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

Appeal Nos. : 1664-1683/2009
Date of Judgment: 26/04/2023.

M/s. Emersion Climate Technologies (India) Ltd,
56, Rama Road Industrial Area,
Moti Nagar Main Market, New Delhi .....Appellant

v.

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

Counsel representing the Appellant : Sh. Puneet Agrawal.
Counsel representing the Revenue : Sh. S.B. Jain.

JUDGMENT

1. The above captioned appeals came to be filed on 01.03.2012. Appeals have been preferred against order dated 28.10.2011 passed by Learned OHA-Additional Commissioner whereby objections filed by the dealer- appellant herein were held to be without any merit and rejected. Accordingly, default assessment of Tax & Interest and Assessment of Penalties passed by the Assessing authority on 08.02.2010, were upheld.

2. As per default assessment of Tax and Interest framed on 08.10.20210, Assessing Authority raised demands of Tax &

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Interest, in total of Rs.7,65,832/- pertaining to the tax period April 2006-07 due to following reasons:

> "Dealer is engaged in the business of sale of compressor in Delhi. Dealer also undertake the business of replacement of old defective compressor with old repaired compressor. In lieu of old compressor given by the consumer different repaired compressor is supplied against the uniform charges. The defective compressor so collected is sent to his factory at Maharashtra and also repair, the repaired compressor is returned to the same office which becomes part of the floating stock of the dealers. The dealer has treated repair charges as its other income not subject to sales tax. In this regard, dealer has also furnished his written submission contesting that this is a service not sale and service tax is being paid on it The Hon'ble STAT, Delhi in case of the dealer in one earlier case has held that transition amount to sale of goods involved in the supposed repair., the use of labour and skill being incidental to supply of goods and there for repair, charges so collected are subject to tax under the DST Act, 1975. In view of the above finding the repair charges collected by the dealers are added in the Local taxable turnover of the dealer and taxed @ 12.5% with interest on the deficiency of this tax notice of penalty u/s86 of the DVAT Act,2004 is being issued separately.
>
> The Dealer is hereby directed is hereby directed to pay tax of an amount of Rs.7,65,832/-(Seven Lakh Sixty Five Thousand Eight Hundred and Thirty Two Only) and furnish details of such payment in Form DVAT 27A along with proof of payment in the undersigned on or before 25.02.2010....."

3. Demands of tax, interest & penalty raised by the Assessing Authority for the relevant tax periods can be tabulated as under:

Tax Period	Amount		
	Tax	Interest	Penalty
April, 2006-07	4,93,214	2,72,618	9,76,563
June, 2006-07	6,78,783	3,58,453	12,55,748
July, 2006-07	6,04,438	3,11,740	10,94,032
August, 2006-07	4,51,680	2,27,386	7,94,956
September, 2006-07	3,94,670	1,93,820	6,78,832
October, 2006-07	2,28,270	1,09,288	3,81,210
November, 2006-07	1,44,670	67,479	2,35,812
December, 2006-07	2,70,951	1,23,041	4,30,812
February, 2007-08	2,43,654	1,04,637	3,65,481
March, 2007-08	4,58,389	1,91,204	6,69,247

4. The impugned assessments were challenged before learned OHA under section 76(4) of DVAT Act. The objections came to be disposed of while observing in the manner as:

> "In connection with the subject of objection, the sub clause (b) of clause (29-A) of Article 366 of the Constitution defines what works contract is. It is deemed sale, which involves the transfer of property in goods (whether as goods or in some other form) involved in the execution of a contract.
>
> The constitutional validity of the 46th Amendment of the Constitution whereby clause(29-A) was inserted to Article 366 has been upheld by the Constitution Bench

of the Supreme Court in Builder Association of India Vs Union of India (1989) 73 STC 370(SC);(1989) 2 SCC645, holding that the object of the new definition of the work "sale" is to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to sub-clauses(a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression" tax on the sales and purchase of goods" in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods(whether as goods or in some other form) involved in the execution of a works contract also.

It is also observed that the Division Bench of the Bombay High Court in the case of Commissioner of Sales Tax vs. Matushree Textile Limited(supra) has held that the contract of dyeing and printing of cloth is a work contract and there is a transfer of property in colours, dyes and chemical. In the case of Commissioner of Sales Tax, Mumbai vs. Hari & Company(supra), Division Bench of Bombay High Court has held that a contract for bringing out the Xerox copies amounts to works contract and the ink used for providing Xerox copies is passed on to the customers and, therefore, its value is liable to tax. The case of Gannon Dunkerley and Co. vs State of Rajasthan is also an important judgement on 'Works Contract'(1993) 66 Taxman 229 = (1993) 10 CLA 56 (SC) = 1992 (3) SCALE 173 = 1993 AIR SCW 2621 = (1993) 1 SCC 364 =(1993) 88 STC 204 (SC-5 member bench judgement). Here, it was held that taxable event is the transfer of property in the goods involved in execution of a works contract. The said transfer of property takes place when goods are incorporated in the works.

Hence, value of goods at the time of incorporation in the works can constitute measure for levy of tax. However, cost of incorporation of the goods in works contract can not be made part of measure for the levy of tax. It was held that value of goods involved in works contract would have to be considered for taxation on works contract. Charges for labour and services have to be deducted from total value of works contract. Moreover, tax cannot be levied on goods which are not taxable under sections 3,4 &5 of CST and goods covered under sections 14 & 15 of CST. If contractor is not able to give detailed breakup, legislature can prescribe scales for deductions permissible on account of cost of labour and services for various types of works contract. It is permissible to have a uniform rate for works contract. This rate may be different from the rates applicable to individual goods.

I have gone through the documents submitted by the dealer in supports of the objections and have also heard the arguments of the counsel. Attention of the counsel was drawn to the case in the matter of M/s. Kirloskar Bros. Limited vs CST(2000-01) 40 DST C J-99(Del. Trib.) wherein it was observed that the dealer, alongwith trading activities, was also engaged in the business of repair of old compressors. In lieu of old compressors given by the customer, different repaired compressor was supplied against the uniform repair charges. The defective compressor so collected was sent to its factory at Maharashtra and after the repair, the repaired compressor was returned to the same office which became part of the floating stock of, that office. The dealer treated repair charges as its other income, not subject to sales tax. The Delhi Sales Tax Appellate Tribunal, however, held that transaction amounts to sale of goods involved in the supposed repair, the use of

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labour and skill being incidental to supply of goods and, therefore, repair charges so collected are subject to tax.

