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

Appeal Nos.: 104-105/ATVAT/12
Date of Judgment: 12/01/2023

M/s Unity Pratibha Multimedia (JV)
B-85, Bisham Pitamah Marg,
Defence Colony,
New Delhi. .....Appellant

v.

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

Counsel representing the Appellant : Sh. Rajesh Jain.
Counsel representing the Revenue : Sh. C. M. Sharma.

JUDGMENT

1. The above captioned two appeals pertain to assessment years 2003-04 and 2004-05 respectively.
2. The dealer-a firm registered under Sales Tax Act, has challenged common order dated 27-01-2012, passed by learned Special Commissioner-III- First Appellate Authority.
3. Vide order dated 27-01-2012, First Appellate Authority upheld *reassessment* framed on 13-04-2009 u s 24 Delhi Sales Tax Act (DST Act) read with section 16 of Delhi Sales Tax of Work Contract Act, 1999 (DSTWC Act) pertaining to the tax periods 2003-04 and 2004-05.

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4. As is available from record, dealer-appellant a "work contractor" was engaged in contract awarded by Delhi Jal Board.

5. Initially, assessment for the year 2003-04 was framed on 24-03-2005 under section 16 DST WC Act read with section 23(3) of DST Act, 1975 whereby a refund of Rs. 18,59,945/- was created.

Case of the dealer – appellant is that it filed an application for seeking release of refund, but notice for re-assessment came to be issued u/s 24 of DST Act.

Said notice was challenged by the dealer before the Hon'ble High court. In the meanwhile, re-assessment was framed and demand of Rs. 13,56,923/- raised. The writ petition filed before the Hon'ble High Court was dismissed having become infructuous. That is how, re-assessment was challenged by way of appeal before learned First Appellate Authority.

Said first appeal was dismissed vide common order dated 27/01/2012 and that is how, dealer has challenged the impugned order by way of present appeal.

6. As regards re-assessment for the tax period - year 2004-05, demand of Rs. 24,24,782/- was raised by the Assessing Authority.

Said re-assessment pertaining to the year 2004-05 came to be challenged by the dealer before learned Special Commissioner by way of first appeal. The appeal was dismissed vide above said

common order dated 27/01/2012 and that is how, dealer has challenged the same by way of present appeal.

7. Learned Special Commissioner dismissed the two appeals while observing in the manner as:-

> "I have heard the arguments put forth by the Ld. Counsel and gone through the records in detail. In the present case the dealer is not paying tax on the central turnover on the grounds that such transactions are in course of interstate transactions under section 3 of Central Sales Tax Act 1956.
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> The goods started from the Mumbai supplier M/s Pratibha Pipes and structural Pvt. Ltd. Mumbai and ended in the delivery at the work site of Delhi Jal Board which the appellant has treated as in the course of interstate sale.
>
> The appellant dealer has claimed exemption on such transactions because they have taken place in the course of inter state trade or commerce where under the movement of goods from one state to another is pursuant to or is an incident to the contract in fulfillment of execution of works contract.
>
> On analysis of the case it is observed that in fact, the dealer is treating two transactions as a single one and claiming it as sales in the course of inter state trade to claim exemption under CST Act.
>
> In fact, the whole transaction has taken place in two different phases, namely, in the course of inter state trade and commerce against C form and the local sale from the dealer to Delhi Jal Board. Both the transactions are two distinct one and liable to be taxed under CST Act, 1956 and DST Act, 1975 respectively.
>
> The transfer of goods from M/s Pratibha Pipes and Structural Pvt. Ltd. Mumbai against C form is in the course of inter state trade and is eligible for exemption whereas the second part of the sale i.e. from Unity Pratibha Multimedia to Delhi Jal Board is a local sale liable to be taxed under DST Act. Therefore, treating the transactions made by M/s Unity Pratibha

Multimedia to Delhi Jal Board as both under CST Act against C form and as well as DST Act, the re-assessment made by the Assessing Authority is justified.
The appeal is accordingly rejected."

8. Arguments heard. File perused.

Validity of Show-cause Notice for Re-assessment (for the tax period 2003-2004)

9. Learned Counsel for the appellant has referred to notice dated 16/01/2009 u/s 24 of DST Act, issued to the dealer and submitted that by way of this notice, the department informed the dealer that "the turnover of its business for the year 2003-04 had escaped assessment to tax / had been under-assessed / had been assessed at a rate at which it was assessable / deduction had been wrongly made vide assessment order dated 31/03/2005 framed u/s 23 of DST Act, 1975", and further submitted that, that is how, the Assessing Authority proposed to determine the best of his judgment u/s 24 of the Act, the amount of tax due.

Learned Counsel for the appellant has submitted that initially assessment pertaining to tax period 2003-04 was framed on 24/03/2005 u/s 16 of Delhi Sales Tax on Work Contract Act, 1975 thereby observing that it was a case of excess payment of Rs. 18,59,945/- which was refundable/adjustable.

