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

M.A. No. 68-69/23
In Appeals Nos. 415-422/ATVAT/15
Date of Order: 28/06/2023

M/s Gem Sanitary Appliance Ltd.,
A-33, Wazirpur Indl Area,
New Delhi

.....Applicant

V.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Applicant : Sh. Sudhir Sangal.
Counsel representing the Respondent : Sh. C. M. Sharma.

Order

1. The dealer-assessee-objector-appellant is engaged in manufacturing and trading of sanitary and bathroom fittings. For manufacturing, it makes purchases of raw material, components and other consumables. Purchases of raw material are made from local markets and also from outside the State of Delhi.

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Furthermore, purchases of tradeable goods are also made by the dealer locally as well as from outside the State of Delhi and even by way of import from other countries.

As regards sales, the dealer claims that it makes inter-state sales against 'C' forms and also by way of transactions charging tax at full rate prescribed under Central Sales Tax Act, 1956 (hereinafter referred to as CST Act). Sales are also made by the dealer in the course of import u/s 5 (2) of CST Act, as further claimed.

2. Feeling aggrieved by the above assessments, assessee-objector filed 16 objections u/s 74 (1) of Delhi Value Added Tax Act (hereinafter refer to as DVAT Act).

3. Vide common order dated 27/01/2016, learned Special Commissioner- Objection Hearing Authority (hereinafter referred to as OHA), disposed of the objections filed by the objector-appellant herein. Said objections were filed as the dealer felt dissatisfied with notices of default assessment of tax and interest framed on 13/09/2011, by learned Assessing Authority-VATO (Audit), u/s 32 of DVAT Act, and notices of default assessment of tax and interest framed on 20/09/2011 u/s 9(2) of CST Act.

4. Learned OHA, after hearing both the sides and going through the records made available and the decisions cited, disposed of the objections by observing in the manner as:

"In the present case of M/s Gem Sanitary Appliances Pvt. Ltd. also, the import is by M/s Gem Sanitary Appliances Pvt. in his own name. The objector is the importer. Though the Objector had entered into an earlier contract with its local buyers, but for the purpose of said contract the objector was not the agent of the supplier in Germany. The contract between the Objector and its local buyers, is on principal to principal basis. The obligation to comply with the purchase order was that of the objector alone.

Similarly the contract entered into by the objector with the German company is a contract on principal to principal basis. Local Buyers, did not have privity of contract whatsoever with the German company. Any default of the contract in the first contract with Local buyers would be liability and obligation of the appellant and not that of the German company.

Thus, they are two independent transactions.

The first transaction between the Local Buyers and the objector and the subsequent transaction between the objector and the German company.

The imported goods could have been diverted to another third person, without violation/default of the contract between the objector and the local buyers.

The rate/ price of goods were also fixed independently by the Local buyers and the objector at one hand and the Objector and the German company on the other hand.

Therefore, the assessee may have imported the sanitary goods to sell the same to

M/s Omega Shelter Pvt. Ltd., Hyderabad,
M/s Platinum Properties Pvt. Ltd., Hyderabad,
M/s Ambience Properties Ltd., Hyderabad,
M/s GMGR Bath Fittings Pvt. Ltd., Hyderabad,
M/s GMGR Bath Fittings Pvt. Ltd., Mumbai,
M/s Magarpatta Township Dev. & Const. Co. Ltd. Pune,

but there was no legal or contractual obligation to sell these goods only to them. There was no bar or prohibition on the objector not to sell the imported sanitary goods to a third party.

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Hence, it cannot be said that the import was occasioned by said import and therefore qualifies for exemption under Section 5(2).

The decision of assessing officer to reject the sales of assessee made in the course of import u/s 5(2) of CST Act is therefore, upheld and confirmed.

In case of interstate sales of objector treated as local sales by the assessing officer in absence of proof of movement of goods, as contended by learned counsel of the objector that the goods were invariably transported to the dealers of NCR Region through Objector Company's own delivery van/ Temp No. DL-ILB-53290 and in very few cases through tempos hired from the parking lots situated in nearby market and through couriers, mere possessing a goods vehicle by the objector cannot establish that goods were transported by using this vehicle as the objector failed to produce any proof of expenses incurred on account of running the Light Goods Vehicle during the assessment year.

