

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

Review Application Nos. 06 & 07/23  
In Appeal Nos. : 152-153/ATVAT/2016.

**Date of Order: 10/07/2023**

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

.....Applicant

v.

Commissioner of Trade & Taxes, Delhi

..... Respondent

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

**ORDER**

1. By way of present two review applications, applicant has prayed for review of the judgment dated 02/05/2023.
2. The above captioned two appeals came to be disposed of by this Appellate Tribunal vide common judgment dated 02/05/2023. The operative part of the judgment reads as under:

“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

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Review Application Nos. 06 & 07/23  
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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.”

3. The two appeals were filed by the dealer-assessee challenging order dated 02/05/2016 passed by learned Special Commissioner–Objection Hearing Authority (hereinafter referred to as OHA), relating to assessments of tax and interest framed under DVAT Act, pertaining to the tax periods 2010-11 and 2011-12.

Dealer–applicant claims that it is engaged in the business of supply, installation, repair, replacement and maintenance of Set Top Box (STB) and further that it stands registered under Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act).



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4. It may be mentioned here that while challenging assessment as regards tax and interest for the tax period 2010-11 and 2011-12, dealer-objector had not challenged rejection of its claim of refund or the assessments of penalty.
5. Arguments heard on the review applications. File perused.
6. While arguing on the review applications, counsel for the applicant has submitted that the applicant is aggrieved by the directions as regards remand of the matter, as provisions of sub-section (7) and (8) of section 76 of DVAT Act have not been complied with.

It is submitted that the above said provisions require that before a remand order is passed applicant be apprised of the proposed order and an opportunity to present additional evidence is to be given to the appellant, so that the matter is finally determined/resolved to avoid multiplicity of litigation.

Counsel for the respondent has submitted that having regard to the given facts and circumstances, while giving reasons disposed of the appeals and while setting aside the impugned orders passed by learned OHA, this Appellate Tribunal rightly resorted to the direction for remand of the matter, as section 76 (6) (c) of DVAT Act empowers the Appellate Tribunal to pass



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such other order for the determination of the issue as it thinks fits.

7. Default assessment is framed u/s 32 of DVAT Act by the Assessing Authority, due to certain reasons. Assessing Authority, which frames assessments, is delegated powers in this regard by the Commissioner u/s 68 of DVAT Act.

Objection Hearing Authority deals with objections filed by the person who feels dissatisfied with the assessments or any other order or decision under DVAT Act.

8. As per section 74, aggrieved person may make an objection to the Commissioner. While disposing of the objections, OHA is to examine the assessment or order or decision, the objection and any other document or information as may be relevant. The OHA may accept the objection in whole or in part and take appropriate action to give effect to the acceptance or refuse the objections or the remainder of the objection, as the case may be. On disposal of the objections, OHA is required to serve on the objector a notice in writing of the decision and reasons. This procedure is available u/s 74 of DVAT Act.



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All the above provisions pertaining to objections go to show that the function/duty of the OHA, who may be Special Commissioner, Additional Commissioner, Joint

Commissioner, Deputy Commissioner, Assistant Commissioner, VATO or AVATO, is to determine and decide the objections. In other words, the OHA adjudicates objections and does not frame assessment.

9. Coming to sub-section (8) of section 76 of DVAT Act, same reads as under:

“The Appellate Tribunal shall not set aside an assessment and remit the matter to the Commissioner for a further assessment, unless it has first-

- (a) Advised the aggrieved person of the proposed order;
- (b) Offered the person the opportunity to adduce such further evidence before it as might assist the Appellate Tribunal to reach a final determination.”

10. From the above provision, it transpires that it comes into application where the Appellate Tribunal is to remit the matter to the Commissioner for a further assessment. When a matter is remitted to the OHA, it cannot be said that the Appellate Tribunal remits the matter for a “further assessment”. Disposal of objections by OHA is equal to disposal of an appeal against assessment and not equal to framing of an assessment. It may be mentioned that remitting of the matter to the OHA is for the purpose of disposal of the objections afresh due to the reasons recorded in the order passed by the Appellate Tribunal. Therefore, in case Appellate Tribunal remits or remands the matter<sup>to</sup> the OHA, the remand being not for the purpose of



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further assessment and rather, being for the purpose of disposal of the objections afresh, provisions of section 76(8) (a) & (b) do not come into application. Even otherwise, as rightly submitted by counsel for the Respondent, Appellate Tribunal is empowered to pass such other order i.e. other than as provided under clause (a) & (b) of sub-section (6) of Section 76 of DVAT Act, and for remand of the matter to OHA. Herein, having regard to all the facts and circumstances and for the reasons recorded in the judgment, this Appellate Tribunal deem<sup>-ed</sup> it a fit case to remand the matter to the OHA. Therefore, there is no merit in the contention raised by counsel for the applicant.