The contention raised by learned Counsel for the appellant is that this is a case of change of opinion and the re-assessments deserve to be set aside.

10. Learned Counsel for the appellant has referred to 1st para of re-assessment order dated 15/04/2009 to point out that even though as per notice dated 16/01/2009, the reason for reopening was escapement of assessment to tax, but as per the re-assessment order, the re-assessment notice in ST-15 (u/s 16 of the DSTWC Act 1999 read with section 24(1) of DST Act) was issued on different ground.

The contention is that in the given circumstances, the re-assessments which were in contradiction with the contents of the notice deserved to be set aside. In support of this contention, Counsel for the appellant has relied on following decisions:

(1) **Kishan Chand Aggarwal v. CST**, 2003(1) UPTC 628 (All.)

(2) **CTT Vs. Chauriha Traders,** 2003 (129) STC 263 (All.)

11. On the other hand, learned Counsel for the Revenue has contended that during the relevant period procedure provided under DST Act, 1975 was being followed, even after enactment of DSTWC Act, and that notice dated 16/01/2009 issued u/s 24 of DST Act, 1975 cannot be said to have got vitiated simply because no reference was made therein to DSTWC Act.

Counsel for the Revenue has also contended that the notice dated 16/01/2009 having being issued u/s 24 of DST Act cannot be said to invalid as words "escaping assessment" which find mention in the said provision, were incorporated in the notice, even though in the order sheet, reasons were recorded for reopening the case for assessment under DSTWC Act, 1999.

12. *Originally*, assessment pertaining to tax period 2003-04 came to be framed due to the following reasons:

> "Total cost of work awarded from DJB is Rs. 44,99,42,900/-. Out of this dealer's receipts during the period 10.09.2003 to 31.03.2004 are of Rs. 1,00,55,48,699/-. This is to be assessed under Tax Assessment Scheme under Section 5 as dealer did not applied for Composition u/s 6 WCT Act. For execution of work material is mainly purchased from factory at Thane (Maharashtra) on the strength of C - forms. Deduction claimed on this a/c is of Rs. 6,31,55,346/-. This, however has not been subjection to Local Sales Tax. Deduction on a/c of Tax paid declared goods and consumables appear in order. Deduction of Rs. 21,680/- & Rs. 18,75,781/- respectively on these accounts is allowed. Total deduction are of Rs. 99691218/-. Taxable sale is thus of Rs. 8,57,181/- which is taxable @ 8%. Dealer has claimed exemption on a/c of labour and services charges of Rs. 3,46,38,231 - appear on higher side, specially profit/margin on labour. However, these details are duly reflected in books of a/c and audited balance sheet and also submitted details. These thus appear in order.
>
> As for non levy of tax on purchases on 'C' forms and local tax on the dealer contented that section 3 of CST Act 1956 formulates the principles that if the contract occasions the movement of goods from one State to another it is transaction in the course of interstate trade of commerce. Further section 9(1) of CS Act fixes the taxable

event in the case of interstate transaction it state from where the goods have originated. The moment goods are handed over to the common carrier, the common carrier becomes the agent of the purchaser and property stands transferred at that very moment. In support the dealer quoted the case of BHEL vs. UOI (102 STC 373) wherein the apex court in case of work contract gave judgment of Builders Association of India (73 STC 370) Supreme Court and Gammon Dunkerley case (88 STC 204) Supreme Court held that were a question arises whether a sale is on ISS or not it has to be answered w.r.t and on the basis of Section 3 alone. Where question arises in which State is the tax leviable, one must look to and apply the test in Section 9(1), no other provision is relevant in this question. The Hon'ble Supreme Court also noted the fact that the goods were dispatched to ultimate purchaser after these were inspected at vendors factory out of the State by ultimate purchaser.

The above mentioned judgement supports the contention that sales have been complete in Maharashtra as movement or goods occasions hereinafter the goods were inspected by agency of DJB. The contention of the dealer thus allowed. However, it has been seen that dealer has claimed exemption of Rs. 6869187 - due to costing and wrapping of pipeline from M/s Lloyd Insulations. It is specialized work. However, it is felt that some material must have been used and transferred to DJB. Accordingly 15% of such work is taken as cost of material transferred and taxed @ 8%. Thus, Rs. 1030378 - taxed @ 8%. Assessment is as follows:

GTO	100548699	Tax Assd	151029
Section 3 of CST Act 1956	63155346	Tax Paid	0
Labour & Services	33607853	TDS Paid	2010974
Tax Paid	21860	Excess Paid	1859945
Declared Goods			
Consumables	1875781		
Taxable @ 8%	1887859		

Hence, this is a case of excess payment of Rs. 1859945/- which is refundable/adjustable."