As held by Hon'ble Delhi High Court in the case of BR Fibres (P) Ltd. that the first and foremost requirement as provided in section 3 of CST Act, is movement of goods which the dealer failed to prove.

Hence, the decision of assessing officer to treat the inter-state sales of assessee as local sales and taxing accordingly is upheld and confirmed.

The Assessing Authority is directed to initiate necessary proceedings for recovery of dues as per laid down procedures."

5. Matter pertains to assessment year 2008-09.

6. Default assessments u/s 32 of DVAT Act, in respect of all the 4 quarters of the year 2008-09 came to be framed with the reasons recorded therein. Default assessments were framed for the following reasons:

"The dealer has, however, not been able to produce satisfactory evidence to support the movements of goods in

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respect of his interstate sales to some nearby places outside Delhi such as Gurgaon, Faridabad, Noida etcc.

He has stated that most of the dispatches to these places are either by local tempos, private vehicles of the purchasers or by bikes etc. according to the volume of the goods and that the registration number of the vehicles are mentioned on sale invoices.

In support of the movement of goods in respect of such sales, he relies on the statement of account of the parties duly confirmed and the fact that all the payments are received by payee account cheques only which are reflected in his bank statements.

Dealer's assumption and contention that the vehicle numbers are already mentioned on the sale invoices and they are proof enough for interstate movement of the goods is not accepted, as merely mentioning a vehicle No. on the interstate invoices does not confirm the physical movement of goods beyond the border of the state, if the sale invoices and they are proof enough for interstate movement of the goods in not accepted, as merely mentioning a vehicle No. on the interstate invoices does not confirm the physical movement of goods beyond the borders of the state, if the sale invoice is not supported by a documentary proof of movement viz. G.R. issued by a transporter.

If indication of vehicle No. on interstate invoice could be considered as a proof of physical movement of goods outside a state, this would be a tool in the hands of unscrupulous dealers for manipulating interstate sales and actually selling their goods locally under disguise of interstate sales.

Dealer's contention that sold goods are also dispatched through private vehicles of the purchasers or by bikes etc. indicates that the representatives of the buyer dealers collect the goods 'by hand' from the dealer's premises in Delhi and transport the goods on their own.

This establishes, beyond doubt, that the delivery of goods takes place in Delhi itself in case of such delivery practice and therefore, these so called interstate sales are not interstate sales but local sales in disguise of interstate sales.

Further, the movement of goods from Delhi to the place of buyer dealer is not established in given circumstances. Possibility of selling of these goods by the representatives of buyer dealers in Delhi itself by delivering the goods in the same manner as during their purchases i.e. 'by hand' cannot altogether be denied."

7. Separate assessments u/s 33 of DVAT Act were also framed by the Assessing Authority thereby imposing penalty.

8. The following table depicts the demands of tax, interest and penalty raised under DVAT Act:

S.No	Tax Period	Nature of Objections	Disputed amount (In Rs.)
01	First Quarter 2008-09	u/s 32 of DVAT Act, 2004	84,515/- (Tax+Interest)
02	First Quarter 2008-09	u/s 33 of DVAT Act, 2004	94,332/- (Penalty)
03	Second Quarter 2008-09	u/s 32 of DVAT Act, 2004	30,912/- (Tax+Interest)
04	Second Quarter 2008-09	u/s 33 of DVAT Act, 2004	32,542/-(Penalty)
05	Third Quarter 2008-09	u/s 32 of DVAT Act, 2004	31,694/- (Tax+Interest)
06	Third Quarter 2008-09	u/s 33 of DVAT Act, 2004	30,861/-(Penalty)
07	March 2009	u/s 32 of DVAT Act, 2004	34,656/- (Tax+Interest)
08	Fourth Quarter 2008-09	u/s 33 of DVAT Act, 2004	31,674/-(Penalty)

