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

M.A. No. 649/22
Date of Order: 16/03/2023

M/s Electronic Paradise (North). .....Applicant

v.

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

Counsel representing the Applicant : Sh. Sushil Kumar Verma.
Counsel representing the Revenue : Sh. P. Tara.

ORDER

1. This order is to dispose of Application M.A No. 649/ADDL./22 filed by the applicant-dealer on 15/01/2023 during pendency of Review Application No. 05/2022. Prayer in the application reads as under:

> "In view of the above exceptional circumstances, the applicant is seeking permission of this Hon'ble Tribunal to place on record the additional evidence in the form of a Certificate from the registered selling dealer stating that they have not claimed that VAT refund nor passed on the VAT refund on the sales made to the applicant – who too is a registered dealer and sales were made against tax invoices only. This evidence was and is very crucial for the determination of the controversy in the parent appeal and in this review application. The whole genesis of the demand is this premise that the selling dealer had reduced the VAT in his returns and hence the applicant was also supposed to reverse the input tax credit. By this certificate being attached in original for the kind consideration of this Hon'ble Tribunal."

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2. In the application, it has been alleged that the additional evidence is in the form of a certificate from the registered selling dealer to the effect that the selling dealer had neither claimed refund of VAT nor passed of the refund of VAT on the sales made to the dealer. It has also been alleged that this certificate is very crucial for determination of controversy involved in this matter.

Further, it has been alleged that the said certificate/evidence was not within the knowledge of the applicant and that even after the exercise of due diligence, same could not be produced earlier.

3. Applicant has alleged that it had sought time to procure and produce a similar certificate but this Appellate Tribunal did not grant more time. Further it has been alleged that after the disposal of the appeal by this Appellate Tribunal, the appellant made strenuous efforts to procure a similar certificate and since the transactions related to very old period, the selling dealer took time for their verification and then issued the said certificate.

4. The application has been opposed on behalf of the Revenue by filing reply thereto. The plea put forth by the Revenue is that after the filing of the reply dated 08/12/2022 to the review application, on behalf of the Revenue, the dealer has come up with present application seeking permission to file additional evidence. As pleaded in the reply, said application for additional

evidence is nothing but abuse of process of law. Further, it has been pleaded that the appeal was filed by the dealer in the year 2011 and disposed of in the year 2022 and whatever evidence was produced by the dealer during said period of 11 years, was considered by this Appellate Tribunal while deciding the said appeal vide judgment dated 16/08/2022. In this regard, reference has been made to paras No. 9 &10 of the judgment dated 16/08/2022. So, it has been pleaded taking the said additional documents on record at this belated stage, while seeking review, is not permissible as per law.

5. Arguments advanced on this application by learned counsel for the parties while arguing the review application.

6. Counsel for the applicant contended that the certificate sought to be produced is very crucial for determination of the controversy in the review application, but the applicant could not procure the same earlier from the supplying dealer despite efforts, and as such same be allowed to be placed on record by way of additional evidence.

In support of his submission, counsel for the applicant has placed reliance on following judgments:

"1. In **Sungandhi (Dead) v. P. Rajkumar,**order passed by the Hon'ble Supreme Court on 13/10/2020 (complete reference not available);

2. In **Jindal Stainless (Hissar) Ltd. v. Saurabh Jinal and Ors,**CS (COMM) 247/2019, order passed by our own Hon'ble High Court 03/01/2022;

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3. In **K. Venkataramiah v. A Seetharama Reddy & Ors,** 1964 SCR (2) 35."

7. On the other hand, counsel for the Revenue has contended that no material has been submitted by the dealer to show any effort made by it for such a certificate from the supplying dealer, during the period of 11 years, the appeal remained pending or prior thereto. It has been contended that when as per case of the applicant itself, this certificate has been procured after filing of the review application, this is not a case of due diligence on the part of the dealer.

Further, it has been contended that this certificate dated 05/12/2022 now sought to be produced is in contradiction with the note already appended to the credit notes discussed by this Appellate Tribunal.

Another submission on behalf of the Revenue is that the dealer had itself reduced its ITC, by way of self-assessment, and as such that objection filed by the dealer u/s 28 of DVAT Act for the purpose of revising of return were rightly dismissed by Objection Hearing Authority.

Accordingly, it has been contended that the application seeking permission to place on record additional evidence be dismissed.

8. For the purpose of disposal of this application, brief facts need to be referred to.

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9. Dealer – applicant - a partnership firm registered vide TIN 07900267600 has challenged order dated 16/11/2011 passed by Learned Additional Commissioner (Special Zone).

