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

Appeal Nos. : 152-153/ATVAT/2016.
Date of Decision : 02/05/2023

M/s Dish TV India (P) Ltd.,
B-10, Lawrence Road,
Industrial Area,
New Delhi-1100 35.

.....Appellant

V.

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant : Sh. Vivek Sarin.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. By way of present two appeals, dealer–appellant has challenged order dated 02/05/2016 passed by learned Special Commissioner–Objection Hearing Authority (hereinafter referred to as OHA) , relating to the tax period 2010-11 and 2011-12.

2. Dealer–appellant is engaged in the business of supply, installation, repair, replacement and maintenance of Set Top

Box (STB). It stands registered under Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act).

Appeal No. 152/16 (Tax Period 2010-2011)

3. Vide order dated 09/02/2015, learned Assessing Authority-VATO (ward-50) framed default assessment of tax and interest u/s 32 of DVAT Act, for the tax period 2010-11.

4. Said assessment came to be framed due to the following reasons:

> "M/s Dish TV India Ltd. Tin No. 07100296558 was issued notice u/s 59(2) of the DVAT Act, 2004 vide dated: 20.10.2014 for examining the matter regarding assessment/refund for 2010-11 and 2011-12.
>
> **REFUND**
> In response to the notice issued, AR of the firm asked for some time for production of the record which was allowed. On dated 12.11.2014 the AR of the firm produced some of the record for 2010-11. Since, the issue involved in the matter was of processing of refund which has been claimed by the dealer in his return for March, 2011 to the tune of Rs. 6,94,82,898/-.
>
> Upon examination it was found that the refund has emanated by the dealer from the purchase and sales proceedings of 2009-10 and because the dealer has shown the goods as capital goods, this refund was spread in three years viz. 2009-10, 2010-11 & 2011-12. For processing the refund claimed in 2010-11 return it is expedient to check the record for which refund has been

claimed.

The AR was thus directed to produce the record for which the refund has been claimed i.e. sale & purchase bills in original for 2009-10.

In subsequent hearing, the AR of the firm vide order sheet dated 04.12.2014 and again on 12.12.2014 informed that it is not feasible for the company to show the original record. The AR of the firm also submitted a written reply dated 04.12.2014 of the firm before the undersigned.

Since, the dealer has not produced the record for which the claim of refund has been made in the return for March 2010-11, therefore, it is not possible to verify the nature of purchases as to the fact that whether these purchases are in the nature of capital goods or is the nature of traded goods."

ITC

"The dealer for the year 2010-11 has claimed ITC as 2nd instalment on purchase of capital goods in each month of 2010-11.

In view of the above and in view of provisions contained in DVAT Act, the dealer is not eligible to claim ITC on goods which are not used as capital goods in the state of Delhi."

Fresh Sales & ITC

"On perusal of returns, it is also noticed that even for the year 2010-11, the dealer is showing local purchases as purchase of capital goods and claiming full ITC on those purchases. It is also noted that in fact dealer has traded in all those goods which are shown as purchase of capital goods.

Therefore, it is clearly established that the dealer is filling false, misleading & deceptive returns.

Since, the dealer has failed to establish his claim of ITC on purchase of capital goods as claimed by him, and also since the dealer has failed to submit any documents in support of his claim of ITC on purchase of capital goods, if any, therefore, the ITC claimed as 2nd instalment on capital goods purchased for the year 2010-11 to the tune of Rs. 6,94,82,898/- is disallowed and rejected."

Sec **10(5)**

During the course of proceedings, sale and purchase invoices were checked on test check basis and following discrepancies have been noted:-

1.The dealer has made purchases of following goods as per sample given below:-
Item Purchase From Purchase amount (Per piece) invoice No./dated Set top box Essel International Limited etc. Rs. 2100/- 07/31.05.2010 etc. Dish Antena Atul Engineers etc. Rs. 359/- 51/30.04.2010 etc. LNB Essel International Limited etc. Rs. 162/- 01/16.04.2010 etc. Cable Cable India etc. Rs. 8.30 per mtr. T-25/21.08.2010 etc.

Total Purchase price; Rs. 2629.30.
Against these purchases, the dealer has made following sales as per sample given below:-

Item Seller Name Selling amount (P/p) Invoice No./date of M/s Dish TV Set-top box Delta on system etc. Rs. 616/- 7113000009/12.04.10 etc. Dish Antena Shri Krishna Enterprises etc. Rs. 170/- 7113000008/09.04.10 etc. LNB JMD

M.M.P.Ltd. etc. Rs.55/- 7113000000/03.04.10 etc. Cable M/s Dishnet etc. Rs. 3.33/- per metr. 7113000007/09.04.10 etc. Total sales price Rs. 844.33.

The above pattern of sale & purchase is being consistently followed by the dealer during entire year of 2010-11.

As per above statement, it is noted that the dealer is selling his goods for Rs. 844.33 whereas his purchase price for the same goods was Rs. 2629.30 and thus, the selling price of the dealer is only 32% of the purchase price.

In view of the above and in view of submission made by dealer, it is established that the dealer is doing transactions of purchase/sale in violation of Section 10(5) which provides that

> "Where the goods which have been purchased by a dealer are sold at a price lower than the price at which it was purchased by the dealer, the tax credit on such purchases shall be reduced proportionately in the tax period during which the goods are sold."

Also the dealer has violated the provision of section 40(A) of DVAT Act which provides that:

> 1. If the commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of the Act or any provision of this Act, then, the Commissioner may, by order, declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for the increase or decrease in the amount of tax

payable by any person or dealer who is affected by the arrangement, whether or not, such dealer or person is a party to the arrangement, in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that dealer from or under the arrangement.

2. For the purpose of this section (a) "arrangement" includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect; (b) "tax advantage" includes,

(i) Any reduction in the liability of any dealer to pay tax;

(ii) Any increase in the entitlement of any dealer to claim input tax credit or refund; and

(iii) Any reduction in the sale price or purchase price receivable or payable by any dealer. In the VAT regime value addition is the Key aspect of any business;

However, it is clearly established that the dealer has entered into an agreement/arrangement to defeat the very purpose of DVAT Act especially the provision of section 48 wherein he has tried to artificially increase its ITC and subsequently claiming the refund of ITC. The mere fact that the dealer has made purchases at higher prices and has sold the same goods at much lower prices, goes to prove the malafide intention of the dealer to claim tax advantage.

Therefore, the necessary excess ITC as stated above is liable to be recovered.

On perusal of return, it has been noticed that the

dealer has not reversed any ITC as per provisions contained u/s 10(5) of DVAT Act. The claim of ITC on purchases made by the dealer is therefore, liable to be reversed in following ratio:-

Hence, 68% of Rs. 2,30,84,948/- (Total ITC on purchase during the year 2010-11) is reversed with interest."