I have gone through the submissions made by the counsel as well as the various courts judgements. The citation by the ld counsel of various judgements that the exchange/barter of the goods is held to be not covered under the definition of sale is not tenable on the grounds that in the instant case the customer never approaches the dealer with the intention of exchange/barter of old non working compressor. His intention to get the old non working compressor repaired from the dealer. It is the dealer who gives in the option of either waiting for about 60 days to get his compressor repaired or exchange it with the old working compressor available with the dealer of the shelf on a payment of fixed charges. These fixed charges constitute both the material component as well as the labour component. This case would, therefore, be different from the cases where old gold /jewellery or old scrap is exchanged/bartered with the new jewellery/new articles by charging the labour charges by the dealer. From the discussion above, it is seen that in the instant case the property in goods is transferred from the dealer to the customer while handing over of a working compressor off the shelf for a valued consideration of fixed price and receiving of a non working compressor. The contract between the customer and the dealer for exchange/repair of nonworking compressor with the working compressor comes under the definition of Works Contract and hence, is covered under the definition of sale envisaged in Section 2 sub Section (zc) of DVAT Act. The fixed price charged is the valuable consideration received for the repair covered under the Works Contract. The supply of a working compressor in lieu of a value consideration is covered under the definition of sale as the property in goods has

clearly changed hands from one person to another person. It is further seen that the repair charges charged by the dealer consist of both material cost and labour cost. However, dealer is not maintaining any separate account and charging fix amount for repair of old compressors. The charges so charged are covered under the definition of sale as per Section 2(zc) of DVAT Act, 2004. Therefore, I feel that the objections filed by the dealer have no merit and deserve to be rejected. The default assessment orders and penalty assessment orders passed by the Assessing Authority are upheld."

5. Hence, these appeals.

6. In the set of appeals, an order was passed on 07.03.2014 on an application under Section 76(4) of Delhi Value Added Tax Act, 2004 (hereinafter referred to as the Act). Said application was disposed of on 12.05.2014. Dealer-applicant filed application No.22/14 for restoration of the files which came to be dismissed. Arguments were heard on said application on 27.04.2015 and orders were reserved. However, thereafter files never came up before the Appellate Tribunal upto 29.11.2022. On 14.10.2022, Sh. S.B. Jain, Counsel for Revenue submitted an application to the Registry that theses appeals had never been disposed of.

7. Thereupon, Registry started looking into the records to trace out this set of appeals, but could not trace out. Ultimately, the Registry brought the matter to the notice of this Appellate

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tribunal on 30.11.2022. Thereupon, the above facts came to light from the submissions put forth by Sh. S.B. Jain, Counsel for Revenue. Since the counsel was not aware of the order, if any, passed on application No.22/14 and even files were not traceable, court notice was issued to dealer and its counsel.

8. It may be mentioned here that on 30.11.2022 when Registry brought the matter to the notice of this Appellate Tribunal, Sh. Vishnu Mittal, VAT Practitioner/STP who was being contacted by the Registry, confirmed that appeals had not been disposed of. That is how, records have been re-constructed on the basis of copies made available by Sh. S.B. Jain, Counsel for Revenue and authenticated by Sh. Vishnu Mittal, STP.

9. After hearing arguments on the above said application No.22/14, same was allowed taking into consideration that the dealer had complied with the order under Section 76(4) of the Act, even though subsequently.

That is how, reconstructed record came to be listed for hearing of final arguments. Matter has been reported to the Commissioner, Department of Trade & Taxes for enquiry and disciplinary action against the concerned delinquent officials.

10. Arguments heard. File perused.

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11. Learned counsel for the appellant has contended that from the nature of the transaction, on the basis of which default assessments of tax, interest and penalty have been framed, are actually covered by 'exchange' and not by the definition of 'sale'. In this regard, reliance has been placed on the provision of section 118 of The Transfer of Property Act and section 2(zc) of DVAT Act.

12. On behalf of the appellant, as regards expression "for cash, deferred payment or any other valuable consideration" appearing in the definition of 'sale' as defined u/s 2 (zc) of DVAT Act, reliance has been placed on the following decisions:-

1. **Devi Das Gopal Krishnan and others v. State of Punjab and others**, (1967) 20 STC 430 (SC);
2. **State of Madras v. Gannon Dunkerley**, (1958) 9 STC 353 (SC); and
3. **State of Andhra Pradesh v. Hotel Srilakshmi**, (1947) 33 STC 444 (AP).

13. It has been contended on behalf of the appellant that where no price is fixed and old defective article is taken and in exchange an old repaired article is given, while charging certain money as repair charges, it would not amount to sale. In support of this contention, reliance has been placed on the following decisions:-

1. **S.T.C. v. Ram Kumar Agarwal**, (1967) 19 STC 400 (All);
2. **Vijaya Aluminium Indust. v. A.P.,** (1996) 103 STC 508 (AP);
3. **M. Jai Hind. v. Kerala**, (1998) 111 STC 374 (Ker);
4. **C.S.T. v. Kansari Udyog**, (1979) 43 STC 176 (MP);
5. **P.A. Raju Chettiar v. Madras**, (1955) 6 STC 131 (Mad.); and
6. **Vishweshwar Das v. Madras**, (1962) 13 STC 113 (Mad.).

May, 2006

14. In the course of arguments, one of the contention raised by learned counsel for the appellant-assessee is that for the tax period May 2006, Special Commissioner, vide order dated 25/11/2010, decided the objections in favour of the appellant-objector, but even then the impugned order came to be passed by learned OHA-Additional Commissioner. The contention is that in the given situation, learned OHA should not have taken a different view from the one taken by the Special Commissioner, in respect of one tax period i.e. May 2006.

15. Learned counsel for Revenue has admitted that learned Special Commissioner dealt with objections filed by the dealer-appellant against assessments pertaining to the tax period May 2006 and that same points were involved.

16. In the order dated 25/11/2010 pertaining to the tax period May 2006, on behalf of the dealer-objector, it was submitted that such a transaction of repair and replacement does not amount to sale, particularly when no price of old defective compressor or of the new repaired old compressor was fixed. In support of said submission, following decisions were relied on by the objector before Ld. OHA:

i. Commissioner of Central Excise (2004) 137 STC 596 (SC);
ii. Commissioner of Income Tax (1993) 91 STC 450 (SC); and
iii. Jindal Dyechem Industries P. Ltd. (2005) 142 STC 257 (Delhi).

17. Learned Special Commissioner, while deciding the dispute and the objections raised by the dealer-objector pertaining to tax period May 2006, observed in the manner as:

> "I have heard the contention of the learned counsel to the appellant and gone through the facts and circumstances of the case it is observed that objector company received the defective compressors from the customers and forwarded the same to their contractor's factory situated at Karad (Maharashtra) and in lieu of old compressor given by the customer, different repaired compressor is supplied against uniform charges from their floating stock available at that point of time. The objector is exchanging an old repaired article and certain money is charged for repair charges in Delhi. It is therefore the transactions in question i.e. collecting defective compressors from customers and supplying repaired compressor to the customers besides collecting labour charges would not amount to sale. Hence,

> the interest of justice the impugned default assessment order and penalty order are set aside and the Assessing Authority is directed to pass a fresh assessment order after examining the facts of the case, the books of accounts, contractual documents between the parties in the light of the provisions of DVAT Act/Rules, instructions of the department and judgments referred by the appellant."