Vide impugned order, Learned Additional Commissioner declined the request of the dealer-applicant to submit revised returns, and thereby disposed of objections u/s. 28 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act).

The dealer sought furnishing of revised return for the tax period February 2009, March 2009, April 2010, May 2010, June 2010, July 2010and August 2010 on the ground that excess tax had been paid by the dealer.

As is available from the Memorandum of Appeal, the applicant used to purchase from LG Electronics electronic goods for resale as its distributor in the defined territory. The dealer received periodical credit notes from LG Electronics representing the discount given as per pre-sale settlement between the parties. However, as alleged, due to mistake in legal interpretation of the provisions of DVAT Act, the dealer – applicant reversed input tax credit on all such credit in respect of the above said tax periods, when actually LG Electronics had paid tax on their total sales turnover, without adjusting their sale price with the value of the credit notes issued to the dealer. In

other words, the seller had not reduced the sale price for transactions done with the dealer – applicant.

Further, as per case of dealer in the appeal, during correspondence by the dealer-applicant with LG Electronics, later the seller confirmed through certificates issued by them that no tax benefit had been taken by them in the returns filed by LG Electronics with the department for the relevant tax periods.

In this way, the case of the dealer-appellant is that it paid tax more than that was due, which led to the filing of the aforesaid application/ objection u/s. 28 of DVAT Act.

10. Objections filed u/s 28(2) of DVAT Act 2004, (as said provision was in force during the relevant period), were disposed of by learned Additional Commissioner on 16/11/2011, while observing that the credit notes did not fulfil the requirements of Rule 45 and same could not be considered for adjustment u/s 10 of DVAT Act and further that their benefit could have been obtained u/s 10 of DVAT Act, only in case credit notes were issued u/s 51(a) of DVAT Act.

Learned Additional Commissioner was also of the view that while reducing its input tax credit on the said credit notes received from the selling dealer, the dealer had not committed any mistake, and further that in case revised return was allowed to be furnished that would have defeated the provisions of

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section 10(1) read with section 51 of DVAT Act and Rule 45 of DVAT Rules.

11. From the very beginning, in its memorandum of appeal, appellant-applicant alleged that on its subsequent request, selling dealer-LG informed the appellant that "no tax benefit had been taken" by them- the selling dealer- for the relevant tax period.

It may be mentioned here that it was averred in the memorandum of appeal that copies of credit notes received were being separately given in the form of paper book. However, no such credit notes were actually furnished with the appeal. Same were presented on 12/08/2022 i.e. at the time of final arguments in the appeal when counsel for the appellant presented an application to place on record copies of credit notes received from the selling dealer, while submitting that inadvertently the same could not be submitted earlier. It was submitted in the application presented on 12/08/2022, that copies of credit notes were also submitted before learned OHA. In view of this submission by counsel for the applicant, copies of credit notes were taken on record, especially when prayer for their production was not opposed.

It is significant to note that the appeal remained pending for about 11 years, but no effort was made to produce the

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certificate, which is now sought to be produced, by way of additional evidence.

Even though in this application, it has been alleged that strenuous efforts were made by the applicant to collect the certificate, but no material what-so-ever has been placed on record to suggest that such and such step was taken by the dealer earlier i.e. during pendency of the appeal or during the pendency of objections before learned OHA.

12. It may be mentioned here that while concluding arguments in the appeal, counsel for the appellant had sought one week's time for production of documents after collecting the same from the selling dealer, but, as already mentioned above, the buying dealer-appellant was not diligent enough in taking steps for collection of any such document and its production before learned OHA or before this Appellate Tribunal, during a period of 11 years during which the appeal remain pending. Accordingly, request for more time was declined.

In Jindal Stainless (Hissar) Ltd.'s case (supra), a suit for permanent injunction, restraining infringement of trademark, passing-off etc., defendant No. 1 submitted an application to bring on record certain additional documents, due to certain developments which were alleged to have taken place during pendency of the suit and after filing of the written statement and documents. Said additional documents were stated to be in

public domain and also necessary for just determination of the case.

Therein, the plaintiff opposed the application on the ground that the additional documents were in possession of the applicant and that the applicant could not show any reasonable cause for non-disclosure of the said documents. As regards partnership agreement, deed of assignment and demand draft, it was contended on behalf of the plaintiff that those were not relevant for the purposes of adjudication of the disputes.