Vide separate assessment dated 15/03/2005 framed **u/s 23(3) of DST Act, 1975**, pertaining to the same tax period 2003-04, learned Assessing Authority observed that during the year, dealer's GTO was of Rs.10,36,14,702/- out of this Rs.10,05,48,699/- was under Work Contract and assessed separately. Learned Assessing Authority further observed that neither there was inter-State sale and nor there was any sale of asset during the said assessment year. Accordingly, it was found to be a case of 'Nil' demand.

Vide separate assessment **under CST Act** pertaining to the same tax period 2003-04, for the aforesaid reasons that the dealer had not made any inter-State Sale during the year, Learned Assessing Authority observed that it was a case of 'Nil' demand.

Issuance of Show-cause Notice

13. As per record, show-cause notice dated 12/07/2007 came to be issued by the Department to the dealer with reference to its refund claim for the year 2003-04 and for the year 2004-05.

In the end of said notice, the reason for reopening stands recorded as under:

"Amount of Rs. 6,31,55,346 - has escaped assessment to tax u/s 5 of Delhi Sales Tax on Works Contract Act, 1999."

14. As finds mentioned in re-assessment order dated 15/04/2009, re-assessment notice in ST-15 was issued to the dealer on the following grounds:

> "From the perusal of books of accounts the dealer, it is confirmed that the dealer has made purchases amounting to Rs 7,80,44,740/- against 'C' forms during A/Y 2003-04. As the abovesaid purchases have not suffered Tax in Delhi. Deduction of Rs. 6,31,55,346/- U/S 3 of CST ACT 1956 is not applicable in this case. Hence the case of the dealer for A/Y 2003-04 is being re-opened to tax under Sale Tax on WCT ACT 1999. Accordingly ST-15 is issued for 02/02/2009 to the dealer through registered post and one copy to Sh. P.S. SARIN, Advocate for the dealer through ward VATI."

However, in the Show-cause notice dated 12/07/2007, it was mentioned that after going through the details of the case, it was obvious that the goods purchased by the dealer in the course of inter-State trade were directly consumed in the works contract and had not been resold, and as such it amounted to misuse of 'C' Form, and said act was punishable u/s 10(d) of Central Sales Tax Act.

15. It is not in dispute that vide order dated 28/09/2007, learned VATO – Ward 96 informed the dealer that its claim for refund was being withheld u/s 13(6) of DVAT Act for both the assessment years 2003-04 and 2004-05, for the reasons recorded therein.

16. In **Kishan Chand Aggarwal v. CST**. 2003(1) UPTC 628 (All.), it was observed that a notice u/s 21 of U.P. Trade Tax Act, 1948 is a jurisdictional notice and its defect cannot be cured in subsequent proceedings and if the notice is invalid, the entire proceedings shall be invalid and liable to be quashed.

Therein, it was held that Appellate Authority and the Tribunal ought to have quashed the order passed u/s 21 read with section 9 (2) under Central Sales Tax Act instead of remanding back the case to Assessing Authority.

In **CTT v. Chauriha Traders.** 2003 (129) STC 263 (All.), for non-compliance of the order u/s 8 C (2) of U.P. Trade Tax Act 1948, notices were issued by the Trade Tax Department to the dealer demanding security, and in response the dealer filed certain documents but did not produce regular account books and the bank guarantee directed to be submitted, and it led to passing of order u/s 8-A (1-B) of the Act. Registration granted in favour of the dealer was also cancelled.

Hon'ble High Court, having dealt with the contentions raised, observed in the manner as:

> "I have heard learned counsel for the parties and I find that the notice for cancellation of registration was contemplating different aspects and grounds whereas, the order cancelling registration were comprising of different aspects and grounds other than what were mentioned in the notice. The cancellation of registration on the grounds and for the reasons other than

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what were contemplated in the notice shall tantamount taking steps in derogation of "rule of audi alteram partem", i.e., indicative of that the opposite party/dealer has not been provided opportunity of hearing. It is therefore, clear that the opposite party/dealer has not been heard before cancellation of his registration certificate both in U.P. as well as in Central. From this point of view I do not find any illegality or impropriety in the order dated May 27, 2002 of learned Tribunal. However, the observation of learned Tribunal in respect of cancellation of registration shall not debar the Trade Tax Department to further initiate any legal action for cancellation of registration of opposite party-dealer, to be made in accordance with law if necessary, in future, after issuing proper notice and passing proper order."

