

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

Appeal No.- 185-191/ATVAT/16 &
192-198 ATVAT/16

Date of Judgment : 10/11/2022

M/s National Building Construction Co. Ltd.
NBCC House Lodhi Road,
New Delhi

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. Bhuvnesh Satija, with Sh. Udit Sharma, Advocate, with Sh. Pranab Majumder, GM (Finance) and Sh. Darshan Lal Karotiya, DGM (Finance) of the dealer-appellant.

Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. By way of present appeals dealer-assessee-objector-appellant has challenged impugned order dated 26/05/2016 passed by learned Special Commissioner-III-Objection Hearing Authority (hereinafter referred as OHA).
2. The appellant is a Navratan Company of Government of India and involved in construction activity.
3. Vide impugned order, learned OHA has rejected the 14 objections filed by the dealer-objector u/s 74 of DVAT Act. 7 objections were

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filed challenging default assessments of tax and interest whereas the remaining 7 objections were against levy of penalty.

4. The matter pertains to tax period 2nd, 3rd and 4th quarter of 2013-14 and 2014-15.

Default assessment of tax and interest for 2nd quarter of 2013-14.

5. While framing assessment for the second quarter of 2013-14, learned Assessing Authority has observed in the manner as:

“(10) From the above narration of the relevant clauses of ‘Memorandum of Understanding’ signed between NBCC & MoUD, following observations are made:-
1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors. 2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money. 3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties. 4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project. 5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties. 6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC’s responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC’s account by transferring the liable amount to NBCC account. 7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act’2004, if any. (11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:- 1.

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Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi. 2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (I) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, service, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.] (12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.311,97,35,922/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 30 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 30 Cr. will be recovered different sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.281,97,35,922/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004. (13) Besides, cross checking of the purchase related data filed by the



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dealer online in Annexure- 2A with the Annexure- 2B filed by respective selling dealers reveals that more Input Tax Credit has been claimed than the corresponding Output Tax, if any, reported by the selling dealer. The dealer has thus claimed excess Input Tax Credit of Rs.59,67,613/- in violation of the provisions of clause (g) of sub section (2) of section 9 of Delhi Value Added Tax Act, 2004 and is therefore liable for default assessment as per clause (c) and (d) of sub section (1) of section 32 of Delhi Value Added Tax Act, 2004. (14) The order o. 150061543205 dated 29-04-2015 is rectified as the penalty u/s 86(12) may be read as U/s 86(10) of DVAT Act, 2004."

Default assessment of tax and interest for 3rd quarter of 2013-14.

6. While framing assessment for the third quarter of 2013-14, learned Assessing Authority has observed in the manner as:

"(10) From the above narration of the relevant clauses of 'Memorandum of Understanding' signed between NBCC & MoUD, following observations are made:-
1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors. 2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money. 3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties. 4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project. 5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties. 6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account. 7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act 2004, if any. (11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:- 1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an



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amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi. 2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (I) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, service, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.] (12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.167,25,86,939/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 30 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 30 Cr. will be recovered different sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.137,25,86,939/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004. (13) Besides, cross checking of the purchase related data filed by the dealer online in Annexure- 2A with the Annexure- 2B filed by respective selling dealers reveals that

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more Input Tax Credit has been claimed than the corresponding Output Tax, if any, reported by the selling dealer. The dealer has thus claimed excess Input Tax Credit of Rs.63,63,164/- in violation of the provisions of clause (g) of sub section (2) of section 9 of Delhi Value Added Tax Act, 2004 and is therefore liable for default assessment as per clause (c) and (d) of sub section (1) of section 32 of Delhi Value Added Tax Act, 2004."

Default assessment of tax and interest for 4th quarter of 2013-14.

7. While framing assessment for the fourth quarter of 2013-14, learned Assessing Authority has observed in the manner as:

"(10) From the above narration of the relevant clauses of 'Memorandum of Understanding' signed between NBCC & MoUD, following observations are made:-
1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors. 2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money. 3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties. 4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project. 5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties. 6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account. 7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act 2004, if any. (11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:- 1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite



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numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi. 2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (1) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, service, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.] (12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.495,89,38,320/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 30 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 30 Cr. will be recovered different sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.465,89,38,320/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004."

Assessment for the tax period- 1st quarter- 2014-15 has been framed while observing in the manner as:

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“(10) From the above narration of the relevant clauses of ‘Memorandum of Understanding’ signed between NBCC & MoUD, following observations are made:-

1. Para I.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors.
2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money.
3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties.
4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project.
5. As per Para I.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties.
6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account.
7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act'2004, if any.

(11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:-

1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer. (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi.



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2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (i) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this Rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, services, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.

(12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.107,21,54,413/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 30 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 30 Cr. will be recovered different sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005] 5 SCC 162, the remaining amount of Rs.77,21,54,413/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004."