18. Present impugned order passed by Learned OHA pertains to tax periods April, 2006-07, June-December, 2006-07, February, 2006-07 & March, 2006-07. It was passed on 28.10.2011. Default assessments of tax and interest were framed on 08.10.2010, which were challenged before Learned OHA and upheld vide the impugned order. While framing assessments, Assessing Authority took into consideration decision by the Appellate Tribunal-STAT and other factors. For ready reference, relevant portion of the default assessments is reproduced hereunder:

> "The Hon'ble STAT, Delhi in case of the dealer in one earlier case has held that transition amount to sale of goods involved in the supposed repair, the use of labour and skill being incidental to supply of goods and there for repair, charges so collected are subject to tax under the DST Act, 1975."

Even Learned OHA, while disposing of the objections vide impugned order referred to earlier decision by this Appellate Tribunal. For ready reference, relevant portion of the impugned order is reproduced:

"Attention of the counsel was drawn to the case in the matter of M/s. Kirloskar Bros. Limited vs CST(2000-01) 40 DST C J-99 (Del. Trib.) wherein it was observed that the dealer, alongwith trading activities, was also engaged in the business of repair of old compressors. In lieu of old compressors given by the customer, different repaired compressor was supplied against the uniform repair charges. The defective compressor so collected was sent to its factory at Maharashtra and after the repair, the repaired compressor was returned to the same office which became part of the floating stock of, that office. The dealer treated repair charges as its other income, not subject to sales tax. The Delhi Sales Tax Appellate Tribunal, however, held that transaction amounts to sale of goods involved in the supposed repair, the use of labour and skill being incidental to supply of goods and, therefore, repair charges so collected are subject to tax."

19. Learned counsel for the Revenue has contended that this is a clear case of sale and there is no merit in the claim of the dealer that it is a case of exchange. In support of his contention, learned counsel has relied on following decisions:

1. **Mohd. Ekram Khan & Sons v. Commissioner of Trade Tax, U.P.,** 2004 (136) STC 515;
2. **Kirloskar Brothers Ltd. v. Commissioner of Sales Tax, Delhi**, Appeal No. 83/STT/99-2000 and others, decided on 27/08/2001 by Appellate Tribunal, Sales Tax, New Delhi;
3. **M/s Indersons Motors Pvt. Ltd. v. Commissioner of Trade & Taxes,** decided by this Appellate Tribunal on 18/11/2013;

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20. Record reveals that notice dated 21/01/2010 u/s 59 of DVAT Act was issued by the Assessing Authority to the dealer for additional information. Thereupon, dealer submitted certain documents which find mention in its reply dated 01/02/2010 (available at internal page 33). Vide separate response of same date i.e., 01/02/2010 (available at internal page 35) dealer submitted its plea as under:

> "We, Emersion Climate Technologies (India) Ltd. (Formerly known as Kirloskar Copeland Limited), New Delhi registered under the VAT & Central Sales Act, vide No. TIN No. 07050165393 dated 03/04/93, are a Branch Office engaged in the Resale of Hermetically Sealed Compressors manufactured at our Factories at Karad & Alil in Maharashtra, and Stock Transferred to us for Sale. These compressors which are used in Air-Conditioning & Refrigeration Appliances & Machinery are sold from this Office on application of appropriate rate of VAT/Cen. Sales Tax or against ST Forms, as the case may be.
>
> As per the conditions of Sale at the time of Sale of the Compressors, a Warranty of 18 months is offered to the customers against any manufacturing defects. When a customer brings a defective compressor for repairing, which has failed within Warranty period, the defective compressor of the customer is replaced with another Repaired Compressor of the same model immediately Off the Shelf, in order not to cause any inconvenience to the customer. No repair Charges are charged to the customer for such In-Warranty Replacement.
>
> The Compressors being Hermetically Sealed, they have to be opened for the purpose of ascertaining the nature & extent of repairs required. The necessary machinery and equipment

required for this job being available at our Authorized Service Centres in Maharashtra, the defective compressors are sent to these Service Centres for Repairs. The repair and return of these compressors are requires an approximate time of about 4-6 Weeks. The Compressors are mainly used in the Hospitality Industry & in the preservation of perishables and therefore - Off the Shelf Replacement becomes absolutely necessary and is a Trade Practice of this Industry.

Whenever a customer brings an Out-of-Warranty Compressor, such defective Compressor is replaced with a Repaired Compressor of the same model against fixed Repair Charges. After repairing the defective Compressors, the Service Centres send back the very same compressors back to this Office.

Therefore, when a customer brings in a defective compressor bearing a Serial No. the same compressor is not returned to him after due repairs, but instead another Repaired Compressor of the same model will come to be issued to him.

The cycle of the documents in the replacement activity is as under:-

- The Customer is given an Acknowledgement stating therein the Model No., Sr. No. & Warranty Status of his defective compressor received by us.
- A Repaired Compressor of the same model is given in replacement to the customer in exchange vie a Delivery Note cum Debit Advice alongwith certain repair charges.
- The defective compressor is sent to the Service Centres vide Delivery Note with details of Model & Compressor Sr. No.
- The Service Centre acknowledges the receipt of the defective Compressor and Service Centre returns

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the very same Compressor duly repaired back to this Office vide their Delivery Note.

- The above chain of activities is recorded in the Replacement Register, which has been maintained Model wise."

21. In Kirloskar Brothers Ltd.'s case (supra), cited on behalf of the Revenue, the question for determination that arose before Appellate Tribunal was as to whether the so called repair charges for transferring a repaired compressor in lieu of defective compressor amounted to sale or not.

Therein, claim of the dealer-appellant was that when a customer approaches the said dealer with a defective compressor, the same was received and another old repaired compressor of the same model was issued to the customer against certain fixed and uniform amount which included the following:

- Direct and Indirect labour charges.
- Excise Duty on inputs.
- Overheads and Establishment charges.
- Handling and Transportation charges.
- Value of inputs of materials used in repairing at Karad in Maharashtra.
- Warranty contingence for one year.
- Element of risk as charges are fixed but repair charges may be more.
- Depreciation, interest and other financial charges.
- Profit margin on the transaction.

In that case, further the claim of the dealer was that the defective compressor was forwarded to the factory of the dealer at Karad (Maharashtra), where only the facility to open a hermetically sealed compressor was available for repair, and that after the repairs, the repaired compressor were returned to the very same office where the same became part of floating stock, and further that the dealer used to credit the charges to the profit and loss account under the head "other income".

In that case, it was observed that it was for the appellant to bring on record material which was to its exclusive knowledge. Appellate Tribunal did not accept the claim of the dealer that from the ingredients of the transactions it was merely a pre dominantly service.

Further, it was observed that what the customer gets in lieu of so called repair charges, is a working compressor with a warranty for free replacement within the specific period; that this right is a property, which a person can acquire hold and transfer and which was transferred for price between two persons competent to contract under the valid agreement as held in **The State of Madras v. Gannon Dunkenley & Co. Ltd.**, 1958 (IX) STC 253.

Therein, Appellate Tribunal was of the opinion that in the given facts and circumstances, the transactions of supplying a

repaired compressor against the uniform repair charges and another defective compressor by itself amounted to sale of goods involved in the supposed repair, the use of labour and skill being incidental to such supply of goods, in absence of material placed by the appellant therein. Consequently, the tax on the aforesaid charges was confirmed.