11. Counsel for the applicant has also submitted that as per special audit report dated 12/06/2012, for the year 2009-2010, it was concluded that the goods, in respect of which the dealer claimed refund, were 'Capital Goods', and as such the applicant was entitled to claim ITC to the extent of 1/3<sup>rd</sup> amount in the relevant year and claim the balance of 2/3<sup>rd</sup> amount equally in the subsequent 2 years.

The contention is that once the issue regarding nature of goods was settled in the Audit Report for the above said financial year, and there was no change in the nature of the goods in the subsequent years, the respondent accepted the same.

On the other hand, counsel for the respondent has contended



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that for the reasons recorded by the Assessing Authority, it cannot be said that the nature of the goods stood established. Counsel for the respondent has also submitted that the appellant-applicant had filed revised returns, that the Assessing Authority had made specific observation about non production of original records by the assessee, due to which no verification could be carried out about ITC and further that it was not clear as to whether ITC was claimed on capital goods or traded goods. The contention is that for the reasons recorded by this Appellate Tribunal, the matter has been rightly remanded to the OHA.

Herein, the assessments pertain to the tax periods - 2010-11 & 2011-12. This Appellate Tribunal, while disposing of the appeals, took into consideration the entire material made available on record and only then directed learned OHA for decision afresh on ITC claim, after arriving at findings on the nature of goods while going through the material, including the additional documents stated to have been submitted by the dealer before learned OHA, in respect of each financial year, and taking into consideration all the relevant provisions of law, while affording an opportunity of being heard to the dealer.

In this regard, reference<sup>✓</sup> may be made to Para 38 of the judgment sought to be reviewed, as therein extract of the order passed by the Hon'ble High Court in Writ Petition No.



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6218/16 & 6219/16 has been reproduced, while dealing with the contention as regards interpretation of section 10(5) of DVAT Act and Rule 6A of DVAT Rules, so that the Assessing Officer could verify sale / purchases of the goods towards the credit which was claimed by the petitioner for the year 2009-10.

When, during arguments on merits in the appeals, a specific contention was raised by counsel for the appellant that the Assessing Authority did not conduct any inquiry on the point of sale of the product at lower price and he also did not join anyone from the market to find out the value at which the goods of like kind and quality were being sold in open market, the Appellate Tribunal deemed it just and appropriate to remand the matter to the learned OHA. Therefore, even on this ground, no review of the judgment is called for.

13. Review of the judgment is also being sought on the ground that there was no justification for issuance of directions by this Court as available in para Nos. 43, 45 and 46 thereof. for further assessment of ITC claim, particularly when the entire material pertaining to financial year 2010-11 had already been examined by the Revenue and no discrepancy could be found, except the violation of provisions of sub-section (5) of section 10 and section 40A of DVAT Act. Applicant also claims that while deciding an appeal, Appellate Tribunal cannot extend



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the scope i.e. beyond the subject matter of appeal.

An inconsistent argument has been advanced on behalf of the applicant that the Assessing Authority and the OHA had well considered the point of ITC.

In support of his contention, counsel for the appellant has raised reliance on following decisions:

1. **Ganga Ram Laxmi Narain v. Commissioner of Sales Tax**, [1980] taxmann.com 570 (Allahabad).
2. **Advanced Systek (P.) Ltd. v. State of Gujarat**, [2014] 44 taxmann.com 473 (Gujarat).
3. **U.K. Paints (India) Ltd. v. Deputy Commissioner of Income Tax**, [1997] 57 TTD Del 537.
4. **Panchura Estate Ltd. v. Government of Madras**, 1972 SCC Online Mad. 301.
5. **Shehroj Akhtar v. Commissioner of Sales Tax**, [1991] 1991 taxmann.com 1170 (Allahabad).
6. **Abdul Majeed P.A. v. State of Kerala**, [2012] 21 taxmann.com 613 (Kerala).
7. **Johnson Matthey Chemicals India Pvt. Ltd. v. Commissioner of Commercial Tax**, [Sales Tax Revision No. 360/2022].