9. Learned Assessing Authority framed assessment of tax, interest and penalty under CST Act due to the following reasons:

"Sales claimed to be made by the dealer under Section 5(2) have been made to M/s. Omega Shelter Pvt. Ltd., Hyderabad, M/s. Platinum Properties Pvt Ltd., Hyderabad, M/s. Ambience Properties Ltd., Hyderabad, M/s. GMGR

Bath Fittings Pvt. Ltd., Hyderabad, M/s. GMGR Bath Fittings Pvt. Ltd., Mumbai, M/s. M/s. Magarpatta Township Dev. & Const. Co. Ltd, Pune which are mostly builders. The modus operandi is almost common.

The purchaser raises a purchase order to M/s. Gem Sanitary Appliances Pvt. Ltd(auditee dealer) describing the item specifications, name of the foreign supplier from whom the goods are to be procured, rate and other terms of payment etc.

An agreement is made between the two on the basis of purchase order. The auditee dealer then places an order on the foreign supplier who exports the goods in the name of the auditee dealer. The auditee dealer gets the goods released from the customs department after paying the custom duty and gets the goods delivered to the purchasing dealer. It is mentioned in the agreement that the custom duty and the freight etc. shall be included in the sale price of the auditee dealer.

The auditee dealer contends that the movement of goods from the foreign company into India was incidental to the contract that he had with the purchasing dealers that the goods would be imported into India and this movement was in pursuance of the conditions of the contract between the auditee dealer and the purchasing dealers.

As it appears, the dealer's main reliance lies on the case of K.G.Khosla & Co. vs Dy. Commissioner of Commercial Tax [1966] 17 STC 473(SC). However, on important factor quoted in this case /judgment is that " there was no possibility of the goods being diverted by the assessee for any other purpose and therefore", it was held that "the sales took place in the course of import of goods within section 5(2) of the Act, and exempt from taxation".

This negative possibility arose from the fact that as per agreement between the assessee and the Director General of

Supplies and Disposals, New Delhi, the goods i.e. axle box bodies were to be manufactured in Belgium according to specifications. This factor is, however missing in the present case at hand, wherein the imported goods are not ascertained goods and it may be possible for any other person or dealer, other than the purchasing dealers, to make use of them.

The foreign supplier in this case is M/S. VIEGA GMBH & Co., Postfach 4 30/440 D 57428, Attendorm, Germany. An interesting fact in this case is that the goods imported from Viega GMBH & Co. are also available in India through its representative offices in the country. Internet surfing revealed that the following offices of Viega GMBH & Co. In India, which are situated at-Time Tower office No.414, M.G.Road, Gurgaon (Haryana) and A/6, Jala Duhita, 5th Kasturba Road, opp. Blue Dart & DHL Courier Office, Borivali East, Mumbai.

It has been enquired telephonically from the representative office that full range of the company's products are available through them.

The circumstances as discussed above discount off the proposition that "there is no possibility of the goods being diverted by the assessee for any other purpose" as mentioned in K.G. Khosla & Co. case.
From the above facts and figures, it appears that the dealer is trying to take cover of law i.e. Section 5(2) in order to avoid the laws i.e. to defeat the purpose of the legislation and to disguise his taxable sales as exempt sales.

In light of the above discussion, it is evident beyond doubt that the sales made by the dealer are not covered under Section 5(2) of CST Act, 1956."

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10. The following table depicts the demands raised towards tax, interest and penalty under CST Act:

S.No	Tax Period	Nature of Objections	Disputed amount (In Rs.)
01	First Quarter 2008-09	u/s 9(2) of CST Act, 1956	15,74,922/- (Tax+Interest)
02	First Quarter 2008-09	u/s 9(2) of CST Act, 1956	.17,57,875/- (Penalty)
03	Second Quarter 2008-09	u/s 9(2) of CST Act, 1956	95,550/- (Tax+Interest)
04	Second Quarter 2008-09	u/s 9(2) of CST Act, 1956	1,00,587/-Penalty)
05	Third Quarter 2008-09	u/s 9(2) of CST Act, 1956	5,43,661/- (Tax+Interest)
06	Third Quarter 2008-09	u/s 9(2) of CST Act, 1956	5,33,824/-(Penalty)
07	March 2009	u/s 9(2) of CST Act, 1956	6,43,082/- (Tax+Interest)
08	Fourth Quarter 2008-09	u/s 9(2) of CST Act, 1956	5,87,760/-(Penalty)