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Assessment for the tax period- 2nd quarter- 2014-15 has been framed while observing in the manner as:

“(10) From the above narration of the relevant clauses of ‘Memorandum of Understanding’ signed between NBCC & MoUD, following observations are made:-

1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors.
2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money.
3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties.
4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project.
5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties.
6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account.
7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act'2004, if any.

(11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:-

1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax

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liability as per details submitted by the dealer. (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi.

2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. - The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes - residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (i) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this Rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, services, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.

(12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.306,04,34,533/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 30 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 30 Cr. will be recovered different



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sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.276,04,34,533/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004."

Assessment for the tax period- 3rd quarter- 2014-15 has been framed while observing in the manner as:

"(10) From the above narration of the relevant clauses of 'Memorandum of Understanding' signed between NBCC & MoUD, following observations are made:-

1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors.
2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money.
3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties.
4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project.
5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties.
6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account.
7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act'2004, if any.



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(11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:-

1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer. (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi.
2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs. 1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs. 190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules 2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (i) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this Rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, services, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.

(12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5% where the under construction properties are to be transferred to the intending

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purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs. 3,27,46,748/- as advance from prospective buyers. IN the light of the Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.3,27,46,748/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act'2004."

Assessment for the tax period- 4th quarter- 2014-15 has been framed while observing in the manner as:

“(10) From the above narration of the relevant clauses of ‘Memorandum of Understanding’ signed between NBCC & MoUD, following observations are made:-

1. Para1.1 of MOU clearly indicates that M/s. NBCC was entrusted the construction work of East Kidwai Nagar re-development project. The Tenders for construction were floated by M/s. NBCC who awarded construction contracts to construction companies/contractors. It is M/s. NBCC who has executed the Agreements with them as MoUD has no agreement with the construction companies/contractors.
2. It is M/s. NBCC, who invited the applications for advance bookings of under construction properties (Commercial & Residential) & received applications money.
3. As per information submitted by M/s. NBCC, MoUD has not executed any agreement with the purchasers of under construction properties.
4. The advance money received by M/s. NBCC, against the booking of under construction properties, is being used by it for construction of the East Kidwai Nagar project.
5. As per Para1.3, M/s. NBCC would recover the cost of the project from lease sale of 10% commercial & residential area. The MoUD has not invested any money in the project and all the expenditure to be made in this project by M/s. NBCC, has to be recovered from the purchasers of the under construction properties.
6. Merely, the advance money collected by the NBCC & remitted into the joint escrow account (M/s. NBCC & MoUD) can not absolve M/s. NBCC of its liability to pay VAT as the same money is transferred in the NBCC account for payment to construction companies/contractors executing the works. All the construction expenditure is being meted out from this account. It is M/s. NBCC's responsibility to pay the due VAT liability, to be included towards construction expenditure. The due VAT can also be either directly paid from the Escrow Account or from NBCC's account by transferring the liable amount to NBCC account.
7. Since M/s/ NBCC has not invested its own money and all the expenditure are being met from the advance received from the purchasers, the VAT liability shall start from the date of receipt of advance. And the VAT shall be applicable on the total money received as advance after allowing permissible deductions as per DVAT Act'2004, if any.

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(11) Following facts & figures have been provided vide letters dated 10/02/2015, 07/03/2015:-

1. Commercial Complex at Okhla, Delhi (a) M/s. NBCC, so far, has received an amount of Rs. 160.41 Cr from the seven buyers against sale of 71,273 Sq. Ft of commercial space. The total construction cost of this project is Rs. 59.34 Cr (b) The organization has paid an amount of Rs. 62.29 Lac as VAT plus interest against their tax liability as per details submitted by the dealer. (c) M/s NBCC has not provided the requisitioned documents/details as mentioned in the said notices despite numerous personal visits to their offices by the senior officers of the Department of Trade & Taxes, Delhi.
2. Residential Cum Commercial Complex at East Kidwai Nagar, Delhi. (a) The organization, so far, has received an amount of Rs.1702,18,48,265/- from the twenty (20) buyers against sale of commercial/residential space. The total construction cost, as informed, incurred as on 16/03/2015 is Rs.190.43 Cr. Rule 3(1) & 3(5) of DVAT Rules'2005 on 'Incidence and Levy of Tax' on Works contracts, reproduced hereunder:- Rule 3: Works Contract (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. Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/ arrangements between the land-owner(s) and the contractor(s) / builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property. & (5) Where an agreement is executed by the builder with the intended purchaser before completion of construction as referred in sub-rule 3, (i) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this Rule shall be deemed to be taxable turnover of sale; (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above; (iii) the builder shall be eligible to deduct labour, services, other like charges in relation to (i) above in the tax period when output tax becomes payable; and (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property.