REFUND

"Also in the revised return for the month of March 2010-11, the dealer has claimed a refund of Rs. 6,94,82,898/- which in view of above stated facts and circumstances, the dealer is not eligible to claim any refund and as such the claim of refund is rejected.

Moreover, the dealer is liable to pay tax and interest as assessed.

Since, the dealer has filed false, misleading and deceptive return as well as there is a tax deficiency, therefore, dealer is liable to pay penalty u/s 86(12) of DVAT Act and thus penalty u/s 86(12) of DVAT Act is also imposed."

5. Aggrieved by the above assessment, dealer filed objections u/s 74 of DVAT Act. Vide impugned order dated 02/05/2016, in respect of this tax period i.e. 2010-11, learned OHA disposed of the objections.

6. Learned OHA rejected the objections vide order dated 02/05/2016. The operative part of the impugned order reads as under:

"I have heard the arguments/ submissions made by the Ld. Counsel for the objector and also heard the arguments tendered by the departmental representative. Also gone through the impugned default assessment orders, records produced and judgments referred before me.

The contention of the learned counsels of the objector that the loss on sale of CPE (Consumer Premises Equipment) is in the ordinary course of business is not acceptable as there is overall no loss in the balance sheet on account of business operation.

Further collective reading of provision of section 10(5) of DVAT Act and judgment of Hon'ble High Court of Tripura in a similar matter leaves no scope of doubt that there could be any loss on account of sale and purchase of CPE (set top box, dish, cable and related accessories) if sale price also includes the monthly rentals received on account of sale of STBs on right to use basis. However, as the objector has not included the sale price received in the form of monthly rental of STBs and made sale of set top boxes at a loss, he is liable to reverse the proportionate ITC to the extent of loss as per section 10(5) of DVAT Act. Therefore, the assessment orders are upheld and confirmed in principle. However, the assessing officer shall consider the contention of the objector that in spite of already being reversed the 2% of ITC of the purchase price on those goods which were stock transferred to the branches outside Delhi, no benefit was provided and while reversing the proportionate ITC on account of loss, entire ITC claimed in the Returns were taken into account."

Appeal No.: 153/16 (Tax period 2011-12)

7. While framing assessment for the tax period – 2011-12, the

Assessing Authority observed in the manner as:

"REFUND

Since the dealer has not produced the record for which the claim of refund has been made in the return for March 2011-12, therefore, it is not possible to verify the nature of purchases as to the fact that whether these purchases are in the nature of capital goods or is the nature of traded goods....."

ITC- 3rd Installment

"The dealer for the year 2011-12 has claimed ITC as 3rd installments on purchase of capital goods in each month of 2011-12.....

In view of the above and in view of provisions contained in DVAT Act, 2004, the dealer is showing local purchases as purchase of capital goods and claiming full ITC on those purchases. It is also noted that in fact dealer has traded in all those goods which are shown as purchase of capital goods. Therefore, it is clearly established that the dealer has filed false, misleading & deceptive returns. Since, the dealer has failed to establish his claim of ITC on purchase of capital goods as claimed by him, and also since the dealer has failed to submit any documents in support of this claim of ITC on purchase of capital goods, if any, therefore, the ITC claimed as 3rd installment on capital goods purchased during the year 2009-10 and claimed in the year 2011-12, in the return for the March, 2012 to the tune of Rs.7,42,37,983/- is disallowed and rejected."

"During the course of proceedings, sale and purchase invoices were checked on test check basis and following discrepancies have been noted:-

1. The dealer has made purchases of Dish antenna, set top boxes, LNB & Cable at an amount of Rs. 399.56, Rs. 1522, Rs. 4.83, & Rs. 8.71 respectively. However, the above items have been sold at an amount of Rs. 105, Rs. 227.25, Rs. 56.25 & Rs. 4.38 respectively. (The detailed annexure of these items including the invoice No., date & dealer's name is annexed with this order as Annexure 'A'.) As per above statement, it is noted that the dealer has purchased the above items at for a price of Rs. 1935.10 whereas the selling price of the same items was found to be Rs.392.88 and thus, the selling price of the dealer of the items is only 20.30% of the purchase price.

In view of the above and in view of the submission made by dealer, it is established that the dealer is doing transactions of purchase/sale in violation of Section 10(5) which provides that "Where the goods which have been purchased by a dealer are sold at a price lower than the price at which it was purchased by the dealer, the tax credit on such purchases shall be reduced proportionately in the tax period during which the goods are sold."

Also the dealer has violated the provision of section 40(A) of DVAT Act which provides that "If the commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of the Act or any provision of the Act, then, the Commissioner may, by order, declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for the increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not, such dealer or person is a party to the arrangement, in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that dealer from or under the arrangement. By analyzing the instant case viz-a-viz the above provisions of the act, It is clearly established that

the dealer has entered into an agreement/arrangement to defeat the very purpose of DVAT Act wherein he has tried to artificially increase its ITC and subsequently claiming the refund of ITC. The mere fact that the dealer has made purchases at higher prices and has sold the same goods at much lower prices, goes to prove the malafide intention of the dealer to claim tax advantage.

Therefore, the necessary excess ITC as stated above is liable to be recovered.

On perusal of return, it has been noticed that the dealer has not reversed any ITC as per provisions contained u/s 10(5) of DVAT Act. The claim of ITC on purchases made by the dealer is therefore, liable to be reversed in following ratio:-

Hence, 79.69% of Rs. 43,89,994/- (Total ITC on purchase during the year 2011-12) is reversed with interest.

REFUND

Also in the revised return for year 2011-12, the dealer has claimed a refund of Rs. 7,42,37,983/-, in the revised return for march, 2012, which in view of above stated facts and circumstances, the dealer is not eligible to claim any refund and as such the claim of refund is rejected.

Moreover, the dealer is liable to pay tax and interest as assessed.

Since, the dealer has filed false, misleading and deceptive return as well as there is a tax deficiency, therefore, dealer is liable to pay penalty u/s 86(12) of DVAT Act and thus penalty u/s 86(12) of DVAT Act is also imposed."

8. Aggrieved by the above assessment, dealer filed objections u/s 74 of DVAT Act. Vide impugned order dated 02/05/2016, learned OHA disposed of the objections by observing in the operative part of the order as under:

"I have heard the arguments/ submissions made by the Ld. Counsel for the objector and also heard the arguments tendered by the departmental representatives.

Also gone through the impugned default assessment orders, records produced and judgements referred before me.

The contention of the learned counsels of the objector that the loss on sale of CPE (Consumer Premises Equipment) is in the ordinary course of business is not acceptable as there is overall no loss in the balance sheet on account of business operation.