11. One of the grounds put forth by the appellant-applicant in the appeals is that while framing default assessments u/s 32 of DVAT Act, learned VATO could not adjudicate nature of inter-State sales transactions, but, he adjudicated said transactions while framing assessments under DVAT Act and that too without discussing the facts and figures made available in the returns.

12. Furthermore, applicant claims that Assessing Authority has wrongly treated the inter-State Sales as local sales on the ground that no goods receipt (GR) was produced by the dealer in proof of fact of movement of goods.

Claim of applicant is that it made sales to the dealers situated in NCR region and for the purpose of proof of movement of goods within the radius of 30/35 Kms, trucks of transport companies, who issued GRs, are not available, particularly

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when the quantity of the goods sold is small and the goods are of small value.

Applicant has tried to explain that it made supply of goods to the purchasing dealers invariably by using its own tempo no. DL-1LA-5329 and the said registration number finds mentioned in the retail invoices issued by the applicant.

13. Further, applicant has claimed that the department should have taken into consideration original "C" Forms submitted by the applicant company, but same were not taken into consideration.

14. It may be mentioned here that while deciding objections filed by the dealer-objector, learned SOHA placed reliance on decision in B.R Fibres Pvt. Ltd. v. Commissioner, VAT, (decided by our own Hon'ble High Court on 17/03/2015), wherein it was held that first and foremost requirement of section 3 of CST Act is movement of goods, and to prove movement of goods, prime requirement is of GR/RR, and further that actual movement of goods from one state to another cannot be judged by documents like bank statement, retail invoices, "C" Forms etc.

As regards decision in B.R. Fibre's case (supra), claim of the applicant is that same does not apply to the present matters, which are distinguishable on facts.

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15. In the course of arguments on these applications u/s 76(4) of DVAT Act, counsel for the applicant has submitted that in the given facts and circumstances when some CRs are not available with applicant and the legal position, the applicant is ready to deposit Rs. 6 Lakhs i.e., 5,50,000/- towards the demands of tax and interest raised under CST Act and a sum of Rs. 50,000/- towards the demand of tax and interest raised under DVAT Act, for all the quarters of the year 2008-09, and that the appeals be entertained on deposit of the said amount by way of pre deposit.

16. Counsel for the respondent submits that he has no objection to the entertaining of the 8 appeals subject to deposit of Rs. 6 Lakhs i.e., 5,50,000/- towards the demands of tax and interest raised under CST Act and a sum of Rs. 50,000/- towards the demand of tax and interest raised under DVAT Act, as submitted by counsel for the applicant.

17. In the given facts and circumstances, and particularly in view of the submission made by the counsel for the applicant and no objection on behalf of the respondent to the said submission, all the appeals are entertained subject to deposit of Rs. 6 Lakhs i.e., 5,50,000/- towards the demands of tax and interest raised under CST Act and a sum of Rs. 50,000/- towards the demand of tax and interest raised under DVAT Act.

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18. Counsel for applicant submits that the applicant shall deposit the above said amount by 20th July, 2023. The amount of pre-deposit to be deposited by the applicant by the said date.

19. On deposit of the above said amount by way of pre-deposit, counsel for the applicant to apprise the Registry by submitting challans and also apprise counsel for the respondent, so that on 25/07/2023 appeals are taken up for final arguments, and in case of non-compliance with the said order, for further orders in accordance with law.

20. Both the miscellaneous application M.A. No. 68-69/2023 (which came to be registered later on though filed earlier), stand disposed of accordingly.

21. Copy of the order 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 : 28/06/2023

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(Narinder Kumar)
Member (Judicial)

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