22. As noticed above, as regards tax period May, 2006, vide order dated 25/11/2010, learned Special commissioner set aside the default assessment and the assessment of penalty, but therein no reference was made to the earlier decision by the Appellate Tribunal, which was referred to by the Assessing Authority while framing assessments in respect of tax periods - April, 2006-07, June-December, 2006-07, February, 2006-07 & March, 2006-07 and Learned OHA decided the objections while upholding the assessments in respect of said tax periods. This goes to show that the assessment pertaining to tax period May, 2006 was set aside by the Special Commissioner, whose attention was not drawn to the previous decision by the Appellate Tribunal on the same point. As a result, order dated 25.11.2010 passed by the Special Commissioner in respect of tax period - May, 2006 does not come to the aid of the dealer-appellant. Revenue authorities were bound by the earlier decision by the Appellate Tribunal on the same point. There is no merit in the contention of learned counsel for the appellant

that the OHA, who passed the impugned order in respect of other tax periods of the same year, should not have taken a different view.

Even otherwise, order dated 25.11.2010 would reveal that Special Commissioner dealing with objections as regards tax period May, 2006 directed the Assessing Authority to pass fresh assessment order after examining the facts of the case, the books of accounts, documents executed between the parties, in the light of provisions of DVAT Act, Rules and instructions issued by the Department and judgments relied on behalf of the dealer-objector. Therefore, it can safely be said that Special Commissioner had remanded the matter to the Assessing Authority for fresh assessment order. No material has been placed on record by the dealer-appellant to show as to what steps were taken by the Assessing Authority in terms of order dated 25.11.2010. Even on this ground, there is no merit in the contention raised by counsel for the appellant that subsequent to passing of order dated 25.11.2010, the Revenue Authorities should not have taken a different view.

23. Section 118 of the Transfer of Property Act defines 'Exchange' as under :-

> "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange'. A transfer of property in completion of an

exchange can be made only in manner provided for the transfer of such property by sale."

The above said definition of 'Exchange' is not limited to immovable property. It would not be a case of exchange, but a sale, where one of the items transferred is money. A sale is always to be for a price, but in the case of an exchange, the transfer of ownership of one thing is not one for the price paid or promises, but for the transfer of another thing in return.

Section 2(zc) of DVAT Act, 2004, defines 'Sale' as under:-

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

(i) a transfer of goods on hire purchase or other system of payment by installments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;
(ii) supply of goods by a society (including a co-operative society), club, firm, or any association to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration, whether or not in the course of business;
(iii) transfer of property in goods by an auctioneer referred to in sub-clause (vii) of clause (j) of this section, or sale of goods in the course of any other activity in the nature of banking, insurance who in the course of their main activity also sell goods repossessed or re-claimed;
(iv) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

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

(vi) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(vii) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

(viii) every disposal of goods referred to in sub-clause 1 [(vii)] of clause (j) of this 2 [sub-section] and the words "sell", buy" and "purchase" wherever appearing with all their grammatical variations and cognate expressions, shall be construed accordingly."

Section 2(zd) of DVAT Act, 2004 defines 'Sale Price' as under:-

""sale price" means the amount paid or payable as valuable consideration for any sale, including-

(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;

(ii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;

(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;

(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;

(v) 3 [amount of duties levied or leviable on the goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962), or the Delhi."

Section 2(zo) of DVAT Act, 2004 defines 'Works contract' as under:-

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

"Price", as defined u/s 2(10) of the Sale of Goods Act, means the money consideration for a sale of goods.

Section 4 of the Sale of Goods Act provides that a contract of sale of goods is a contract whereby a seller transfers or agrees to transfer the property in goods to the buyer for a price.

Where the consideration for transfer of property in goods from one person to another consists of delivery of other goods, the contract is not a contract of sale, but a contract of exchange or barter. Where the consideration for such a transfer consists partly of the delivery of goods and partly the payment of money, it would be a case of contract of sale.

The general rule seems to be that if the contract is intended to result in transferring for a price from A to B, an article in which B had no previous property, it would be a contract of sale, but if the real substance of the contract is the performance of work by A for B, it would be a contract for work and materials,

notwithstanding that the performance of work necessitates the use of certain materials and that the property in those materials passes from A to B under the contract.

In Gannon Dunkerley & Co. (Madras) Ltd.'s case (supra), Hon'ble Apex Court, while dealing with expression "sale" observed in the manner as:

> "In order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer is not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale. Moreover under the law there cannot be an agreement relating to one kind of property and a sale as regards another. There must be an agreement between the parties for the sale of the very goods in which eventually property passes."

In the above cited case, Hon'ble Apex Court observed that if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. However, as noticed above, definition of "sale" as available u/s 2(zc)(iv) of DVAT Act provides that sale includes transfer, *otherwise than in pursuance of a contract*, of property

in any goods for cash, deferred payment or other valuable consideration.

24. In **The Additional Commissioner of Sales Tax, VAT-III, Mumbai v. M/s Kirloskar Copeland Ltd.,** Sales Tax Application No.10 of 2012, decided on 08/05/2014, following questions of law arose before the Hon'ble High Court of Judicature at Bombay for consideration:

> "(i) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of the term 'sales' defined under sub-section 28 of section 2 of the Bombay Sales Tax Act 1959, Hon'ble Tribunal was correct in holding that the impugned transfer of compressor effected by the respondent to its customers is not sale of goods under this Act as there is no consensual agreement of sale of the said compressor?
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> (ii) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of the definition of sales under sub-section 28 of section 2 of the Bombay Sales Tax Act, 1959, Hon'ble Tribunal was correct in holding the impugned transfer of compressor effected by the respondent to its customers against money and old defective compressor together, is not transfer for valuable consideration?
>
> (iii) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of the impugned contract, Hon'ble Tribunal was correct in holding that the impugned transfer of compressor effected by the respondent to its customers is transaction of cross transfer of property in defective compressor and repaired compressor off the shelf, from the sales office of the company and not sale of goods under this Act as there is no consensual agreement of sale of the said compressor?
>
> (iv) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of the impugned contract, Hon'ble Tribunal was correct in holding that the

amount of Rs.2,02, 55,207/-, received by the respondent from its customers against the impugned transfer of property in compressor is a price of labour charges or repair charges?"

25. It may be mentioned that in the course of arguments in these appeals, learned counsel for the appellant has submitted that the dealer – appellant herein was earlier known as M/s Kirloskar Copeland Ltd.

As per facts of the said ST-Application, respondent therein (appellant herein) was engaged in the business of manufacturing and selling compressors of various models and capacities used in Air-conditioner; while accepting defective compressors outside the warranty period with certain fixed repair charges and replacing them at the option of the customer with any other repaired compressor, off the shell.

For the year 2002-03, the respondent therein was subjected to default assessment. Before framing of assessment, Assessing Authority issued a notice to the dealer for treating repair charges as sale of the old repaired compressors.