Therein, Hon'ble Court vide interim order dated 15/05/2019 had permitted the defendant to use the trade/word mark and no restrained order was passed in respect thereof and after receipt of trade mark registration certificate, defendant No. 1 had requested the Hon'ble Court to place the same on record.

That suit was at the stage of cross-examination of PW-1. Parties were yet to establish their case with respect to use of trade mark on the issues framed. As regards other three documents, Hon'ble Court observed that defendant No. 1 had brought to the notice of the Hon'ble Court about creation of a LLP Company from 14/08/2020. Applying observations made by Hon'ble Apex Court in Sugandhi's case (supra), particularly paras No. 8 & 9, Hon'ble High Court allowed the taking on record of the above said documents, without prejudice to the rights of the parties.

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In Sughandi's Case (supra) Hon'ble Apex Court dealt with appeal wherein application filed by appellant to produce additional documents was dismissed, and Hon'ble High Court had dismissed the revision petition. The application was filed by the defendant in the suit for injunction, when it was pending for their evidence. It was claimed by the defendant that they had recently traced documents relating to the suit property and the same could not be produced along with written statement.

Hon'ble Supreme Court granted leave to the Appellant to produce said documents while observing that application was filed by them assigning cogent reasons for not producing the same with the written statement i.e. said documents were missing and were only traced at a later stage, and further that it could not be disputed that said documents were necessary for arriving at a just decision in the suit.

Both the two cases referred to above are distinguishable on facts and as such do not come to the aid of the applicant.

In K. Venkataramiah's case (supra), the challenge before the Hon'ble Apex Court was to the order passed by the Hon'ble High Court allowing additional evidence. Hon'ble High Court had allowed admission of additional evidence while observing that it required such evidence either to enable it to pronounce judgment or for any other substantial cause. Hon'ble High Court

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had allowed production of the evidence on its own requirements and as per provisions of order 41 Rule 27 CPC.

There was a petition filed by the appellant seeking declaration that election of the three persons be declared void and the petitioner be declared as duly elected to the Legislative Council. The additional evidence that was produced in the matter had not been tendered in evidence before the Election Tribunal.

As per facts of the said case, counsel for the appellant had concluded arguments before the Hon'ble High Court and there after counsel for the respondent started addressing the Hon'ble Court, but on the next date an application was filed on behalf of the respondent claiming that two registers on registration and withdrawal be received and admitted as additional evidence in appeal.

Said registers were stated to have been summoned by the appellant along with the other documents and actually produced before the Election Commission by the Head Master. When the record was transmitted to the High Court, said registers were also transmitted. It was stated that said document had "an important bearing" upon the case for arriving at correct conclusion with respect to Issue No. 1. During appeal, the respondent filed counter objection.

Hon'ble Apex Court found that when neither party could rely upon the said record for being proved and exhibited, the

Respondent No. 1 filed a petition under Order 41 Rule 27 CPC and section 151 C.P.C. to receive them as evidence and mark the registers, as exhibits. Hon'ble Supreme Court vide order dated 21/07/1961 had permitted the 1st respondent in the appeal to prove the said documents before the Election Tribunal, while granting opportunity to the appellant to cross examine the persons, to be summoned to prove thesaid documents. Accordingly, Election Tribunal recording statements of two head masters. This is how, the entries in the two registers were Exhibited as R-21 and R-24.

Hon'ble Apex Court observed that the requirements was the requirement of the High Court and it was not right for the Hon'ble Apex Court to examine the evidence to find out whether the Hon'ble Supreme Court required such additional evidence to enable to pronounce judgment. It was further observed that Appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause.

Ultimately, Hon'ble Apex Court felt satisfied that the High Court allowed additional evidence as it required the said evidence to enable it to pronounce judgment or for any other substantial cause.

Therein, even though record was summoned before the Election Tribunal, same was not got proved, and Hon'ble High Court

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found that said evidence was required to enable to pronouncement judgment, but, herein, very well knowing its case from the very beginning, the applicant-dealer did not take any step to collect any such certificate from the supplying dealer, either before Learned OHA or before the Appellate Tribunal, during a period of more than 11 years. It also did not take any step to call the supplying dealer for examination either before OHA or before the Appellate Tribunal to explain the things. The certificate now sought to be produced is inconsistent with most of the foot-notes appended to the Notes. Therefore, this decision relied upon on behalf of the applicant also does not come to its aid.

13. As a result, the application seeking permission to place additional evidence is hereby dismissed.

Announced in open court.
Dated: 16/03/2023.

Narinder Kumar 16/3/2023

(Narinder Kumar)
Member(J)