On the other hand, counsel for the respondent has submitted that no request was made on behalf of the appellant before this Appellate Tribunal seeking permission for production of any additional document and this Appellate Tribunal never prevented the appellant from doing so. The contention is that when this Appellate Tribunal considered all the documents made available, for arriving at the decision, there was no



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question of permitting the appellant to produce any additional document or not to pass an order of remand. Counsel for respondent has also submitted that the order of remand came to be passed in the given facts and circumstances, when this Appellate Tribunal found that final resolution of the matter could not be made. It has also been contended that this Appellate Tribunal also did not exceed the scope or subject matter of the appeals.

14. Once, it has been contended on behalf of the applicant that this Appellate Tribunal could not travel beyond the subject matter of the appeal, does the above said contention raised on behalf of the applicant not amount to inconsistent plea? The second mentioned contention is certainly inconsistent with the first contention that this Appellate Tribunal exceeded the subject matter of the appeal.
15. So far as powers of the Appellate Tribunal under sub-section (7) of Section 76 of DVAT Act are concerned, no doubt, final resolution of the matter can be made, but Appellate Tribunal decided the issues which were the subject matter of the appeals.
16. In Johnson Matthey Chemicals India Pvt. Ltd.'s case (supra), it was observed that the documents which were required to be considered by the Assessing Authority by the Tribunal were already on record, which the Appellate Tribunal being the last





fact finding authority himself did not consider and only to escape from deciding the matter on merits had taken a shortcut and remanded back the matter to the Assessing Authority.

Herein, this Appellate Tribunal considered all the documents made available, for arriving at the decision, and there was no question of permitting the appellant to produce any additional document after any such advice to the appellant. In the given facts and circumstances, Johnson Matthey Chemicals India Pvt. Ltd.'s case (supra) does not come to the aid of the applicant.

17. In Ganga Ram Laxmi Narain's case (supra), Hon'ble High Court observed that the subject matter of appeal did not extend to the part which was accepted by the Assessing Authority. It was so observed in view of the contention raised on behalf of the assessee - appellant therein that the Appellate Tribunal had no jurisdiction to enhance the turnover of bullion over that fixed by the Assessing Authority in appeals filed by the assessee. Therein, reliance was placed on decision in M/s Madan Studio v. Assistant Commissioner Sales Tax, 1975, U.P. Tax Cases 58, wherein it was held that the Appellate Authority is confined to the subject matter of the appeal preferred by the dealer and it cannot go outside it i.e. it could not enhance the turnover of bullion.

18. In Advanced Systek (P.) Ltd.'s case (supra), it was observed



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that the portion of the order passed by the Assessing Officer, which was in favour of the appellant, was not the subject matter of appeal before the Tribunal and as such the Appellate Tribunal could not set aside the said order and further that the scope of the appeal before the Tribunal was confined to finding out as to whether Assessing Officer was correct in confirming Central sales tax demand and also as to whether the First Appellate Authority was justified in rejecting the appellant's appeal.

19. In U.K. Paints (India) Ltd.'s case (supra), our own Hon'ble High Court observed that the assessment framed u/s 143(3) of Income Tax Act was a nullity and non-est being beyond the subject matter of appeal and further that it is the scope of the relief which determine the subject matter of appeal.
20. In Panchura Estate Ltd.'s case (supra), reliance was placed on decision in Commissioner of Income Tax v. Karamchand Premchand Pvt. Ltd., (1969) 74 ITR 254 (Gujarat), wherein it was held that Tribunal was not entitled to allow the assessee to agitate the question under the guise of granting leave under Rule 11 of the Income – Tax (Appellate Tribunal) Rules 1963. Both the tax cases were dismissed while further observing that “it will be a fortiori a case where an assessee did not seek to challenge a particular item before the Appellate Assistant Commissioner or before the Tribunal at the original stage but



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seeks to challenge the same at a later stage by way of additional grounds. We, therefore, hold that the Tribunal is justified in refusing to excuse the delay in filing the additional grounds of appeal dealing with a new subject-matter.”