(12) In the East Kidwai Nagar project, the consideration amount received by M/s. NBCC as advance against the properties under construction, is taxable @ 12.5%



where the under construction properties are to be transferred to the intending purchasers or lease sale basis. In this quarter, M/s. NBCC has received an amount of Rs.310,52,51,390/- as advance from prospective buyers and the cost incurred so far in construction is Rs. 40.43 Cr. (Rs.190.43 Cr. Proportionately divided). The VAT liability on construction cost incurred so far i.e. Rs. 40.43 Cr. will be recovered different sub-contractors involved in the construction. However, in the light of Hon'ble Supreme Court Judgment in the case of K. Raheja Development Corporation Vs. State of Karnataka [2005]5 SCC 162, the remaining amount of Rs.270,09,51,390/- received by M/s. NBCC is taxed @ 12.5% along with interest. The resultant tax deficiency also attracts penalty u/s 86(10) of DVAT Act '2004."

Disposal of observations made by learned OHA in the impugned order.

8. Feeling aggrieved by the assessments, the dealer filed objections before learned OHA. The objections came to be disposed of in the manner as:

"As regard the objections, record of the cases and the submissions made on behalf of the objector by Shri P.S. Sareen, Sr. Counsel and by the Revenue, it is noticed that it is not in dispute that the objector is a dealer registered under the DVAT Act, 2004. It is NBCC who has to construct the buildings after getting the plans approved as per the statutory requirements. It is also not disputed that the objector is engaged in development and construction of commercial and residential properties. It is also not in dispute that the possession of the land situated at Kidwai Nagar over which the redevelopment work is being undertaken by the objector which was handed over to the objector by CPWD/MOUD. It is also an undisputed fact that cost of construction is being incurred by NBCC though by making withdrawals from an Escrow account. It is also a fact that such cost of construction is to be recovered by NBCC by leasing out part of commercial and residential premises for a period 30 years and in case the entire cost is not recovered by leasing the property for 30 years the MOU contemplates extension of lease period for recovery of cost of construction. It is also not in dispute that the advertisement inviting the application for lease of property were issued by NBCC, and the applications for allotment of office or residential space were to be received by NBCC. The allotment is to become final and binding upon NBCC only after the applicant gives an undertaking after issuance of allotment letter and signing and executing of the agreements, to abide by the terms and conditions laid down therein. NBCC has the discretion to treat the applications as cancelled and refund the money if the agreement is not executed and returned within 30 days. If for any reason, the NBCC is not in a position to allot the dwelling unit within a period of one year from the date of



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application, the NBCC has to refund the money deposited with simple interest @ 6% p.a. Further, the agreement is to be executed between the applicant and NBCC. The application form also states that NBCC shall allot the space. It is also provided in the instructions in the application that in case it is not feasible to allot space on pro rata basis, NBCC may choose the same by draw of lots and decision of NBCC shall be final and binding. It is also provided that maintenance charges are to be collected by NBCC. In case of consolidated demand on account of property tax is received, allottees are required to pay property tax pro rata to space allotted by NBCC. The very fact that the demand of property tax may be raised on NBCC established who is allotting the space to the applicant. Para 7 of the application also provides that service tax/VAT and other taxes as application shall be payable extra. This clause shows that it was in the contemplation of NBCC that there would be liability on account of VAT on allotment of flats to the prospective buyers. In the letter dated 20.11.13 addressed by NBCC to Indian Oil Corporation, it has been found stated that NBCC has provisionally allotted the space referred to therein in the proposed complex at Kidwai Nagar to Indian Oil Corporation. It has also been stated the NBCC may revise of built space. It has further been stated that the payments can be deposited in the form of DD in favour of NBCC Ltd. payable at New Delhi. This belies the claim of NBCC that it has no authority to receive the payment which were to be made to MOUD.

In my opinion, the case of NBCC is squarely covered by the decision of the Hon'ble Supreme Court in K. Raheja as well as in L&T according to which in both these cases, NBCC qualifies to be a developer of the property. Though MOUD is the owner and NBCC as a developer entered into agreement with prospective buyers. So far as submission of NBCC that it is only an agent of MOUD is concerned. It is seen that an agent is covered within the definition of the word 'dealer' under the DVAT Act and, therefore, on the sales effected by an agent, the agent is liable and covered under the provisions of DVAT Act. Secondly, if for the purpose of meeting the cost of construction, NBCC is authorized to withdraw money from the Escrow account therefore, there may not be any reason that why NBCC cannot discharge its tax liability by making withdrawal from the said account when it agrees that agreements are being entered into with prospective buyers, and therefore, the liability of paying VAT be cleared by them. Here it may be pertinent to state that NBCC has goodwill and enjoys reputation of being a Mini Ratna Corporation of Government. It is that advertisement of NBCC which evoked the desired responses from the prospective allottees which probably would not have been the case if the said task had been undertaken by any other contractor in normal course.