Further collective reading of provision of section 10(5) of DVAT Act and judgement of Hon'ble High Court of Tripura in a similar matter leaves no scope of doubt that there could be any loss on account of sale and purchase of CPE (set top box, dish, cable and related accessories) if sale price also includes the monthly rentals received on account of sale of STBs on right to use basis.

However, as the objector has not included the sale price received in the form of monthly rental of STBs and made sale of set up boxes at a loss, he is liable to reverse the proportionate ITC to the extent of loss as per section 10(5) of DVAT Act.

Therefore, the assessment orders are upheld and confirmed in principle. However, the assessing officer shall consider the contention of the objector that inspite of already being reversed the 2% of ITC of the purchase price on those goods which were stock transferred to the branches outside Delhi, no benefit was provided and while reversing the proportionate ITC on account of loss, entire ITC claimed in the Returns were taken into account."

9. Arguments heard. File perused.

10. At the outset, it may be mentioned that the appellant has, by way of appeal No. 152/2016, challenged assessment as regards tax and interest for the tax period 2010-11, and not as regards claims of refund or the assessment of penalty.

11. In the course of arguments, learned counsel for the appellant has submitted that this is a case of deemed sale because of transfer of right to use the above said item i.e. set-top-box, in which the dealer also deals.

12. While referring to the observation made by the Assessing Authority regarding sale of the product by the dealer at lower price, Ld. Counsel for the dealer-appellant has submitted that dealer is at liberty to sell its goods at lower or lowest price. It has also been contended that while framing assessments, the Assessing Authority should have inquired into as to what was the fair market value of the goods, but the Assessing Authority did not conduct any enquiry in this regard.

Further, it has been submitted that the Assessing Authority did not join anyone from the market to find out the value at which goods of the like kind and quality were being sold on behalf of the unrelated parties in the open market in Delhi.

Learned Counsel for the appellant has referred to the provisions of Section 10(5) of DVAT Act and Rule 6A(3) of DVAT Rules. He has also referred to the expression "ordinary course of business" as appearing in sub-rule (3) of Rule 6A of DVAT Rules to contend that when the dealer-appellant in the ordinary course of business sold the goods at a loss, the

provisions of sub-section (5) of section 10 of DVAT Act relating to proportionate reduction of tax credit on purchases of goods sold at a price lower than the purchase price, were not applicable.

As regards section 10(5) of DVAT Act, contention of learned counsel for the appellant is that learned OHA wrongly rejected the claim of the dealer-objector that it was a case of loss of sale on consumer premises equipments "in the ordinary course of business". In support of this contention counsel for the appellant has referred to the meaning of the expression "in the ordinary course of business" as available in dictionaries and also placed reliance on following decisions :

1. **Somany-Pilkington's Ltd. v. B.P. Verma**, (1995) 76 ELT 281.
2. **Eicher Tractors Ltd. v. Commissiner of Customs, Mumbai**, [2000] 122 ELT 321 (SC).
3. **Dilip Kumar Swain v. Executive Officer, Cuttack Municipal Corporation,** 1997 AIHC 1210.

Further, the contention is that actually this is a case where the dealer-objector always sold goods at the price lower than that of the purchase price, and as such, it was covered by sub-rule (3) of Rule 6A of DVAT Act Rules and further urged that in the given situation, provisions of section 10(5) of DVAT Act were not applicable.

13. In the course of arguments, Learned Counsel for the appellant also placed on record copy of judgment dated 01/11/2017 passed by our own Hon'ble High Court in Writ Petition (Civil) Nos. 6218/2016 & 6219/2016, filed by the dealer-petitioner-appellant against Government of NCT of Delhi, and others. Therein, the claim of the petitioner was that despite directions of the Hon'ble High Court, its refund claim on account of the default assessments, made for the assessment year 2010-11 and 2011-12 had not been paid.

Having regard to the submissions put forth and in view of the interpretation of Section 10(5) of DVAT Act and Rule 6A of DVAT Rules, Hon'ble High Court was of the following view:

> "That direction to the respondent to refund the entire amount is not expedient in the circumstances. At the same time, the court is of the opinion that so far as the exercise of verification of refund claim for the years 2009-10 are concerned, the assessing officer should conduct it fully and a direction is, therefore, issued to the assessing officer to verify the sales/purchases of the goods towards the credit which was claimed by the petitioner and after taking into account the selling price of the said goods, pass a speaking order. This exercise shall be carried and completed within a period of three months from today."

Hon'ble High Court went on to observe as under:

> "10. The petitioner also claims that a penalty order was issued. The petitioner contends that the individual penalty

orders dated 09.02.2015 and 10.02.2015 were passed in respect of years 2010-11 and 2011-12, without following the prescribed procedure i.e. show cause notice, explaining the proper reason as to why such a quantum of penalty is required to be imposed.

11. Learned Senior Counsel for the respondent submitted that this grievance can be addressed afresh.

12. In these circumstances, the penalty orders dated 09.02.2015 and 10.02.2015 are hereby quashed. The respondent/VAT authorities are directed to pass penalty order after issuing notice and duly taken into account the reasons and submissions of the petitioner.

13. The writ petitions are disposed of in the above terms."

Therefore, the contention on behalf of the appellant is that the assessments framed by Learned Assessing Authority deserve to be set aside.

14. Counsel for the appellant has submitted that even though Assessing Authority, while invoking the section 10(5) and section 40 A of DVAT Act reversed 68% of the total ITC claimed by the dealer-assessee on the purchases made during the year 2010-2011 & 79.69% of the total ITC claimed on purchases made during 2011-12, learned OHA has not dealt with the applicability or non-applicability of section 40A of DVAT Act while passing the impugned order and as such, in these appeals, there is no challenge to the reasons given by the Assessing Authority as regards applicability of Section 40A.

Contention raised on behalf of the Revenue

15. While opening arguments, learned counsel for the Revenue has

contended that in case of claim of ITC in respect of capital goods, dealer can claim the same, as provided u/s 9(a) of DVAT Act, on 1/3rd of the input tax and such capital goods arising in the tax period, and that too in the same tax period, whereas the balance 2/3rd of such input tax, can be claimed in equal proportions, in two immediately successive financial year.

Learned counsel has explained that there may be a case of claim of ITC on the goods purchased for resale purpose, but, here in these matters, the dealer revised returns i.e. for the year 2010-11 of 2011-12, to claim ITC on capital goods. While referring to the assessments, learned counsel for the Revenue has submitted that the Assessing Authority dealt with claim of ITC on each of the two aspects referred to by him-learned counsel. He has also referred to the return available at page 59 of the record (pertaining to AY 2010-11), to point out that in column R-6.1, the dealer, as against the column meant for capital goods did not depict any capital goods by putting digit 'zero'.