In reply to the notice, claim of the respondent-assessee was that it was not a case of sale of old repaired compressor, but a case of exchange for the defective compressor, and that the dealer-assessee used to receive repair charges for repairing the defecting compressor. The Assessing Authority rejected this

claim of the dealer-assessee having regard to the provisions of section 2 (28) of Bombay Sales Tax Act and finding that the repair charges received by the dealer-assessee was the sale price. Accordingly, the Assessing Authority framed assessment levying Sales Tax.

Feeling dissatisfied with the above said assessment, the dealer-assessee filed appeal before Joint Commissioner of Sales Tax (Appeals), Pune region, but the same came to be dismissed. Thereupon, the dealer-assessee preferred second appeal before Maharashtra Sales Tax Tribunal. Second appeal was allowed by the Tribunal holding that transaction of cross transfer of property between a defective compressor and repaired compressor, off the shell, did not amount to a sale of the repaired compressor by the dealer-assessee to its customer, the reason being that there was no consensual agreement of sale supported by price or money consideration, and that it was not a case of taxable event for levy of Sales Tax, and rather, it was a case of transaction in the nature of labour/repair charges.

Feeling aggrieved by the order passed by the Tribunal, the department preferred Reference Application u/s 61 of BST Act with prayer for drawing up questions of law for decision.

Hon'ble High Court, after referring to the provisions of section 2 (28) of BST Act, which defines "sale", decision by Hon'ble

Apex Court in **Gannon Dunkerley and Co. (Madras) Ltd.'s** case (supra); and decision in **Devi Dass Gopal Krishnan and others's** case (supra), observed as under:

> "11. In the present case, we find that there is no sale at all. As stated earlier, a defective compressor is brought by the customer of the Respondent to its Sales and Service Office. Thereafter, the customer is informed about the normal time of repairs which is approximately 60 days. At that time, on payment of the repair charges, the customer is given an option either to wait for 60 days or to take another repaired compressor off the shelf of the Respondent. If the customer opts for the latter, then a delivery note cum debit advice as well as a repaired compressor is handed over to the customer. It is therefore evident that there is no sale of the repaired compressor. All that is done is that on payment of repair charges, the customer is given an option not to wait for 60 days and instead take another second hand repaired compressor immediately in lieu of the defective compressor.
>
> 12. The MSTT, after considering all the evidence in this regard, came to the conclusion that in the present case, there was a transaction of cross transfer of property between the defective compressor and the repaired compressor and therefore, there was no consensual agreement of sale supported by price or other montetary consideration. We are in full agreement with the findings of the MSTT on this aspect. What is paid is only the repair charges and not the price for purchasing the repaired compressor. This is clear from the fact that even if the customer opted not to take a repaired compressor off the shelf of the Respondent, it would still have to pay the same repair charges for repairing its own compressor and wait for 60 days to receive the same from the Respondent, after repairs. This puts it beyond the realm of doubt that what is charged to the customer by the

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> Respondent is only repair charges and not a price for the sale of the repaired compressor."

In that matter, one of the contentions raised on behalf of the department was that repair charges are fixed and uniform all over India and therefore, that was the price at which repaired compressor was being sold by the dealer-assessee to the customer. Hon'ble High Court did not agree, while observing in the manner as:

> "If the repair charges were really the price of the sale of the repaired compressor, there would be no question of the customer having to return his defective compressor and thereafter take the repaired compressor off the shelf of the Respondent. In the scenario suggested by Ms Helekar, all that the customer has to do is simplicitor pay the repair charges and takes the repaired compressor off the shelf of the Respondent. That is not the case. It is an admitted position that the defective compressor is handed over to the Respondent alongwith the repair charges and in lieu thereof the customer is handed over a repaired compressor. We therefore find no merit in this contention."

As a result, Hon'ble High Court dismissed the application filed by the department for making of reference.

As already noticed above, in **Gannon Dunkerley and Co. (Madras) Ltd.'s** case (supra), Hon'ble Apex Court observed that if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale.

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Herein, case of the appellant is based on following 4 documents:

i. Acknowledgement of Defective Compressor Received;
ii. Delivery Note Cum Debit Advice For Reparied Compressor given as Replacement;
iii. List of Fixed Repair Charges which mentions that repair charges will attract service tax;
iv. Entry in Replacement Register.

No agreement or contract has been placed on record by the appellant.

Definition of "sale" as available u/s 2(zc)(iv) of DVAT Act, 2004 provides that sale includes transfer, *otherwise than in pursuance of a contract*, of property in any goods for cash, deferred payment or other valuable consideration.

The question arises as to whether this is a case of transfer of property in the goods i.e. the old compressor supplied by the dealer to the customer after receipt of old defective compressor, so as to term the same as sale?

As is available from the documents submitted by the dealer, transfer of the property in the old compressor supplied to the customer, cannot be said to be in dispute. It is also not in dispute that the dealer received old defective compressor from the customer. This is not a case where the dealer alleges that any of the customers opted for repair of the old defective compressor,

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delivered by him to the dealer. Even in the course of arguments, learned counsel for the appellant has clearly submitted that the data made available pertains to receiving of old defective compressor, when the customers opted not for repair thereof, and rather opted for supply of old compressor said to have been already repaired. Had it been a case of supply of the old defective compressor to the customer, after repair, it would have been a different matter and a case of charging of repair charges. But, when the case is that the customers were supplied some other old compressor, already got repaired by the dealer and lying with the dealer, and money was charged from the customers, the said amount charged by the dealer from the said customers cannot be termed to be repair charges. Rather, same can safely to said to be sale price. Furthermore, as per admitted case of the dealer, fresh warranty was given to the customer on supply of the old compressor, already got repaired and lying with the dealer. It is significant to note that no document has been made available by the dealer to suggest that such and such repair was carried out and such and such amount had to be spent/paid by the dealer for getting the compressor repaired, already lying with it.

In the given facts and circumstances, delivery of old defective compressor by the customer to the dealer is one transaction, and as such transfer of property in the old compressor already got repaired

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by the dealer and lying with it, to the customer, coupled with charging of money, cannot be said to be a transaction of exchange or barter, and rather, can safely be said to be a transaction of 'sale' within the meaning of section 2(zc) of DVAT Act, 2004. Had it not been a case of charging of money by the dealer from such a customer and only a case of supply of old repaired compressor, already lying with the dealer, in exchange of old defective compressor, then it would have been a case of exchange or barter. In the given facts and circumstances, and the documents made available by the dealer, it is held that the present case pertains to transaction(s) of "sale" and hence exigible to tax.

As already noticed above, on the same point, this Appellate Tribunal in M/s Kirloskar Brothers Ltd.'s case (supra), held that same transaction amounted to sale of goods. The Revenue Authorities were bound by the said decision delivered by this Appellate Tribunal. In the given peculiar situation, decision in Kirloskar Copeland's case ~~did~~ does not come to the help of the dealer-appellant.

26. In **Devi Dass Gopal Krishnan and Others's** case (supra), interpretation of provisions of Punjab General Sales Tax Act, 1948, as amended by Punjab Act, 1958, relating to three categories of goods, namely, oilseeds, oil and cotton was involved.