17. As per record, **re-assessment** for the period 2003-04 was framed by learned Assessing Authority for the following reasons:-

"Re-Assessment notice in S T-15 (u/s 16 of the Delhi Sales Tax on WC Act 1999 read with section 24(1) of Delhi Sales Tax Act, 1975) was issued to the Assessment year 2003-04 on the following ground recorded in the order sheet:

"From the perusal of books of accounts the dealer, it is confirmed that the dealer has made purchases amounting to Rs. 7,80,44,740/- against 'C' forms during A/Y 2003-04. As the abovesaid purchases have not suffered Tax in Delhi. Deduction of Rs. 6,31,55,346/- u/s 3 of CST Act 1956 is not applicable in this case. Hence the case of the dealer for A/Y 2003-04 is being re-opened to tax under Sale Tax on WCT Act 1999. Accordingly, ST-15 is issued for 02/02/2009 to the dealer through registered post and one copy to Sh. P.S. Sarin, Advocate for the dealer through ward VATI"

In response to the said ST-15 Sh. P.S. Sarin, Advocate joined re-assessment proceedings and also noted the above reasons recorded for

re-assessment of the case and requested for Adjournment to collect the requisite documents from Mumbai Office of the dealer. On his Request the case was Adjourned for 16-02-2009. On the said date Sh. Manoj Mittal C.A, also authorized by the dealer, appeared and filed a written submission that "the dealer has Filed writ petition in Delhi High Court" on the said submission, it was observed that the dealer has not prayed obtained stay on the re-assessment proceedings, however the case was adjourned 27-02-2009. On 27-02-2009. Sh. D.M. Sinha, Advocate appeared and filed a written submission signed by him and Sh. P.S. Sarin that the said cases is listed for briefing on 26-03-2009. Finally, a fresh Call-Memo was issued on 27-03-2009 for 13-04-2009 but none appeared nor any intimation was received I have, therefore, been left with no option but to decide the case Ex-party to the best of my judgment and documents available on record.

M/s Unity Pratibha Multimedia J.V. is registered under Delhi Sales Tax on work contract Act 1999 and Central Act and the dealer is engaged in execution of work contract. During the assessment year 2003-04, the dealer was exclusively engaged in execution of a composite works contract amounting to Rs. 44.99 crore awarded by Delhi Jal Board for design build clear water transmission mains for filling the storage reservoirs in South Delhi.

"The dealer has made Central purchases against C form on the strength of Registration Certificate and despite that has not paid any tax under Sales Tax on WCT Act 1999, on The plea that goods have been purchase u/s 3 of CST Act 1956, in pursuance of privity of Contract with Delhi Jal Board. Further it has been pleaded at the time of assessment that the purchases from the other state used in the execution of Works Contract is a sale in the course ISS and is no taxable as per provisions of CST Act. As per provision of section 5(4) of the DST on Works Contract Act 1999 read with rule 5(1)(a) the turnover of the goods involved in the execution of works contract which are transferred in the course of Inter State Trade or covered u/s 3 & 5 of CST Act, 1956 are deductible from turnover of the dealer.

The plea of the dealer that the goods have been purchased from inter state suppliers directly on behalf of DJB under privity of contract is not tenable because goods have been purchased by the dealer under section 8(4)(a) of Central Act, on the strength of his registration certificate. In this regard it is found that the dealer has misinterpreted the Central Sales Act, 1956 because section 9(1) can't be read in isolation as the clarification provided in the section have been ignored and if a holistic view of the section read with provisions of sub section (1)(a) of the said section is taken the Delhi State is empowered to imposed tax on such purchases made against 'C' forms.

Further the dealer has also misinterpreted the provisions of section 5(4) of the DST on Works Contract Act 1999, because the said deduction has been provided for the registered works contract dealers of Delhi who are engaged in execution works contract in a number of states which can't be taxed under DST on WCT Act. 1999 but the same is needed for the purpose of reconciliation of their total Gross Turnover with the Audited Books of accounts in a particular assessment Year.

Accordingly, the dealer is liable so be taxed under DST on WCT ACT 1999, 76 when a dealer purchases goods on the strength of 'C' forms he cannot opt for composition u/s sec. 6 and such a dealer is liable to be assessed under section 5 of the Act. There is clear provision in section 5(1) and 5(2) of the aforesaid Act to tax interstate purchase (i.e. the purchases which have not suffered tax in Delhi) @ 8% (other then declared goods) and @ 4% (Declared goods u/s 14 of CST ACT) respectively.

But the dealer failed to comply with the above said provisions and instead of paying tax on the central purchase made on the strength of 'C' form (Which are deemed sale in Delhi) reflected them as central sales u/s 3 of CST ACT thereby got it deducted from the taxable turnover and paid on tax u/s 5(1) & 5(2) of WCT Act.

The amount of the said unauthorized deduction is Rs 63155346/- during assessment year 2003-04 as a result of which instead of paying

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tax to the state the dealer managed to create unlawful claim for refund.