Learned counsel has also referred to revised return for March 2011-12, available from page 106-110 and particularly column R-6.1 to show that the dealer claimed tax credit to the tune of Rs. 5,49,171/-

The contention raised by learned counsel for the Revenue is

that in the assessments, learned Assessing Authority made specific observation that dealer did not produce original record and as such no verification could be carried out as to the claim of tax credit put forth by the dealer. Reference has also been made to the observation made by the Assessing Authority in the assessments that it would not clear as to whether dealer was claiming ITC of capital goods or traded goods.

16. Another contention raised by learned counsel for the Revenue is that this is a case of violation of provision of section 10(5) of DVAT Act, as tax credit, on the goods purchased by the dealer for the purpose of resale, was required to be reduced, proportionately in the tax period during which the goods were sold, especially, at a price lower than price at which the goods were purchased by the said dealer, but the dealer did not reduce or reverse said ITC claim, while furnishing revise return for the tax period during which the goods were sold.

In support of his contention, learned counsel has referred to the observations made by learned Assessing Authority in the assessments.

17. As regards applicability of section 40A of DVAT Act, learned counsel for the Revenue has raised contention, in the alternative that in this case said provision is clearly attracted as the dealer enter into a conspiracy with the other dealers to had tax advantage, as defined in sub-section 2(b) of section 40A.

Learned counsel for the Revenue has also submitted that even though it has been argued on behalf of the dealer-appellant that dealer is at liberty to run its business as per its choice, but at the same time dealer is required to see that it does not violated any provision of the taxation law. Reference has been made to the definition of word "business" as available u/s 2(d) (v) of DVAT Act, to contend that it is of no significance ~~where~~ whether such trade etc. is carried out with a motive to make gain or profit and whether or not any gain or profit accrues from such trade.

18. It has been contended on behalf of the Revenue that a conjoint reading of the provisions of section 10(5) and 40A of DVAT Act when ~~complied~~ applied to the facts of the present case, would reveal that this is a case where the revenue suffered loss because of the dealer.

Learned counsel has contended that as per proviso Fifth of Section 9(9) of DVAT Act, no tax credit is to be allowed on that part of the value of capital goods which represents the amount of input tax of such capital goods, and which the dealer claims as depreciation u/s 32 of Income Tax Act. In support of his contention learned counsel has referred to documents available at page 184 to 186 furnished by the dealer itself.

19. Learned counsel for Revenue has referred to order dated 09/01/2018, passed by the Hon'ble Apex Court in **Government of NCT of Delhi v. Dish TV India Ltd. & Ors.**, SLP (Civil) No(s). 22867/2016, filed by the Revenue challenging the judgment passed by Hon'ble High Court as regards year 2009-10, and submitted that operation of the judgment passed by the Hon'ble High Court has been stayed, and as a result the said decision by the Hon'ble High Court cannot be acted upon by the department.

In this regard, on the other hand, learned counsel for the appellant has submitted that the amount directed to be refunded vide judgment dated 04/04/2016, has already been refunded and as such, the order passed by the Hon'ble Apex Court is of no help to the department.

20. With all respect, it may be mentioned that in these appeals challenge is to levy of tax and interest, as regards tax period 2010-11 and 2011-12, and the said dispute can be adjudicated by this Appellate Tribunal on the basis of material made available on record to find out legality/illegality of the impugned order passed by learned OHA upholding the assessments, in the manner to the extent indicated therein.

21. Section 2(d) of DVAT Act defines "business" as under:

" 2(d). "business" includes –

(i) the provision of any services, but excluding the services provided by an employee;
(ii) any trade, commerce or manufacture;
(iii) any adventure or concern in the nature of trade, commerce or manufacture;
(iv) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and
(v) any occasional transaction in the nature of such service, trade, commerce, manufacture, adventure or concern whether or not there is volume, frequency, continuity or regularity of such transaction;

Whether or not such service, trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern;

Explanation :- For the purpose of this clause-

(i) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be business;
(ii) purchase of any goods, the price of which is debited to the business and sale of any goods, the proceeds of which are credited to the business shall be deemed to be business."

22. Section 10(5) of DVAT Act came to be amended vide notification dated 15/07/2015. Before amendment, said provision read as under:

"**10 Adjustment to tax credit**

(5) Where the goods which have been purchased by a dealer

are sold at a price lower than the price at which it was purchased by the dealer, the tax credit on such purchases shall be reduced proportionately in the tax period during which the goods are sold.

Explanation. – The tax credit claimed on a particular purchase shall not exceed the amount of tax payable on its sale."

23. Sub-rule (3) of Rule 6A, before amendment vide notification dated 12/08/2015 read as under:

> "(3) The provisions of sub-section (5) of Section 10 of the Act relating to proportionate reduction of tax credit on purchases of goods sold at a price lower than the purchase price shall apply to the cases where, during the tax period, the dealer receives credit note or notes from the selling dealer on account of discount, commission, rebate, remission in price or incentive, or by whatever name called.
>
> ***Explanation*** – For the removal of doubt, it is hereby clarified that the provisions of sub-section (5) of section 10 of the Act shall not apply to a case where in the ordinary course of business the goods are sold by a dealer at a loss."

Rule 6A(3) of DVAT Rules appears to have been brought as a benevolent provision. Said provision has reduced the adverse magnitude of the provisions of Section 10(5) of DVAT Act considerably, the reason being that where a dealer sells goods at a loss in the ordinary course of business, sub-section (5) of Section 10 would not apply.

In **Somany's case** (supra), it was held as under:

> "84. Under Section 4 of the Act, duty of excise chargeable on the excisable goods, is with reference to the value and this value is the normal price, at which the goods are ordinary sold by the assessee, to the buyer, in the course of wholesale trade for delivery at the time and place of removal.
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> 85. The word "ordinarily", has been interpreted in several cases. The word "ordinarily" means 'in the majority of cases' but not invariably.
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> 86. As already stated above, plaintiff has proved that it has about 200 dealers all over India. The officials of the Department recorded the statements of about 62 dealers/persons out of 200 dealers. It is also on record that out of 62 dealers, only 5 dealers alleged extra payment to Shri Vyas.
>
> 98. Out of 200 dealers, D.R.I. Officers, recorded the statements of 62 dealers under Section 14 of the Act. Except 5, the other dealers; appear to have denied payment of any extra amount to even Mr. Vyas or plaintiff. In the show cause notice, the Department did not rely upon the statements of all the 62 dealers, but relied only on the statements of 7 dealers. This, in my view, not only violated the legal procedure, but resulted in grave injustice to plaintiff.
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> 99. There is no material on record to suggest that the money collected by Mr. Vyas was paid to the plaintiff or to any of its Directors, or it was credited in the account of the Company. Payment should be from buyer to the assessee.
>
> 100. In other words, there was no material before the Authority, to indicate the involvement of plaintiff or any of its Directors, either directly or indirectly, with any act of Mr. Vyas.
>
> 101. From the perusal of the admitted facts and documents, it is evident that the total number of transactions involving the alleged payment of extra money over the invoice price, constituted less than 1% of the total sales/transaction alone, during the period in question. In other words, in the substantial majority of transactions, dealers paid the price, as indicated in the invoices. Thus this price, alone

constituted the normal price, at which the goods were ordinarily sold. By the show cause notice, the Department sought to recover excise duty, on the additional amount, allegedly received by Mr. Vyas. This, in my view, is contrary to Section 4 of the Act. So, the Department did not follow the provisions as contained in Section 4 of the Act."