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While dealing with provisions of Section 4 of Sale of Goods Act, it was observed that for the purpose of sale, there shall be a transfer of property or agreement to transfer property by one party to another and it shall be for consideration of money payment or promise thereof by the buyer.

Clause (h) of Section 2 of Punjab General Sales Tax Act defined "sale" as under:

> "Sale means any transfer of property in goods other than goods specified in Schedule 'C' for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

Therein, Hon'ble Supreme Court, while interpreting expression "price" observed that in the Sales of Goods Act, same has been defined as money consideration, and further that cash or deferred payment appearing in Clause (f) of Section 2 of Punjab General Sales Tax Act specified the said definition.

As regards expression "valuable consideration", Hon'ble Apex Court observed that same takes colour from the expression "cash or deferred payment" and that the same can only mean some other monetary payment in the nature of cash or deferred payment.

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In view of the above discussion in these appeals by this Appellate Tribunal, in the peculiar facts and circumstances, the above said decision does not help the dealer-appellant.

27. In **S.T.C. v. Ram Kumar Agarwal**, (1967) 19 STC 400 (All), cited on behalf of the appellant herein, while interpreting the definition of "sale", Hon'ble Allahabad High Court observed that the same must be construed in the sense which it has in the Sale of Goods Act and further that words "other valuable consideration" appearing in Section 2(h) of U.P. Sales Tax Act, 1948, must be interpreted on the basis of rule of ejusdem generis, to mean cheques, bills of exchange or any such other negotiable instruments, but, they cannot cover a case where no price is paid and the transaction is merely one of exchange or barter.

Therein, the giving of bullion and making charges by a dealer in bullion and ornaments in exchange for ready-made ornaments manufactured by goldsmiths was not defined to be a "sale of bullion" within the meaning of U.P. Sales Tax Act, but was only a barter or exchange transaction, and therefore not liable to be taxed.

Facts of that case were different from the facts of present case. There, what was given to the dealer-assessee was bullion. Old ornaments were not got exchanged with readymade ornaments.

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Furthermore, that was not a case of payment of any price. Therefore, said decision does not come to the aid of the appellant, as rightly submitted on behalf of the Revenue.

28. In **BSNL v. Union of India**, 2006 3 SCC 1 (SC), Hon'ble Apex Court observed in the manner as:

> "But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which **Gannon Dunkerley** has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act 1930 for the purpose of levy of sales tax.
>
> The Amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase 'tax on sale or purchase of goods' occurs. This definition changed the law declared in the ruling in **Gannon Dunkerly & Co.** only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not neutralized.
>
> While the true scope of the amendment may be appreciated by overall reading of the entirety of Article 366 (29A), deemed sale under each particular sub clause has to be determined only within the parameters of the provisions in

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that sub clause. One sub clause cannot be projected into another sub clause and fiction upon fiction is not permissible. As to the interpretation of fiction, particularly in the sales tax legislation, the principle has been authoritatively laid down in the **Bengal Immunity Company Ltd. Vs. State of Bihar and Others**, 1955 (2) SCR 603 at 647."

In view of the above discussion in these appeals by this Appellate Tribunal, in the peculiar facts and circumstances, the above said decision does not help the dealer-appellant to record a finding that it is a case of exchange or barter and not a case of sale.

29. As regards burden to prove that it was a case of sale, learned counsel for the appellant has contended that it was for the Revenue to discharge said burden, and has placed reliance on the following decisions:

1. **Girdhari Lal Nannelal v. STC,** (1976) 3 SCC 701;
2. **Haleema Zubair v. State of Kerala,** (2008) 16 SCC 504.

In Girdhari Lal Nannelal's case (supra), Hon'ble Apex Court observed in the manner as:

"In order to impose liability upon the appellant-firm for payment of sales tax by treating that amount as profits arising out of the undisclosed sales of the appellant, two things had to be established, (i) the amount of Rs. 10,000 was the income of the appellant-firm and not of Kanji Deosi

or his wife, and (ii) that the said amount represented profits from income realised as a result of transactions liable to sales tax and not from other sources. The onus to prove the above two ingredients was upon the department.

The fact that neither the assessee-firm nor its partner or his wife adduced satisfactory material to show the source of that money would not, in the absence of anything more, lead to the inference that the said sum represents the income of the firm accruing from undisclosed sale transactions. It was, in our opinion, necessary to produce more material in order to connect the amount of Rs. 10,000 with the income of the assessee-firm as a result of sales. In the absence of such material, the mere absence of explanation regarding the source of Rs. 10,000 would not justify the conclusion that the sum in dispute represents profits of the firm derived from undisclosed sales."

In Haleema Zubair's case (supra), Hon'ble Apex Court observed in the manner as:

"A provision relating to "reverse burden", must be construed having regard to the nature of the statute; as the general law is that the burden of proof would be on the State as has been held by this Court in Cooperative Company Ltd. V. Commissioner of Trade Tax, U.P. [(2007) 4 SCC 480], in the following terms :-

"16. In absence of any stipulation made in the contract of sale for the purpose of levy of sales tax or otherwise, the Revenue Authorities must arrive at a finding as to whether there had been any implied condition of transfer, burden of proof wherefor would be on the Revenue. Consideration of (sic - for) a part of goods may be held to be a condition precedent for constituting a sale, but therefore each case must be judged on its own facts.""

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Section 78 of DVAT Act, 2004 specifically provides that the burden of proving any matter in issue in proceedings under section 74 of this Act, or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act shall lie on the person alleged to be liable to pay the amount. The above decisions are of no avail to the dealer-appellant in view of provisions of Section 78 of DVAT Act.

30. One of the contentions advanced on behalf of the appellant is that the impugned order is self contradictory and beyond assessment orders. It has also been contended that Appellate Authority cannot go beyond original assessments. In this regard, reliance has been placed on following decisions:

1. **Reckitt & Colman of India ltd. v. CCE,** (1997) 10 SCC 379 (SC);
2. **Hindustan polymers Co. Ltd. & Ors. v. CCE Guntur**, (1997) 11 SCC 302 (SC);
3. **Bhor Industries ltd. v. Union of India,** (2011) 266 ELT 444;
4. **PRIPL v. The State of Punjab & Anr.,** VATAP No. 96 of 2016 (O&M) (P&H HC).

In Reckitt & Colman of India ltd.'s case (supra), Hon'ble Apex Court observed in the manner as:

> "It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based

on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed."

In Hindustan polymers Co. Ltd. & Ors.'s case (supra), Hon'ble Apex Court observed in the manner as:

"While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."

In Bhor Industries ltd.'s case (supra), Hon'ble Court observed in the manner as:

"The law thus and the ratio emerging from the judgment is that it is not open to a tribunal under the guise of moulding relief to pass order in respect of a demand which was never made.

In the instant case, we find that the show cause notice was only in respect of the reversal of MODVAT credit on the ground that the input was exempted and as such could not have been utilized. No show cause notice was issued to the

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Petitioner on the ground that the Petitioner had wrongly claimed the credit than what the Petitioner was entitled to.

