performance of act / job of not only of supply of goods but also of erection, installation, fitting out, and commissioning of moveable property by the assessee. This is not a case where the delivery of goods or act/job of transfer of moveable property took place separately or initially or individually or where the act / job of

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installation came to be done / performed subsequently. It was a case of composite contracts.

Under DVAT Rules 2005, Rule 3 has been so framed that in the table of percentage of works contract specifically defines "supply and fitting of electrical goods, supply and installation of electrical equipments including transformers", as a kind of works contract. As per the table available under Rule 2 of the Rules, in case of such a works contract, labour, service and other like charges shall have 15% of total value of the contract, for the purpose of deduction. This percentage would be applicable where amount of charges towards labour, services, other like charges are not ascertainable from the books of accounts of the assessee.

From the material available on record, it can once again safely be said that this is a case of works contract so as to apply the ~~sub-~~ rules available under Rule 3 of DVAT Rules, 2005.

38. As regards application of the provisions of DVAT Act and rule 3 of DVAT Rules qua works contract, there is no merit in the submission put forth by counsel for the appellant that a works contract, ~~only~~ 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. This opinion is based in view of the peculiar specifications available in the



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table under Rule 2 of DVAT Rules and the above said peculiar definition of "works contract" as provided under DVAT Act.

In the assessments that the dealer had claimed exemption on charges towards labour and services provided for installation by raising separate invoices.

Had it not been a case works contract, even the Assessee would not have claimed exemption on labour and services. By claiming such exemption on charges towards labour and services, it can safely be said that the assessee claimed it to be a case of works contract. However, in the returns, indisputably, the assessee did not mention any figure in the columns pertaining to works contract, for the reasons best known to it. Had the dealer any doubt regarding rate or levy of tax, it could seek determination from the Commissioner, Department of Trade & Taxes. But, the dealer never sought any such determination.

39. In view of the above established facts and applying the settled law thereto, the assessments of tax and interest framed by the Assessing Authority as well as the impugned order passed by learned OHA, deserve to be upheld, though subject to deduction towards labour & services etc. as per law, as regards tax period 2010-2011. It is ordered accordingly.

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## Penalty

40. In these cases, penalties have been imposed u/s 86 (12) read with Section 33 of DVAT Act. Section 86(12) of DVAT Act reads as under:

“Where a tax deficiency arises in relation to a person, the person shall be liable to pay, by way of penalty, a sum equal to one percent of the tax deficiency per week or a sum equal to rupees one hundred per week, whichever is higher, for the period of default.”

41. Learned Counsel for the appellant has submitted that penalty has been imposed u/s 86(12) of DVAT Act on the ground of tax deficiency i.e. the dealer-assessee paid tax @ 4% whereas in the opinion of the Assessing Authority, the turnover was exigible to tax @ 12.5%. The contention is that in the given facts and circumstances, when the question as to whether the turnover is exigible to tax @ 12.5% or @ 4%, was a debatable question, Assessing Authority should not have imposed penalty. In support of his submission, Learned Counsel has relied on following decisions:

1. **Sony India Pvt. Ltd. v. The Commissioner of Trade & Taxes**, ST.APPL 29/2013, decided by our own Hon'ble High Court on 04/08/2015;
2. **Sree Krishna Electricals v. State of Tamil Nadu and Anr.**, (2009) 11 SCC 687.

42. On the other hand, Learned Counsel for the Revenue has rightly contended that it cannot be said that any debatable point was involved. Further, it has rightly been submitted that

2  
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in case there was any doubt in the mind of the dealer-assessee regarding exigibility of the transactions to tax, it could seek determination order from the Commissioner, but no question was raised by the dealer-assessee before the Commissioner for its determination in this regard.

As regards decisions cited by Learned Counsel for the appellant, the contention raised by Learned Counsel for the Revenue that same are distinguishable on facts, has merit as present case being a case where definition of works contract, being wide open, there was no debatable point or doubt to the exigibility of the transactions to tax @ 12.5%, though subject to exclusion of labour and service charges etc. as per law.

43. In para 30 of the decision in Sony India Pvt. Ltd's case (supra), penalty was levied u/s 86 (12) of DVAT Act. Therein, our own Hon'ble High Court observed that the appellant acted bona fide in charging tax at 4%, and as such accepted the said claim of the appellant. Hon'ble Court while observing that the conduct of the appellant could not be characterised as a deliberate attempt to avoid paying applicable rate of VAT, set aside the assessment levying penalty. The case referred <sup>is</sup> distinguishable on facts.
44. In Shree Krishna Electricals' case (supra), Hon'ble Apex Court observed that the items which were not included in the turnover were found incorporated in the account books of the

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applicant. Hon'ble Apex Court held that where certain items, not included in the turnover, are disclosed in the account books of the assessee and the Assessing Authorities include the said items in the turnover of the dealer while disallowing the exemption, penalty cannot be imposed. Accordingly, Hon'ble Apex Court set aside the assessments imposing penalty.

Herein, the dealer did not reflect the relevant <sup>& genuine</sup> data in the relevant column of works contract <sup>at the same time</sup> but/ opted to claim deduction as regards labour and service charges etc. So the case referred <sup>✓</sup> is distinguishable on facts.

45. Assessing Authorities also observed in the assessment for the tax period 2010-11 that as per retail invoice No.9515763495 dated 01/07/2010, the dealer-assessee charged tax @ 5%; as per retail invoice No.95155850509 dated 01/07/2010, the dealer-assessee did not charge any tax; as per retail invoice No.9515759273 dated 08/04/2010, the dealer-assessee did not charge any tax; as per retail invoice No.9515769119 dated 04/10/2010, the dealer-assessee charged tax @ 5%.

Assessing Authority also specified in the assessment other such invoices where the dealer has charged tax @ 5% only. No explanation has come forth from the side of the dealer regarding non-charging of any tax in the invoices which find mentioned in the assessment for the tax period 2010-11.




Learned Assessing Authority has rightly taken into consideration this fact as well while imposing penalty.

46. No other argument was advanced by Learned Counsel for the parties either on the point of tax, interest or penalty.
47. In view of the above discussion, the appeals challenging levy of tax and interest in support of the turnover of the tax period 2009-2010 are allowed, the assessments being barred by limitation.
48. As regards the turnover pertaining to tax period 2010-2011, the appeals challenging levy of tax, interest and penalty are dismissed, while upholding the assessments for the said tax period <sup>-/though</sup> subject to adjustment / deductions toward<sup>of</sup> labour & service charge etc. as per Rule 3(2) of DVAT Rules, 2005.
49. Revenue Authorities to take appropriate steps for enforcement of this decision, in accordance with law.
50. 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 : 03/10/2022

  
(Narinder Kumar)  
Member (J)