In **Eicher Tractors Ltd's** case (supra), it was held as under:

"Under the Act, customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not fixed the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery of the time and place of importation- in the course of international trade. The word 'ordinarily' necessarily implies the exclusion of "extraordinarily" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale....." Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1A) in accordance with the rules framed in this behalf."

In **Dilip Kumar Swain's case** (supra), it was held as under:

"In the context Section 32(2) of Indian Evidence Act, 1872 (in short, 'Evidence Act') may be noted. Expression "in the ordinary course of business" means "on the ordinary course of a professional avocation or currant routine of business" which was usually followed by the person whose declaration it is sought to be introduced. Expression "in the ordinary course of business" means in the usual course of routine of business. It is used to detect current routine of

business. It is trite law that definition or interpretation given in respect of a particular entry has to be judged in the background of that statute itself and cannot always throw a guiding light in respect of other statutes. It has to be judged in the background and context in which it is used in a particular statute."

24. In **Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd.**, (2020) 8 SCC 401, Hon'ble Apex Court, while dealing with the expression "in the ordinary course of business" as regards provisions of Insolvency and Bankruptcy Code observed as under:

> **"28.6.1.** Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL.
>
> It remains trite that an activity could be regarded as "business" if there is a *course of dealings, which are either actually continued or contemplated to be continued with a profit motive.* [Vide *State of A.P.* v. *H. Abdul Bakhi & Bros.*, AIR 1965 SC 531 : (1964) 15 STC 644 (at p. 647).]
>
> As regards the meaning and essence of the expression "ordinary course of business", reference made by the appellants to the decision of the High Court of Australia in *Downs Distributing Co.* [*Downs Distributing Co. Pty Ltd.* v. *Associated Blue Star Stores Pty Ltd.*, (1948) 76 CLR 463] , could be usefully recounted as under:
>
> "As was pointed out in *Burns* v. *McFarlane* [*Burns* v. *McFarlane*, (1940) 64 CLR 108 (Aust)] the issues in sub-section 2(*b*) of Section 95 of the Bankruptcy Act, 1924-1933 are "(1) good faith;

(2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor". It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. *It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation.*"

28.6.2. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of "ordinary course of business" of a particular corporate entity only if it falls in place as part of "the undistinguished common flow of business done"; and is not arising out of "any special or particular situation", as rightly expressed in *Downs Distributing Co.* [*Downs Distributing Co. Pty Ltd.* v. *Associated Blue Star Stores Pty Ltd.*, (1948) 76 CLR 463] Though we may assume that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the

corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the homebuyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL."

Assessment dated 09/02/2015 u/s 32 of DVAT Act (Tax period 2010-11) – Claim of ITC

25. As observed by learned Assessing Authority, it was not possible for him to verify the nature of purchases i.e. as to whether the same were in the nature of capital goods or in the

nature of traded goods.

As regards ITC claimed by the dealer for the year 2010-11, by way of second instalment on purchase of capital goods in each month of 2010-11, learned Assessing Authority observed that the dealer was not entitled to claim ITC on the goods not used as capital goods in the State of Delhi.

Learned Assessing Authority further observed that dealer had traded in all those goods, shown as purchase of capital goods, and as such, it stood established that the dealer was filing false, misleading and deceptive returns. Accordingly ITC claimed as second instalment to the tune of Rs. 6,94,82,898/- was disallowed.

Assessment dated 08/05/2015 u/s 32 of DVAT Act (for Tax period 2011-12)

26. While framing assessment for the tax period 2011-12 and dealing with the claim of ITC, learned Assessing Authority observed in the manner as:

> **"ITC- 3rd Installment**
>
> The dealer for the year 2011-12 has claimed ITC as 3rd installments on purchase of capital goods in each month of 2011-12.....
>
> In view of the above and in view of provisions contained in DVAT Act, 2004, the dealer is showing local purchases as purchase of capital goods and claiming full ITC on

those purchases. It is also noted that in fact dealer has traded in all those goods which are shown as purchase of capital goods. Therefore, it is clearly established that the dealer has filed false, misleading & deceptive returns. Since, the dealer has failed to establish his claim of ITC on purchase of capital goods as claimed by him, and also since the dealer has failed to submit any documents in support of this claim of ITC on purchase of capital goods, if any, therefore, the ITC claimed as 3rd installment on capital goods purchased during the year 2009-10 and claimed in the year 2011-12, in the return for the March, 2012 to the tune of Rs.7,42,37,983/- is disallowed and rejected."

Burden to prove liability as to tax

27. As regards burden to prove exigibility of an item to tax, counsel for appellant has relied on decision in **Union of India and Others v. Garware Nylons Ltd. and Others**, (1996) 10 SCC 413. Therein, it was held by Hon'ble Apex Court as under:

> "The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case a this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt

was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessees has been treated as a kind of Nylon Tarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary. We would do well to remember the guidelines laid down by this Court in Dunlop India Ltd. v. Union of India in such a situation, wherein it was stated: (AIR p. 607 : SCC p. 254, para 35)

"When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause."

In these matters, ITC claim of the dealer has been rejected. Therefore, above said decision cited by learned counsel for the appellant is not applicable as there is no dispute as to the item falling under any particular entry of any schedule.

Sale of STB (Set-Top-Box)

28. In the impugned order, learned OHA relied upon decision in **Bharti Telemedia Ltd. v. State of Tripura**, W.P. (C) No. 563 of 2010, decided by Hon'ble High Court of Tripura, to observe that State has full authority to levy value added Tax on the sale part of the transaction i.e. the value of STBs and that said decision, in a similar matter left no scope of doubt that there could be any loss of account of sale and purchase of CPE if

sale price also includes monthly rentals received on account of sale of STBs on right to use basis.

29. Learned counsel for Revenue has also relied on the above decision to support the assessments and the impugned orders.

The contention raised by learned counsel for the appellant is that decision in **Bharti Telemedia's** case (supra) relied on by learned OHA and by learned counsel for Revenue, is not applicable to facts of this case. It has been pointed out that in that case, the State was imposing VAT of the value of STBs as valued by the dealer-petitioners therein, in their own books, but it is not so in this case.