21. In Shehroj Akhtar’s case (supra), Honble High Court observed that the subject matter of the appeal before the Appellate Tribunal was confined to relief granted by the Appellate Authority, namely, the assessee had not made any purchases during the second period and that the Appellate Tribunal, in its turn could only deal with that part of the order of the Appellate Assistant Commissioner (Judicial) which had been made the subject matter of attack in the appeal and further that it was not open to the Appellate Tribunal to adjudicate the question on which there was no dispute between the parties, and was not even the subject matter of appeal.

22. In Abdul Majeed P.A. case (supra), it was observed that the Appellate Tribunal could not have directed revision of CST assessment while disposing of an appeal filed against the assessment, though for the very same year.

Herein, while remanding the matter, this Appellate Tribunal did not exercise powers to enhance the turnover and rather, deemed it a fit case, for the reasons recorded therein, to remit the matter to the OHA. In the given facts and circumstances, the decisions cited by counsel for the applicant do not come to



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the aid of the applicant for review of the judgment.

Learned counsel for the respondent has rightly submitted that when the impugned order passed by learned OHA has been set aside and the dealer-appellant still feels aggrieved, the appropriate remedy was to file an appeal against the judgment passed by this Tribunal instead of seeking this review, particularly when the applicant has failed to point out any error apparent from the record of the proceedings.

23. As regards the contention put forth in the review applications that the material pertaining to the financial year 2010-11 and 2011-12, available on record was examined by the respondent, but no discrepancies with respect to the provisions of sections 9 and 10 of DVAT Act could be found, it may be mentioned here that on this point, at the time of final arguments on the appeals, counsel for the respondent argued that the dealer had failed to produce before the Assessing Authority original record, for want of which, no verification could be carried out as to the claim of the tax credit put forth by the dealer, and further that it was not clear as to whether dealer was claiming ITC on capital goods or traded goods.

24. In para 25 of the judgment, specific reference was made to the observation made by the Assessing Authority in respect of ITC claim for the year 2010-11 that the dealer was not entitled to ITC on the goods not used as capital goods in the State of

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Delhi and further that the dealer had traded in all those goods, shown as purchase of capital goods, and as such filed false, misleading and deceptive return.

In para 26 of the judgment, as regards ITC claim (3<sup>rd</sup> installment), for the tax period - 2011-12, reference was made to the observation made by the Assessing Authority that the dealer had traded in all those goods, which were shown as purchase of capital goods.

At this stage, ready reference to observations made by this Appellate Tribunal in para Nos. 39 and 41 of the judgment, is necessary. Same are reproduced and read as:

**“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



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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.

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".

25. Ultimately, in para No. 43 of the judgment, while taking into consideration that certain record stated to have been produced by the dealer before the Assessing Authority and one document, copy available at page 237, produced before OHA, were neither taken into consideration nor discussed as regards ITC claim on goods, this Appellate Tribunal found that the Assessing Authority disposed of ITC claim without conducting thorough inquiry and OHA passed the impugned order without discussing any of the documents on ITC claim,





and as such this Appellate Tribunal arrived at the conclusion for remand of the matter to the OHA.

26. Herein, this Appellate Tribunal delivered judgment of <sup>50</sup>~~68~~ pages giving detailed reasons, before arriving at the conclusion. Therefore, para 22 of the review applications has not been happily worded while pleading that the Tribunal, without any reason, remitted the matter to the OHA to reassess the ITC claim.
27. As noticed above, applicant herein claims that when the entire material pertaining to financial year 2010-11 & 2011-12 had already been examined by the Revenue and no discrepancy could be found, except the violation of provisions of sub-section (5) of section 10 and section 40A of DVAT Act, but this Appellate Tribunal made the above said observations i.e. in the previous two paragraphs, there is no merit in the contention that instead of remanding the matter this Appellate Tribunal should have itself gone through the material for final resolution.
28. There is also no merit in the contention that with the remand of the matter to learned OHA, this Appellate Tribunal has prolonged the litigation or the same is oppressive in nature and going to set in motion multiplicity of litigation.

#### Result

29. As a result, both the applications seeking review of the



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judgment dated 02/05/2023 deserve to be dismissed. Accordingly, both the review applications are hereby dismissed.

30. Copy of this common order be placed in the file of review application No. 07 of 2023. 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 : 10/07/2023.

*Narinder Kumar*  
10/7/2023  
(Narinder Kumar)  
Member (J)