The provisions u/s section 5(1) & 5(2) of Delhi sales Tax on works contract Act. 1999 is in Consonance with said judicial pronouncements and provisions under central sales act 1956. In the instant case no assessment under Central Sales Act 1956 or under Delhi Sales Act 1975 is required. And such the Re-assessment order has been framed under sales tax on WCT Act 1999. In the re-assessment order there is no change in the Gross Turnover, deduction claim on account of labour and service charges, consumables and tax paid declared goods and the changes have been made in 4% and 8% sales being the purchases made against 'C' forms used in the execution of works contract and the Re-Assessment order is framed as under:

GTO		103614702/-
Less (1) tax paid declared goods	21860/-	
(2) Consumable	1875781/-	
(3) Lab & Ser charges	33607853/-	
	----------	35505494/-
Taxable @ 8%		1887859/-
Taxable @ 4%		66221349/-
Total Tax due		2799883/-
TDS Paid		2010974/-
Tax Due		788909/-
Interest		568014/-
Total Demand		1356923/-

Hence the dealer is liable to pay the demand of Rs 1356923/- instead of refund of Rs. 1859945/- in the initial assessment order dated 31-03-2005."

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18. As noticed above, in the notice dated 16.1.2009 given under DST Act, issued for re-assessment, the reason given is that amount of Rs.6,31,55,346/- had escaped assessment to tax u/s 5 of the WCT Act.

19. In the course of arguments, Counsel for the appellant has not disputed the contention raised by Counsel for the Revenue that during the relevant period procedure provided under DST Act, 1975 was being followed, even after enactment of DSTWC Act. In the given situation, notice dated 16/01/2009 issued u/s 24 of DST Act, 1975 cannot be said to have got vitiated simply because no reference was made therein to DSTWC Act, particularly when in the order sheet which led to issuance of re-assessment notice in ST-15, it was observed that the case was being reopened for the purpose of exigiblity to sales tax under DSTWC Act.

20. However, the other contention raised on behalf of the appellant is that even if it is assumed that the said notice was under DSWCT Act, the reason attributed that the said amount had escaped assessment to tax, was contrary to the record made available. It has been submitted that the amount of Rs. 6,31,55,346/- was duly recorded in the books of accounts; that it was shown in the return as deduction being transaction in the course of inter state trade and commerce and that as per assessment order passed under the DSWCT Act, the Assessing Authority had allowed deduction on

the basis of contract, documents on record, accounts and the judgments relied upon on this issue.

As regards the above contention raised by Counsel for the appellant that the notice dated 16/01/2009 having being issued u/s 24 of DST Act is invalid for the reason that it was not a case of "escaping assessment", but a case of change of opinion, in the given facts and circumstances, there is merit in said contention.

In the Show-cause notice dated 12/07/2007, it was mentioned that it was a case of misuse of "C" Forms as the details of the case revealed that goods purchased by the dealer in the course of inter-State trade had been directly consumed in the works contract and had not been resold.

As is available from the notice dated 16/01/2009 issued under Section 24 of DST Act in Form ST-15, it was mentioned that it was a case of escapement of assessment / under-assessment / assessment at a rate lower than a rate at which it was assessable / deduction has been wrongly made vide assessment order dated 31/03/2005. In the notice, specific reason for its issuance should have been mentioned or tick marked while deleting the other irrelevant reason, but in the presence of so many reasons, without striking off the irrelevant, said notice cannot be said to be a happily worded notice clearly communicating to the dealer as to on what ground it was being issued.

Section 46 of DST Act empowers the Commissioner to call for record of any proceeding under the Act and examine the same and pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment and penalty (if any) imposed or cancelling the assessment and penalty (if any) imposed and directing a fresh assessment, if he considers that any order passed therein by any person appointed under sub-section (2) of section 9 to assist him, is erroneous in so far as it is prejudicial to the interests of revenue, and that too he may, after giving the dealer an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary.

Herein, no power u/s 46 of DST Act was resorted to and rather, re-assessment came to be framed by the Assessing Authority.

Furthermore, there is nothing on record to suggest that at the time the assessment was initially framed, such and such material was not available with the Assessing Authority, which called for re-assessment.

In **CST v. Janta Wire Works**, (1991) 81 STC 250 (Del.), it has been held that if the assessing authority did not have information or material which had let to under-assessment or escaped assessment, then in such a case resort can only be had to this section, and the escaped turnover reassessed. However, if the

assessing officer, at the time of making the assessment, could pass a correct order but he has failed to do so, then that error or mistake can be corrected by the revisional authority.

In the given facts and circumstances, framing of re-assessment by the Assessing Authority can safely be said to be a case of change of opinion. Therefore, the re-assessment framed on 15/04/2009, for the tax period 2003-04 deserves to be set aside. It is ordered accordingly.

Assessment for the tax period 2004-05

21. Learned counsel for the appellant has submitted that assessment pertaining to tax period 2004-05, u/s 16 of DST WC Act, 1999, read with section 23(3) of DST Act 1975 was framed on 31/03/2006 observing that it was a case of excess payment of Rs. 40,18,893/- which was refundable/adjustable. A separate assessment u/s 9 of CST Act was framed raising demand of Rs. 1,68,06,565/-. Feeling aggrieved, the dealer challenged said assessment under CST Act, before Additional Commissioner-I by filing an appeal, whereupon the said assessment framed under CST Act was set aside and case was remanded to the Assessing Authority to look into the matter and frame fresh assessment after ascertaining that goods purchased from outside Delhi were utilized in the specific work contract and not sold. This is not being disputed by the Revenue.