For the aforesaid reasons, we are clearly of the opinion that the tribunal misdirected itself in travelling beyond the show cause notice. To that extent the direction issued in terms of Para 10 of the order of the Tribunal directing Assistant Commissioner to communicate to the appellant duty required to be paid being without jurisdiction is set aside. Rule made absolute accordingly."

In PRIPL's case (supra), Hon'ble ~~Apex~~ High Court observed in the manner as:

"Another argument had been raised to the effect that the Tribunal had acted beyond its competence by considering pleas which were not the subject matter of the assessment order nor had been raised by the revenue before the DETC (A).

The appellant obviously was never put to meet this ground. As such, the ground so taken into consideration by the Tribunal while denying the exemption, not being canvassed by the revenue earlier was incompetent, in our opinion. In this regard, we rely upon **Reckitt & Colman of India Ltd.'s** case (supra) as cited by the learned counsel for the appellant, wherein, the case of the revenue which the appellant was required to meet at every stage from the issuance of show cause notice onwards, was that the product was a preparation basis of starch. The Tribunal held that the product fell outside the ambit of exemption because it was a preparation with a basis of flour. It was held by Hon'ble Apex Court that it was beyond the competence of the Tribunal to make out in favour of the revenue a case which the revenue had never canvassed and which the appellant had never been required to meet. On that ground alone, the appeal of the assessee was allowed. For the reasons as discussed above, we are of the considered opinion that the appeal deserves to be allowed. The same is accordingly allowed."

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A perusal of the impugned order passed by learned OHA would reveal that same is based on reasons and came to be passed after providing reasonable opportunity to the objector of being heard, while dealing with all the grounds pressed before him. Therefore, there is no merit in the contention raised on behalf of the appellant.

31. One of the contentions advanced on behalf of the appellant is that when service tax has been paid or levied, VAT cannot be charged, as it would be a case of double taxation. On this point, learned counsel has relied on following decisions:

1. **Imagic Creative (P) Ltd v. CC T & Ors,** (2008) 2 SCC 614;
2. **B.H.E.L v. UOI,** (1996) 4 SCC 230;
3. **Essar Telecom Infrastructure (P) Ltd v. UOI**, 2011 (4) TMI- Karnataka HC;
4. **ITO v. Bachu Lal Kapoor**, AIR 1996 SC 1148;

In B.H.E.L's case (supra), Hon'ble Apex Court observed in the manner as:

> "So far as Civil Appeals Nos.5362-68 of 1996 are concerned, the issues raised therein are identical to the issues raised in Civil Appeals Nos.5369-75 of 1996 except the direction asked for by BHEL far adjustment of tax amounts between the concerned States in such a manner that appropriate tax is collected in the State wherein it is lawfully leviable and the State which is not entitled to collect the tax but has yet collected it unlawfully, refunds the same to BHEL or sends it to the State wherein it is lawfully due and payable. We see

no valid objection to making such a direction. In fact, such a direction was made by this Court in K.G. Khosla and Company Limited [supra]. Accordingly, there will be a direction to the above effect. All refunds and adjustments consequent upon the judgment of Andhra Pradesh High Court in Tax Revision Cases Nos.195-201 of 1989 shall be carried out and given effect to by the parties within three months from today."

In Essar Telecom Infrastructure (P) Ltd.'s case (supra), Hon'ble Karnataka High Court observed in the manner as:

"For the assessment years in question, the amount is paid by the petitioner to the 1 respondent and it is for the State to seek for recovery of the amount so paid by the petitioner to the 1 respondent in a separate proceedings based on the judgment rendered Herein. Further, in future, it is for the petitioner to file returns/assessment under the provisions of Section 3 and 4 (1b) of the VAT Act, 2003.

23. Petitions are allowed in part while upholding the assessment orders passed, so far as recovery of the amount which is legally due to the State, the State can very well have recourse to recover from the 1 respondent Union. However, the differential amount if any to be paid, be adjusted from the amount already deposited by the petitioner and, if there is any excess amount remaining, the same be refunded to the petitioner."

In ITO's case (supra), Hon'ble Apex Court observed in the manner as:

"It was then forcibly brought to our notice that the said view would be subversive of the doctrine of "double taxation". It was said that as the orders of assessment on the individual members of the said family had become final, if the Income-tax Officer was permitted to assess the Hindu undivided family for the same assessment year, tax would be imposed

> on the same income twice over. It is true that the Act does not envisage taxation of the same income twice over "on one passage of money in the form of one sort of income.""

In Imagic Creative (P) Ltd.'s case (supra), Hon'ble Apex Court observed in the manner as:

> "Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

It is not for the dealer to name the tax as per his or its choice and rather tax is to be charged in accordance with law. Herein, even if the dealer is said to have charged service tax or to have deposited the same, it cannot be said that the transaction was not exigible to VAT. In view of the above decision in Imagic Creative (P) Ltd.'s case (supra), there is no merit in the contention raised by learned counsel for the appellant.

32. Learned counsel for the appellant has contended that the impugned order passed by OHA is a non speaking order and as such deserves to be set aside. On this point, he has relied on following decisions:

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1. **SAIL vs STO, Rourkela,** (2008) 9 SCC 407;
2. **Siemens Engg. & Mfg Co of India Ltd. v. UOI,** (1976) 2 SCC 981;
3. **GKN Driveshafts (India) Ltd. v ITO,** (2003) 1 SCC 72.

In SAIL's case (supra), Hon'ble Apex Court observed in the manner as:

> "Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. (See Raj Kishore Jha v. State of Bihar.
>
> Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

In Siemens Engg. & Mfg Co of India Ltd.'s case (supra), Hon'ble Apex Court observed in the manner as:

> "It is incontrovertible that the proceedings before the Assistant Collector arising from the notices demanding differential duty were quasi judicial proceedings and so also were the proceedings in revision before the Collector and the Government of India. Indeed, this was not disputed by the learned counsel appearing on behalf of the respondents. It is

now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. That has been laid down by a long line of decisions of this Court ending with N. M. Desai v. The Testeels Ltd. & Anr. But, unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him con firming the demand for differential duty. This was in plain disregard of the requirement of law. The Collector in revision did give some sort of reason but it was hardly satisfactory. He did not deal in his order with the arguments advanced by the appellants in their representation dated 8th December, 1961 which were repeated in the subsequent representation dated 4th June, 1965. It is not suggested that the Collector should have made an elaborate order discussing the arguments of the appellants in the manner of a court of law. But the order of the Collector could have been a little more explicit and articulate so as to lend assurance that the case of the appellants has been properly considered by him.

Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of **audi alteram partem**, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

In GKN Driveshafts (India) Ltd.'s case (supra), Hon'ble Apex Court observed in the manner as:

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> "However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years."

As already mentioned above, the impugned order passed by learned OHA is a reasoned order and it came to be passed after providing reasonable opportunity of being heard to the objector and while dealing with all the grounds pressed on behalf of the objector. Therefore, there is no merit in the contention raised by learned counsel for the appellant.

33. No other argument has been advanced by learned counsel for the parties. In the course of arguments, references were made only to the decisions which have been cited and discussed above at the relevant places.