As further pointed out, in that case the contention raised on behalf of the petitioner was that they were rendering service only and being service providers, they were paying service tax and were not liable to pay any VAT, but it is not so in this case.

Further, it has been pointed out that in that case it was contended on behalf of the petitioner that there was no transfer of property or transfer of right to use any such equipments and as such the contract did not amount to sale within the meaning of Tripura Value Added Tax Act, but herein the claim of dealer is that this is a case of transfer of right to use the item, and as such, the above said decision is not applicable to the present case.

In this regard, suffice it to say that when appellant, through its counsel submits in the course of arguments that it is a case of sale of STBs on account of transfer of right to use, the same findings by learned Assessing Authority and learned OHA on the point of sale of STB go unchallenged.

Section 40A of DVAT Act

30. Section 40A of DVAT Act reads as under:

> "If the Commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of this Act or any provision of this Act, then, the Commissioner may, by order, declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for the increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not, such dealer or person is a party to the arrangement, in such manner as the Commissioner considers appropriate **so as to counteract any tax advantage** obtained by that dealer from or under the arrangement.
>
> (2) For the purposes of this section –
>
> (a) "arrangement" includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect;
>
> (b) "tax advantage" includes, -
>
> (i) any reduction in the liability of any dealer to pay tax,
>
> (ii) any increase in the entitlement of any dealer to claim input tax credit or refund,

(iii) any reduction in the sale price or purchase price receivable or payable by any dealer."

31. As pointed out on behalf of the appellant, so as to record satisfaction, as provided u/s 40A of DVAT Act, department was required to collect evidence as to contemporary share market value during the said period and if any other party was involved or if any contract was identified by the dealer-appellant with any such party, but no such effort was made to collect any such evidence. Furthermore, as required u/s 40A, in case of any arrangement, same is required to be declared null and void. However, no such declaration by the department is found on record.

In absence of any thorough inquiry or investigation into the matter by the learned Assessing Authority or learned OHA, there is merit in the contention raised on behalf of the appellant that this is a case where provisions of section 40A of DVAT Act are not attracted. Therefore, findings recorded by learned Assessing Authority in this regard are set aside.

Tax credit- relevant provisions

32. Tax credit is available on purchase of capital goods, as per procedure prescribed u/s 9(9) of the Act unless these goods are listed in VII Schedule of DVAT Act relating to "Non-Creditable goods".

Conditions and restrictions on claiming tax credit

In accordance with section 9(2), no tax credit shall be allowed-

(a) in the case of the purchase of goods for goods purchased from a person who is not a registered dealer;

(b) for the purchase of non-creditable goods;

(c) for the purchase of goods which are to be incorporated into the structure of a building owned or occupied by the person. However, this sub-section does not prevent a tax credit arising for goods and building materials that are purchased either for the purpose of re-sale in an unmodified form, or for the performance of a works contract on a building owned or occupied by another;

(d) for goods purchased from a dealer who has elected to pay tax u/s 16 of the DVAT Act;

(e) for goods purchased from a casual trader; and

(f) to the dealers or class of dealers specified in the Schedule V except the entry no.1 of the said Schedule ~~that is~~ i.e CSD Stores which was inserted w.e.f 02.06.2005.

Moreover, tax credit in respect of capital goods shall not be allowed if such capital goods are used exclusively for the purpose of making sale of exempted goods specified in the first schedule. [Fourth proviso to section 9(9)(a).

It may be mentioned here that as per *Explanation* appended to

sub-section (2) of section 9 DVAT Act, this sub-section does not prevent a tax credit arising for goods and building materials that are purchased either for the purpose of re-sale in an unmodified form, or for the performance of a works contract on a building owned or occupied by another.

"*Non-creditable goods*"

As per VII Schedule available under DVAT Act, subject to clauses (2) and (3) of this Schedule, the following goods shall be "non-creditable goods" for the purposes of this Act:

> "(vi) Goods designed, and used predominantly for, the provision of entertainment including television receivers, video cassette players, radios, stereo systems, audio cassette player, CD players, DVD players, computer game consoles and computer games, cameras of any kind."

As noticed above, and as per entry at serial no. 1(vi) of VII Schedule, no tax credit can be claimed or allowed in case of purchase of non-creditable goods.

33. It has been contented on behalf of the Revenue that set-top box (STB) is covered by the goods designed and used predominantly for the purpose of entertainment and that this item being television receiver can safely be said to be "non-creditable goods" and as such, said item cannot be termed to

be a capital goods. Accordingly, it has been urged that dealer is not entitled to claim any ITC.

34. So far as definition of expression "capital goods", as per section 2(1)(f) of DVAT Act is concerned, the items specified in this definition are plant, machinery and equipment. These items are not capital goods, unless directly or indirectly used in the process of trade or manufacturing or for execution of works contract in Delhi.

In other words, where a dealer purchases a machine for the purpose of re-sale, it would be a case of trading stock and not the capital goods.

So far as word "machinery" is concerned, an item to be termed as machinery, in its ordinary sense must be:-

(i) A completed machine or a number of completed machines, or

(ii) Parts or numbers of machine which, when assembled, form a complete machine, or

(iii) Some such of those parts which, when assembled with other necessary parts would form a complete machine.

So far as expression "in the process of" is concerned, as per decision in **Coffee Board v. Joint CTO**, (970) 25 STC-528 (SC), it means "progress or process of" or "during."

Capital Goods- Exemption on sale of capital goods -

35. Unless exempted from tax u/s 6(3) of the Act, sale of "capital goods" is exigible to tax.

36. Section 6(3) of DVAT Act reads as under :-

> "When a dealer sells capital goods which he has used since the time of purchase exclusively for purposes other than making non-taxed sale of goods, and has not claimed a tax credit in respect of such capital goods under section 9, the sale of such capital goods shall be exempt from tax".

As noticed above, sub-section (3) of section 6 of DVAT Act provides that where a dealer sells capital goods, which he has used since the time of purchase exclusively for purposes *other than making non-taxed sale of goods,* and has not claimed a tax credit in respect of such capital goods u/s 9, the sale of such capital goods shall be exempt from tax.

"Non-taxed sales" are sales which are not subject to DVAT Act, but dealer may claim tax credit on purchases related to the sales they consist of inter-State and export sales from Delhi.

Section 8(3) of DVAT Act provides that where a dealer sells goods that have been used in part for making sales that are subject to tax under this Act or sales that are not liable to tax u/s 7; and partly for other purposes, the amount of tax on the sale of the goods shall be in the manner indicated in this sub

section.

How to claim or allow tax credit on capital goods

Notwithstanding anything contained to the contrary in sub-sections (1) and (3) and subject to sub-section (2) of section 9, tax credit in respect of capital goods shall be allowed as described under section 9(9) of the Act.