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22. As per record **re-assessment** pertaining to the period 2004-05 was framed while observing in the manner as:-

> "Re-Assessment notice in ST-15 (u/s 16 of the Delhi Sales Tax on WCT Act 1999 read with section 24 (1) of Delhi Sales Tax Act, 1975) was issued to the dealer on 27-03-2009 for the Assessment year 2004-05 on the following ground recorded in the order sheet:
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> "From the perusal of books of accounts the dealer, it is confirmed that the dealer has made purchases amounting to Rs. 2,02,08,896/- during A/Y 2004-05 out which purchase against 'C' Forms are Rs. 15,70,88,513/-. AS the above said purchases have not suffered Tax u/s 5 of Delhi, Sale Tax on WCT Act 1999 being the Central purchases which have not suffered Tax in Delhi. Out of the total GTO of Rs. 22,51,41,068 - has claimed deduction of Rs. 14,61,26,654/- on account of ISS transactions u/s (3) of CST Act 1956, but actually it is the amount of purchases made against 'C' forms and consumed in the execution of works contract of Delhi Jal Board. Hence the case of the dealer for A/Y 2004-05 is being re-opened to tax under Sale Tax on WCT Act 1999. Accordingly ST-15 is issued for 13/04/2009 to the dealer through registered post and one copy to Sh. P.S. SARIN, Advocate for the dealer through ward VATI".
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> "The Adovcate Sh. P.S. SARIN refused to accept the notice from the VATI according his copy of notice was sent through registered post. The copy of notice sent to the dealer through registered post have been received back undelivered and today no one has appeared at the given time. I have therefore, been left with no option but to decide the case Ex-party to the best of my judgment and document available on record."
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> M/s Unity Pratibha Multimedia J.V. is registered under Delhi Sales Tax on work contract Act 1999 and Central Act and the dealer is engaged in execution of work contract. During the

assessment year 2004-05, the dealer was exclusively engaged in execution of a composite works contract amounting to Rs. 44.99 crore awarded by Delhi Jal Board for design build clear water transmission mains for filling the storage reservoirs in South Delhi.

"The dealer has made Central purchases against C form on the strength of Registration Certificate and despite that has not paid any tax under Sales Tax on WCT Act 1999, on The plea that goods have been purchase u/s 3 of CST Act 1956, in pursuance of privity of Contract with Delhi Jal Board. Further it has been pleaded at the time of assessment that the purchases from the other state used in the execution of Works Contract is a sale in the course ISS and is no taxable as per provisions of CST Act. As per provision of section 5(4) of the DST on Works Contract Act 1999 read with rule 5(1)(a) the turnover of the goods involved in the execution of works contract which are transferred in the course of Inter State Trade or covered u/s 3 & 5 of CST Act. 1956 are deductible from turnover of the dealer.

The plea of the dealer that the goods have been purchased from inter state suppliers directly on behalf of DJB under privity of contract is not tenable because goods have been purchased by the dealer under section 8(4)(a) of Central Act, on the strength of his registration certificate. In this regard it is found that the dealer has misinterpreted the Central Sales Act. 1956 because section 9(1) can't be read in isolation as the clarification provided in the section have been ignored and if a holistic view of the section read with provisions of sub section (1)(a) of the said section is taken the Delhi State is empowered to imposed tax on such purchases made against 'C' forms.

Further the dealer has also misinterpreted the provisions of section 5(4) of the DST on Works Contract Act 1999, because the said deduction has been provided for the registered works contract dealers of Delhi who are engaged in execution works

contract, in a number of states which can't be taxed under DST on WCT Act, 1999 but the same is needed for the purpose of reconciliation of their total Gross Turnover with the Audited Books of accounts in a particular assessment Year.

Accordingly, the dealer is liable so be taxed under DST on WCT ACT 1999, 76 when a dealer purchases goods on the strength of 'C' forms he cannot opt for composition u/s sec. 6 and such a dealer is liable to be assessed under section 5 of the Act. There is clear provision in section 5(1) and 5(2) of the aforesaid Act to tax interstate purchase (i.e. the purchases which have not suffered tax in Delhi) @ 8% (other then declared goods) and @ 4% (Declared goods u/s 14 of CST ACT) respectively.

But the dealer failed to comply with the above said provisions and instead of paying tax on the central purchase made on the strength of 'C' form (Which are deemed sale in Delhi) reflected them as central sales u/s 3 of CST ACT thereby got it deducted from the taxable turnover and paid on tax u/s 5(1) & 5(2) of WCT Act.