Penalty

34. While challenging levy of penalty u/s 33 read with section 86(12) of DVAT Act, dealer – appellant has claimed that the

assessments of penalty are vague, general and non-speaking, and as such the same deserve to be set aside.

35. Another submission on behalf of the appellant is that before penalty is imposed u/s 86(12) of DVAT Act, it is to be established that the case is of a deficiency, but herein when it has not been established to be a case of deficiency, the penalty deserve to be set aside.

It has also been submitted that assessment of penalty is different from the default assessments of tax and interest and that no penalty can be levied without recording a finding in the assessments, in absence of any evidence on record regarding violation.

36. On behalf of the appellant, it has been submitted that no penalty can be levied where the dealer states all the facts correctly and none of the documents produced by the dealer in support thereof is false. Further, it has been submitted that merely because department does not accept claim of the appellant, same is not a ground for levy of penalty.

37. Another contention raised on behalf of the appellant is that for levy of penalty, department is required to establish *mens rea* i.e. a deliberate attempt to evade tax, knowing falsehood of a fact furnished in the return, and that penalty is not automatic. As further submitted, here, the dealer is stated to have not shown the

transaction of repair/ replacement as taxable, under *bona fide* belief and as such the impugned assessments deserve to be set aside.

In **Sony India Pvt. Ltd. v Commissioner of Trade & Taxes**, MANU/DE/2198/2015, cited by learned counsel for the appellant, our own Hon'ble High Court observed in the manner as:

> "While the impugned order of the AT upholding the determination of the VAT and interest thereon is therefore not interfered with, the Court is of the view that since there was a reasonable doubt as regards the applicability of Entry 41 to DSCs, the Appellant's plea that it acted bona fide in charging tax at 4% deserves acceptance. In other words, the conduct of the Appellant cannot be characterised as a deliberate attempt to avoid paying the applicable rate of VAT so as to warrant the levy of penalty.
>
> While the Appellant would be required to pay interest on the differential amount of tax, it is not liable to pay any penalty in terms of Section 86 (12) of the DVAT Act for the period 1st April 2005 to 7th August 2005;"

In **CST v. Nand Mohan**, (1984) 57 STC (All.), Hon'ble High Court observed in the manner as:

> "It is well-settled that even if certain evidence led by the assessee in support of the turnover submitted by him has not been accepted by the assessing authority, and the turnover submitted by him is found to be wrong but that by itself cannot be taken to be a valid ground for holding that the

assessee has deliberately submitted wrong turnover or has concealed material particulars in submitting turnover. In proceeding under Section 15-A(1)(a) and (c), the onus lies on the department to positively prove the mens rea and the fact of deliberate concealment of the particulars of the turnover and the findings recorded by the assessing officer in assessment proceeding cannot be made the basis of any order imposing penalty under Section 15-A(1)(a) and (c) of the Act. Merely because the assessee's books of account had not been accepted and a best judgment assessment has been made at a figure higher than that indicated in the .dealer's turnover it would not mean that the dealer had deliberately furnished inaccurate particulars of the turnover so as to attract the provisions of Section 15-A(1)(a) and (c) of the Act. There should be some element of mens rea before it can be said that there was concealment of turnover or that a false return was furnished so as to make the dealer liable to pay penalty under the aforesaid provision. In penalty proceedings the taxing authority has to deal with the matter independently of assessment proceedings by drawing separate proceedings and proceed to decide the case in accordance with the provisions of the Act after giving full opportunity of hearing to concerned parties."

In **Narayan Swaroop v. State of UP**, (1980) 45 STC 471(All.), Hon'ble High Court observed in the manner as:

"In the Anwar Ali's case, the Supreme Court laid down two principles. One that the order passed in the assessment proceedings was admissible and the other that it cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However it is good evidence. Before penalty could be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate

particulars. If the argument of the standing counsel that the finding, if it is of concealment, is sufficient for imposition of penalty is accepted then the statement of law by the Supreme Court that it is not conclusive cannot be reconciled by subsequent sentences. As then no surrounding circumstances are needed."

In **ACTO v. Kumavat Udyog,** (1995) 97 STC 238, Hon'ble Apex Court observed in the manner as:

> "It has been the consistent view of this Court that if an entry is existing in the books of account and the matter relates only to the interpretation about the nature of the transaction 01 non-taxability on account of the interpretation of the provision of law, then the authorities under the Act would not be justified in levying the penalty. In the present case the finding which has been given by the Tribunal while upholding the tax is that the entries were existing in the books of account and the action was bona fide and the matter stood covered by the judgment of the honourable Supreme Court reported in the **Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax,** [1980] 45 STC 197. I do not find any justification to interfere in the revision which is dismissed."

Herein, in view of decision by this Appellate Tribunal in Kirloskar Brothers Ltd.'s case on 27/08/2001, even before DVAT Act came into force, it cannot be said that the dealer-appellant was not aware of the said decision on the exigibility of such transaction to tax, under CST Act, or that it charged service tax, while acting bona fide. Therefore, the above

decisions cited by learned counsel for the appellant do not come to the aid of the appellant.

38. However, it is significant to note that herein, whereas Assessing Authority recorded reasons for levy of penalty, learned OHA did not discuss the reasons recorded by the Assessing Authority, while upholding the assessments.

In **M/s. Parma & Parma India Pvt. Ltd. v Commissioner of Trade & Taxes, New Delhi in,** Appeal No.922-923/VAT/2013, decided by this Appellate Tribunal on 10/02/2023, it was observed in the manner as:

> "I have gone through the decisions cited by learned counsel for the appellant to appreciate the contention raised. As per impugned assessment of penalty, same has been imposed while observing the manner as:
>
> > "As is available from the above portion of the notice of assessment of penalty framed u/s 33 of DVAT Act, for reasons Assessing Authority referred to DVAT 24 i.e. default assessment of tax and interest u/s 32 of DVAT Act.
> >
> > Assessing Authority was actually required to record specific reasons in the very notice of assessment of penalty, the reason being that the two assessments are to be framed separately while applying mind to the facts and circumstances describing and reasons for imposing thereof before imposing penalty.

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> Since Assessing Authority has not given specific reasons for imposition of penalty and simply referred to the reasons which find mentioned in default assessment of tax and interest, the impugned notice of assessment of penalty cannot be said to be valid in the eye of law.
>
> As per impugned order passed by learned OHA, while rejecting the objections, he upheld both the assessments, learned OHA appears to have not at all discussed legality/illegality of the assessment of penalty, before upholding the same.""

Herein, learned OHA while upholding the assessment of penalty simply observed as under:

> "The default assessment orders and penalty assessment orders passed by the Assessing Authority are upheld."

Applying the above said decision to the present assessments of penalty, when learned OHA did not discuss the assessments of penalty or record reasons for upholding the said assessments, the impugned order and the impugned assessment deserve to be set aside. I order accordingly.

Result

39. In view of the above discussion and findings arrived at, whereas appeals challenging assessments of tax and interest are dismissed, the appeals challenging assessments of penalty are allowed.

40. 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 : 26/04/2023.

Narinder Kumar
26/4/2023
(Narinder Kumar)
Member (Judicial)