Section 9(9) of DVAT Act

Section 9(9) of DVAT Act reads as under:-

> "(9)(a) Notwithstanding anything contained to the contrary in sub-sections (1) and (3) and subject to sub-section (2), tax credit in respect of capital goods shall be allowed as follows: -
>
> (i) 1/3rd of the input tax on such capital goods arising in the tax period, in the same tax period;
>
> (ii) [balance 2/3rd of such input tax, in equal proportions, in corresponding tax periods, in two immediately successive financial years :
>
> PROVIDED that, where the dealer sells such capital goods, the dealer shall be allowed as tax credit, the balance amount of the input tax, if any, in respect of such capital goods as has not been earlier availed as tax credit, such tax credit shall be allowed in the tax period in which such capital goods are sold and only after adjusting the output tax payable by him:
>
> PROVIDED FURTHER that where the dealer transfers such capital goods from Delhi otherwise than by way of sale before the expiry of three years from the date of purchase, he shall, after claiming the balance amount of input tax, if any, not availed earlier in respect of such capital goods, reduce the input tax credit by the prescribed percentage of the purchase price of such capital goods and make adjustments in the input tax credit in the tax period in which these capital goods are so transferred:

PROVIDED ALSO that where a dealer has purchased capital goods and the capital goods are to be used partly for the purpose of making sales referred to in sub-section (1) of this section and partly for other purposes, the amount of tax credit shall be reduced proportionately:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed if such capital goods are used exclusively for the purpose of making sale of exempted goods specified in the first schedule:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed on that part of the value of such capital goods which represents the amount of input tax on such capital goods, which the dealer claims as depreciation under section 32 of the Income Tax Act, 1961 (43 of 1961).

(b) If any capital goods in respect of which tax credit is allowed under clause (a) of this sub-section is transferred to any other person otherwise than by way of sale at the fair market value before the expiry of a period of five years from the date of purchase, the tax credit claimed in respect of such purchase shall be 1 [reversed] in the tax period during which such transfer takes place."

In accordance with "Working Guide on DVAT" released by the DVAT Department in 2005, a dealer can claim credit for one-third of the input tax on capital goods at the time he buys the goods, one-third in the following year, and the remaining one-third in the second financial year following the year he acquired the goods.

Where a dealer sells capital goods before availing total eligible tax credit, he shall claim the tax credit in the tax period in which such capital goods is sold in the following manner:

(a) He will determine his output tax payable on sale of such capital goods;
(b) He will determine unclaimed tax credit on such capital goods;
(c) If (a)-(b) is positive, he will pay tax in that tax period; and
(d) If (a)-(b) is negative, he will claim tax credit in that tax period, i.e., when such capital goods are sold.

37. As noticed above, in the default assessment for the year 2010-11, learned Assessing Authority observed that the dealer having not produced the record (for which the claim of refund was made in the return for the year 2010-11), it was not possible to verify the nature of the purchases as to the fact that whether these purchases were in the nature of "capital goods" or in the nature of "traded goods".

Learned Assessing Authority further observed that on perusal of returns, it was noticed that for the year 2010-11, the dealer was showing local purchases as purchases of capital goods and claiming full ITC on those purchases. He went on to observe that actually the dealer had traded in all those goods, which were shown as purchase of capital goods.

Said observations also came to be made as regards claim of ITC so far as second installment on purchase of capital goods in each month of 2010-11 is concerned.

Same observations were made by learned Assessing Authority as regards non-production of record on the point of claim of

refund made in the return for the year 2011-12, and specifically mentioned that it was not possible to verify the nature of the purchases as to the fact that whether these purchases were in the nature of capital goods or in the nature of traded goods.

Learned Assessing Authority further observed that on perusal of returns, it was noticed that for the year 2011-12, the dealer was showing local purchases as purchases of capital goods and claiming full ITC on those purchases. He went on to observe that actually the dealer had traded in all those goods, shown as purchase of capital goods.

Said observations also came to be made as regards claim of ITC so far as third installment on purchase of capital goods in each month of 2011-12 is concerned.

38. At this stage, it may be mentioned that "as regards refund" claimed by the dealer, on account of default assessment, made by the assessment year 2010-11 & 2011-12, while disposing of Writ Petition (Civil) Nos. 6218/2016 & 6219/2016, filed by the dealer, and dealing with the contention raised as regards interpretation of Section 10(5) of DVAT Act and Rule 6A of DVAT Rules, Hon'ble High Court was of the following view:

> "That direction to the respondent to refund the entire amount is not expedient in the circumstances. At the same time, the court is of the opinion that so far as the exercise

of verification of refund claim for the years 2009-10 are concerned, the assessing officer should conduct it fully and a direction is, therefore, issued to the assessing officer to verify the sales/purchases of the goods towards the credit which was claimed by the petitioner and after taking into account the selling price of the said goods, pass a speaking order. This exercise shall be carried and completed within a period of three months from today."

Is it a case of non-production of documents by dealer before Assessing Authority

39. As regards the observation made by the Assessing Authority in respect of the year 2010-11 that in response to notice u/s 59(2) of DVAT Act, the dealer had not produced documents, counsel for the dealer-appellant has submitted that before the Assessing Authority, the dealer produced documents which are lying in this file at page No. 112, 114, 116, 118, 121, 124 and that before learned OHA-Special Commissioner dealer had produced a document, copy of which is available at page 183.

As regards the observation made by the Assessing Authority in respect of the year 2011-12 that in response to notice u/s 59(2) of DVAT Act, the dealer had not produced documents, counsel for the dealer-appellant has submitted that before the Assessing Authority, the dealer produced documents which are lying in this file at page No. 112, 115, 116, 117, 118 and 119, and that before learned OHA-Special Commissioner dealer had produced one document, copy of which is available at

page 237.

40. While contending that the findings recorded by the Revenue Authorities are perverse findings and deserve to be set aside, counsel for the appellant has relied upon the following decisions:

1. **Dhirajlal Girdharilal v. Commissioner of Income-tax,** [1954] 26 ITR 736 (SC).
2. **H.B. Gandhi Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons,** 1992 Supp. (2) SCC 312.

In **Dhirajlal Girdharilal's case** (supra), it was held as under:

> "It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises."

In **H. B. Gandhi Excise's case** (supra), it was held as under:

> "It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

41. In view of the above documents available on record with the above-said paging, and stated to have been produced by the dealer before learned Assessing Authority in respect of two tax periods, and also an additional document for each annual year

2010-11 and 2011-12, stated to have been produced before the learned OHA with the above said paging, it was for the Assessing Authority to consider the said documents and for the learned OHA to consider the above said additional document, but the same appear to have not been considered at all. Otherwise, learned Assessing Authority would not have expressed in the assessments that it was not possible to verify the nature of the purchases i.e whether those were "capital goods" or "traded goods".