The amount of the said unauthorized deduction is Rs 63155346 - during assessment year 2003-04 as a result of which instead of paying tax to the state the dealer managed to create unlawful claim for refund.

The provisions u/s section 5(1) & 5(2) of Delhi sales Tax on works contract Act, 1999 is in Consonance with said judicial pronouncements and provisions under central sales act 1956. In the instant case no assessment under Central Sales Act 1956 or under Delhi Sales Act 1975 is required. And such the Re-assessment order has been framed under sales tax on WCT Act 1999. In the re-assessment order there is no change in the Gross Turnover, deduction claim on account of labour and service charges, consumables and tax paid declared goods and the changes have been made in 4% and 8% sales being the purchases

made against 'C' forms used in the execution of works contract and the Re-Assessment order is framed as under:

GTO	:	22,51,41,068/-
Less (1) Tax paid declared goods	:	40,68,796/-
(2) Consumables	:	8,70,218/-
(3) Labour & Service Charges	:	7,10,96,759/-
	-------	7,60,35,773/-
Taxable @ 8%	:	29,78,641/-
Taxable @ 4%	:	14,61,26,654/-
Total Tax due	:	60,83,357/-
TDS Paid	:	45,08,823/-
Tax Due	:	1574534/-
Interest/-	:	850248/-
Total demand	:	24,24,782/-

23. While disposing of/said appeal filed u/s 9 of CST Act, learned First Appellate Authority had observed in the manner as:

> "I have heard the arguments of the counsel and have also gone through the written submission placed on record. From the facts placed on record, it is clear that there is a privity of contract between the supplier and the contractee. The contractee is a party to the arrangements between the contractor and the supplier. The terms and conditions of the contract and goods are specific one supplied by the particular supplier at the site and instruction of the contractee. The purchases from the other states used in the execution of works contract is a sale in the course of ISS and is not taxable as per the provisions of CST

Act. As per the provision of Section 5(4) of DST on Works Contract Act, 1999 read with rule 5(1)(a), the turnover of the goods involved in the execution of works contract which are transferred in the course of inter state trade or covered under section 3 & 5 of CST Act, 1956 are deductable from the total turnover of the dealer.

In view of the same orders dated 24/03/2005 passed by the AA under the Central Act are set aside. The case is remanded back to the AA with the direction to look into the matter and assess afresh after ascertaining that good purchased from outside Delhi have been utilized in the specific work contract and not sold.

The appellant is directed to appear before the Ld. AA on 12/04/2007 so that assessment be completed expeditiously."

24. On behalf of the appellant, it has been submitted that before framing re-assessment for the tax period 2004-05, show-cause notice is stated to have been issued by the Assessing Authority as per order dated 27/03/2009. As per order sheet dated 02/04/2009 passed by the Assessing Authority, VATI had informed that Sh. P.S. Sareen had refused to accept ST-15 notice.

Contention is that when Sh. P.S. Sareen was not authorized representative of the dealer at the relevant time and as such he was not authorized by the dealer to accept notice, his refusal to accept the notice could not be taken into consideration.

Provisions of Section 24(1) of the DST Act lay down mandatory precondition of service of a notice on the assessee. As far as 2004-05 is concerned, no statutory notice in Form ST-15, u/s 16 of WCT

Act read with Section 24(1) of the DST Act, 1975 was served on the appellant.

In this regard, reference ~~may be~~ has been made to decisions in :

> **Commissioner of Sales Tax, Maharashtra State, Bombay v. Shrimal Sakharchand,** 1984 (57) STC 224 (Bom.);
> **S.K. Manekia v. Commissioner of Sales Tax,** (1977) 39 STC 426;
> **Laxmi Narain Anand Prakash v. Commissioner of Sales Tax,** 1980 (46) STC 71 (All.);
> **Y. Narayana Chetty And Another v. Income Tax Officer, Nellore, and Others,** AIR 1959 SC 213.

As per the provisions of Section 24(1) of the DST Act, read with Rule 46 of the DST Rules, the expression used with respect to notices is "to serve", which tantamount to be "given" or tendered or to be "communicated" and not merely "to issue". The service of notice would ~~is~~ not be completed by mere issuing of the notice, without actual communication of it to the assessee. In this regard, reliance has been placed on following decisions :

> **Margra Industries Ltd. v. Commissioner of Customs, New Delhi,** 2006 (202) E.L.T. 244;
> **Purushottam Jajodia v. Dir. Of Revenue Intelligence, New Delhi.** 2014 (307) E.L.T. 837 (Del.);
> **Munnalal Agarwal v. Jagdish Narain And Others.** 2000 (1) SCC 31;
> **Mrs. Payal Ashok Kumar Jindal v. Captain Ashok Kumar Jindal,** 1992 (3) SCC 116;
> **K. Narasimhiah v. H.C. Singri Gowda And Others,** AIR 1966 S C 330;

25. Revenue has not placed on record any material to suggest that Sh. P.S. Sareen was authorized by the dealer to accept any such notice or participate ~~any~~ in the proceedings by way of re-assessment for the tax period 2004-05. So, there is merit in the contention raised on behalf of the appellant that Sh. P.S. Sareen, being not authorized representative of the dealer, had not authority to accept the show cause notice for the purpose of re-assessment for the tax period 2004-05.