As far as submission of NBCC that its position is that of a contractor, it is noticed that even as a contractor the NBCC has not discharged its liability which was expected of a Government Corporation as NBCC has attempted to take shelter under the judgement of the Hon'ble Supreme Court in L&T's

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case by not paying any tax as a contractor while the said judgment was distinguished by the Hon'ble Delhi High Court in L&T's itself.

Moreover, even assuming that the position of NBCC is only that of a contractor, in my opinion, where the contractor is being paid the consideration in the form of a right in the property, as in the present case the right to lease out the property is given to NBCC by virtue of which the NBCC enters into agreement with the prospective buyer during the construction, compels me to arrive at an inescapable conclusion that objector is liable to pay VAT on the basis of his agreement with the prospective buyer and the money from market has been raised from the prospective buyers, as such the VAT liability is required to be discharged. The fact that the objector did not disclose correct GTO on account of which the penalty u/s 86(10) was also imposed. I do not find any merit, as such objection in this regard are also rejected.

With above observations, I am inclined to reject the objections preferred."

8. Since the objections were dismissed by learned OHA, dealer-assessee has come up in appeals.
9. Heard. File perused.
10. When the appeals were taken up for arguments, learned counsel for the appellant submitted that while framing default assessment of tax and interest, Assessing Authority wrongly observed that as regards East Kidwai Nagar Project, consideration amount was received as advance by the dealer-assessee, against the properties under construction, and accordingly fell in error in levying tax @12.5% on this amount. The submission was that actually no amount was received by the dealer-assessee as advance in respect of properties under construction and that the said amount received by way of

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advance lease rental was initially kept in Escrow Account, whereas NBCC had nothing to do with this lease rental.

11. Today, when the appeal has been taken up for arguments, Learned counsel for the Revenue submitted that in the peculiar facts and circumstances of this case, liability of the dealer-appellant to pay tax arose as soon as the dealer-appellant submitted invoice(s) pertaining to the activities of works contract, irrespective of the date when the said bill was actually sanctioned by the committee and the amount was transferred from Escrow Account to the account of the dealer-appellant.
12. As regards the above said submission put forth by learned counsel for the Revenue, learned counsel for the dealer-appellant did not controvert the same and rather agreed that this is a case where liability of the dealer-appellant to pay tax arose as soon as the dealer-appellant submitted invoice(s) pertaining to the activities of works contract, irrespective of the date when the said bill was actually sanctioned by the committee and the amount was transferred from Escrow Account to the account of the dealer-appellant.
13. Learned Counsel for the dealer-appellant and learned counsel for the Revenue submitted that these appeals can be disposed of in view of the above submission put forth by learned counsel for the latter-Revenue and accepted by learned counsel for the dealer-appellant,



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and while setting aside the impugned order passed by learned OHA and the impugned assessments, matter be referred to learned OHA only for recalculations in view of the said agreement as regards the submission put-forth by learned Counsel for the Revenue.

14. Learned counsel for the dealer-appellant further submitted that in view of the above submission of learned counsel for the Revenue and accepted by him (learned counsel for the dealer-appellant), he did not press any other argument or ground.
15. Learned counsel for the appellant went on to submit that for the purpose of recalculation in view of the above submission, the dealer shall submit relevant documents if already not submitted before learned OHA.
16. It may be mentioned here that Learned counsel for the dealer-appellant has not disputed that this is a case of works contract in terms of agreements between MoUD and the dealer-appellant. Further, it may be mentioned that as per case of the dealer-appellant and the documents produced by, receipt of amounts by the dealer-appellant from time to time, on the basis of invoices issued by it and submitted to the concerned committee supervising Escrow Account, is not being disputed by the dealer-appellant.
17. Having regard to the peculiar facts and circumstances of this case, the admitted facts, keeping in view the provisions of DVAT Act, concerning works contract and the above said submission made




today by learned counsel for the Revenue and accepted by learned counsel for the dealer-appellant, these appeals are disposed of, and while setting aside the impugned demands towards tax, interest and penalty upheld by learned OHA vide impugned order, the matter is referred to learned OHA for recalculations, keeping in view that the parties are in agreement that this is a case where liability of the dealer-appellant to pay tax arose as soon as the dealer-appellant submitted invoice(s) pertaining to the activities of works contract, irrespective of the date when the said invoices were actually sanctioned by the committee and the amount was transferred from Escrow Account to the account of the dealer-appellant.

It is made clear that for the purpose of recalculations in view of the above submission, the dealer shall submit relevant documents if already not submitted, before learned OHA. Dealer to appear before learned OHA on 28/11/2022.

18. 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: 10/11/2022


Narinder Kumar
Member (Judicial)