42. As is available from the order dated 04/04/2016 by our own Hon'ble High Court in **Dish TV India Limited's** case (supra), W.P.(C) 6510/2014 and others, challenging issuance of notices of default assessment of tax and interest on 18/11/2015, under section 32 of DVAT Act for each of the months of assessment year 2009-10, a special audit was undertaken.

The special Auditor submitted a report on 12th June 2012, raising therein an objection that the Assessee was capitalizing the cost of goods sold to the customers; that, therefore, such goods were in the nature of capital goods, and that the input tax credit ('ITC') thereon should be availed in terms of section 9(9) of the Act.

The audit report concluded that the Assessee was entitled to only 1/3rd of the input tax credit claimed on capital goods

purchased during the period 2009-10 and the balance 2/3rd input tax credit in equal proportions in the immediate successive financial years. Out of the total claim of Rs. 20,59,55,250, a part thereof was disallowed. The credit of Rs. 18,75,61,739 was allowed in three equal yearly installments. Accordingly, Rs. 6,25,20,580 was held eligible to be claimed for the AY 2009-10. The balance was permitted to be allowed as refund in 2 equal installments of the same amount during 2010-11 and 2011-12.

On 11th July 2012, a notice under Section 59 of the DVAT Act was issued by the VATO to the Assessee again calling for documentary evidence with respect to the discrepancy pointed out in the special audit report.

The Assessee stated therein before the Hon'ble High Court that none of the queries raised by the VATO in the above said notice u/s 59 of DVAT Act pertained to its refund claim. Nevertheless, the Assessee furnished the details as called for by the VATO.

The VATO (Vat Audit) issued a further notice on 10th December 2012 to the Assessee seeking information which was provided by the Assessee on 27th December 2012.

On 28th December 2012, the Assessee revised its return for the AY 2009-10, claiming refund of Rs. 6,66,05,308 due to the Assessee for the said AY "as required by the special audit

report". The balance refund was claimed in 2 equal installments in the subsequent AYs.

On 9th January 2013, the VATO again issued a notice for personal hearing and the Assessee was called to furnish further documents. This was also complied with by the Assessee.
After the OHA had, by his order dated 24th June 2013, allowed the Assesse's objections against the order of the VATO dated 12th September 2011 rejecting its refund claim, the VATO on 19th September 2013 again issued a notice of default assessment of tax and interest under Sections 32 of the DVAT Act.

In the said notice, the VATO observed that the Assessee had filed revised returns claiming only 1/3rd of the ITC and remaining 2/3rd in the subsequent financial year. The revised return of the Assessee for the Annual year 2009-10 was accepted to the above extent.

43. Picking up the thread
As noticed above, dealer claims that as regards A.Y. 2010-11 and A.Y. 2011-12, various documents were produced by the dealer before learned Assessing Authority and an additional document was produced before learned OHA. The claim of the dealer-assessee-appellant as regards ITC on "goods" could be

decided fully, only after perusal of the documents and their verification.

The Assessing Authority was required to record a specific finding that such and such was the turnover of the "capital goods", if any, and such and such turnover was of the "traded goods". Such a finding could be recorded only after thoroughly going through each document and the books of accounts, particularly when the dealer had revised its returns. It is found that learned Assessing Authority disposed of the ITC claim without conducting thorough enquiry and without going through the above referred to documents said to have been submitted to him.

Even learned OHA, while passing the impugned order, nowhere discussed any of the documents submitted by the dealer as regards ITC claim on goods.

Therefore, rejection of its claim for ITC vide impugned orders deserves to be set aside and the matter is required to be remanded to Learned OHA for decision afresh, after going through the entire material available on record, including the additional document stated to have been submitted by the dealer before learned OHA in respect of each year i.e. 2010-11 & 2011-12, having regard to the relevant provisions of law, as find mention in this judgment, and the well settled law on the

point of ITC claim.

44. So far as the contention raised on behalf of the Revenue that this is a case of non compliance with the provision of Section 48 of DVAT Act, once the matter is being remanded to learned OHA, it is for him to apply the relevant law, once facts are established.

45. Indisputably, every dealer engaged in business is required to comply with the provisions of DVAT Act or other relevant statute so that there is no evasion of tax. Law empowers the Commissioner to take appropriate step so as to counteract any tax advantage on account of any reduction in the sale price or purchase price receivable or payable by any dealer or on account of any increase in the entitlement of any dealer to claim input tax credit or refund or any reduction in the liability of any dealer to pay tax.

A perusal of the impugned assessments and the impugned orders would reveal that it came to the notice of the department that the dealer-appellant had availed of benefit of input tax credit; that the purchase price of set of products was higher but by way of various transactions the dealer sold the same at a price much below the cost price. In the given situation, department was required to look into the validity of the claim of the dealer for input tax credit, keeping in mind the

provisions of Sections 9 and 10 of DVAT Act. However, from the impugned order and the impugned assessments, it transpires that significant aspect of applicability of *Explanation* to Section 10(5) skipped the consideration of the department and the learned OHA.

To be specific, it was for the department to consider the impact of sale of the goods by the dealer in the manner indicated above i.e. its claim about sales at a price lower than the cost price in ordinary course of business, and not only by observing that it was not a case of loss to the dealer having regard to collection of rentals on monthly basis, especially when the dealer was claiming input tax credit on said plea. Department was required to look into and record specific findings as to whether the dealer used to sell said item at price lower than cost price, in routine or in the ordinary course of business and if it violated any of the provisions of DVAT Act. But, no such step appears to have been taken by Revenue Authorities.

Therefore, matter needs to be reconsidered by learned OHA, as regards applicability of Sec. 10, *Explanation* to Section 10(5) and Section 9 of DVAT Act, having regard to all the relevant documents of the dealer.

Result

46. In view of the above findings, both these appeals Nos. 152-153/2016 are disposed of and while setting aside the impugned

orders passed by learned OHA as regards tax periods – years 2010-11 & 2011-12, the matter is remanded to learned OHA for decision afresh on ITC claim, after arriving at findings on the nature of goods, while going through the material available on record, including the additional document stated to have been submitted by the dealer before learned OHA in respect of each year i.e. 2010-11 & 2011-12, taking into consideration all the relevant provisions of law, as find mention in this judgment, and having regard to the well settled law on the point of ITC claim.

Of course, learned OHA shall provide to the dealer-assessee an opportunity of being heard. Dealer to appear before learned OHA on 12/05/2023.

47. File be consigned to the record room. Copy of the judgment be supplied to both the parties as per rules. One set of judgment be placed in the record of the connected Appeal No. 153/16. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date : 02/05/2023

Narinder Kumar
2/5/2023

(Narinder Kumar)
Member (J)