26. As per order sheet dated 02/04/2009 the show-cause notice dtd. 27.3.2009 sent by the Assessing Authority to the dealer by registered post was received back undelivered.

The notice dated 27/03/2009 issued to the dealer having been ~~had~~ returned to the Department ~~which~~ goes to show that there was no service of the notice. Therefore, ex-parte order could not be passed. In this regard, reference may be made to decision in:

> **Tele Tube Electronics Ltd. v. Delhi Sales Tax Appellate Tribunal and Others,** 2003 (132) STC 424 (Del);

Therefore, it was again a case of non service of show cause notice upon the dealer for the purposes of re-assessment for the tax period 2004-05.

27. There is nothing on record to suggest that any steps were taken by the Assessing Authority for service by affixation of the show cause notice. I do not find any merit in the contention on behalf of the

Revenue that service by affixation was to be effected only in case of refusal by Sh. P.S. Sareen to put signatures while refusing to accept the show cause notice.

28. In the given circumstances, I am of the view of that re-assessment for the tax period 2004-05 came to be framed without due service of show cause notice upon the dealer.

29. As regards merits, suffice it to say that in view of the above observations and findings recorded by learned First Appellate Authority that the turnover of the goods involved in the execution of works contract which are transferred in the course of inter- state trade or covered under section 3 & 5 of CST Act, 1956 are deductable from the total turnover of the dealer, it remains unexplained as to how re-assessment order, under challenge, came to be framed raising demand of Rs. 24,24,782/-, in respect of tax period 2004-05. In other words, Assessing Authority could not record observations or reasons contrary to what had already been decided by the learned First Appellate Authority on this point. Therefore, even on this ground, the re-assessment order deserves to be set aside.

Refund

30. On the point of refund and for grant of interest thereon, learned counsel for the appellant has referred to the provisions of section

30(4) of DST Act and submitted that when the dealer has not been given refund of the amount due, as per assessment initially framed pertaining to tax period 2003-04, dealer is entitled to interest for the period commencing on expiry of 90 days period, from the date of filing of application-ST-21.

Application seeking refund was filed on 09/05/2005. It has also been submitted that there is nothing on record to show that there was any delay on the part of the dealer in the proceedings, so as to disentitle him to interest or exclude any period for the said purpose i.e. grant of interest on the amount of refund.

In support of entitlement of the dealer-appellant to interest, learned counsel for the appellant has referred to decision in **Ranbaxy Laboratories Ltd. v. Union of India,** 2011 (273) E.L.T.3 (S.C.)..

It has been contended that as the proceedings for re-assessment for both the years were patently without jurisdiction and initiated to deny the refund to the appellant, appellant be granted refund of Rs. 18,59,945/- for 2003-04 and Rs. 40,17,481/- for the year 2004-05. Counsel for the appellant has submitted that the appellant is also entitled to interest in terms of Section 30(4) of the DST Act.

31. Record reveals that dealer submitted application dated 09/05/2005 for refund under sub-section (1) of Section 30 of DST Act, 1975 in form ST 21, seeking refund of Rs. 18,59,945/-, so far as tax period

2003-04 is concerned and a refund of Rs. 40.18.893/- for the tax period 2004-05, But the Revenue issued to the dealer show cause notice dated 12/07/2007 while observing that the goods purchased by the dealer in the course of inter-state trade were directly consumed in the work contract and were not sold, and it tantamount to misuse of 'C' form punishable u/s10(d) of CST Act.

32. Vide order dated 28/09/2007, learned Assessing Authority-VATO-Ward-96, withheld refund for both the assessment years- 2003-04 and 2004-05. It may be mentioned here that the dealer did not challenge order dated 28.09.2007 whereby refund for both the assessment year was withheld, before the Competent Authority. By filing first appeal, the dealer challenged only the re-assessment vide which demand was raised. The re-assessment orders did not deal with the point of refund at all. In the given situation, when the refund order dated 28/09/2007 is not the subject matter of these appeals, no decision is required to be given by this Appellate Tribunal on the point of refund and grant of interest.

Result

33. In view of the above discussion, both the appeals are allowed and the impugned common order passed by learned First Appellate Authority upholding the re-assessment for the tax period 2003-04 and 2004-05 are set aside.

12/1/23

APPELLATE TRIBUNAL VAT DELHI

34. File be consigned to 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: 12/01/2023.

Narinder Kumar
12/1/2023
(Narinder Kumar)
Member (Judicial)