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

Appeal Nos. 938-944/ATVAT/2010
& 946-967/ATVAT/2010
Date of Judgment: **26/07/2023**

M/s Techbook International
Pvt. Ltd.
A-28 Mohan Co-op. Industrial
Estate Mathura Road,
New Delhi-110044.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. S. K. Verma.
Counsel representing the Respondent : Sh. P. Tara.

Judgment

1. On 26/05/2009, learned Assessing Authority framed default assessments of tax and interest, u/s 32 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act) as regards tax periods- June, July, August & September of 2005; May, June, July, August, September, October, November & December of 2007; and January, February & March of 2008, concerning the dealer-appellant named above.

Narinder Kumar
26/7/2023

Separate assessments of penalty u/s 33 of DVAT Act for the aforesaid tax period also came to be framed by learned Assessing Authority.

2. Feeling dissatisfied with the default assessments and assessments of penalty, dealer filed objections before learned Objection Hearing Authority (hereinafter referred to as OHA).

3. Vide impugned order dated 12/02/2010, learned OHA disposed of the objections.

4. As is available from the default assessments of tax and interest, same came to be framed due to the following reasons:-

June 2005-06:

"The company has claimed refund of Rs. 1,10,063/- for June 05 on stationery items consumed during the course of executing client specified services on the data provided by the foreign customers and as per the specification/instructions given by them.

Since the company is claiming refunds on consumable i.e. Stationery items for which input tax credit is not allowed as per schedule VII of the DVAT Act, 2004 hence all the input tax credit claimed by the company in the above tax period is disallowed and penalties u/s 86(10) have been imposed. Interest 63,286/- w.e.f. 26/08/2005 till date as per rules."

July 2005-06:

"The company has claimed refund of Rs. 359833/- for July 05 on stationery items consumed during the course of executing client specified services on the data provided by the foreign customers and as per the specification/instructions given by them.

26/7

Since the company is claiming refunds on consumable i.e. Stationery items for which input tax credit is not allowed as per schedule VII of the DVAT Act, 2004 hence all the input tax credit claimed by the company in the above tax period is disallowed and penalties u/s 86(10) have been imposed. Interest 211402/- w.e.f. 28/09/2005 till date as per rules."

August 2005-06:

"The company has claimed refund of Rs. 1,80,806/- for August 05 on stationery items consumed during the course of executing client specified services on the data provided by the foreign customers and as per the specification/instructions given by them.

Since the company is claiming refunds on consumable i.e. Stationery items for which input tax credit is not allowed as per schedule VII of the DVAT Act, 2004 hence all the input tax credit claimed by the company in the above tax period is disallowed and penalties u/s 86(10) have been imposed. Interest 1,03,963/- w.e.f. 27/10/2005 till date as per rules."

Septmeber 2005-06:

"The company has claimed refund of Rs. 46051/- for September 05 on stationery items consumed during the course of executing client specified services on the data provided by the foreign customers and as per the specification/instructions given by them.

Since the company is claiming refunds on consumable i.e. Stationery items for which input tax credit is not allowed as per schedule VII of the DVAT Act, 2004

Hence all the input tax credit claimed by the company in the above tax period is disallowed and penalties u/s 86(10) have been imposed. Interest 25,901/- w.e.f. 29/11/2005 till date as per rules."

May 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the

input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

June 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

July 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

August 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

26/7

APPELLATE TRIBUNAL VAT DELHI

September 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

October 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

November 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

December 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

January 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

February 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

March 2007-08:

"The company is claiming refunds/input tax credit on consumables i.e. stationery items for which input tax all the input tax credit is not allowed as per Schedule VII of the DVAT Act, 2004.

Hence all the input tax credit claimed by the company during the period of Audit i.e. 2007-08 is disallowed and penalties u/s 86(10) have been imposed."

5. Following table depicts the demands raised:

Ref. No.	Date of Order	Month	Tax(Rs)	Interest (Rs)	Penalty	Total Demand (Rs.)
40277890910	26/06/2009	June, 2005	---------	---------	110,063.00	1,10,063.00
40277890910	26/06/2009	June, 2005	1,10,063.00	63,286.00	---------	1,73,349.00
40549970910	24/08/2009	July,2005	---------	---------	3,59,833.00	3,59,833.00
40549880910	24/08/2009	July,2005	3,59,833.00	2,11,402.00	---------	5,71,235.00
40550240910	24/08/2009	Aug., 2005	---------	---------	1,80,806.00	1,80,806.00
40550220910	24/08/2009	Aug., 2005	1,80,806.00	1,03,963.00	---------	2,84,769.00
40550510910		Sep,2005	46,051.00	25,904.00	---------	71,955.00
40005870910	15/04/2009	May, 2007	---------	---------	1,96,822.00	1,96,822.00
40005870910	01/04/2009	May, 2007	1,96,822.00	1,310.00	---------	1,98,132.00
40057470910	15/04/2009	June, 2007	---------	---------	1,11,059.00	1,11,059.00

26/7

APPEL... VAT DELHI

40005950910	01/04/2009	June, 2007	1,11,059.00	27,750.00	---------	1,38,809.00
40057480910	15/04/2009	July, 2007	---------	--------	1,89,170.00	1,89,170.00
40006040910	01/04/2009	July, 2007	1,89,170.00	44,857.00	---------	2,34,027.00
40057500910	15/04/2009	Aug,2007	---------	----------	1,50,134.00	1,50,134.00
40006390910	01/04/2009	Aug,2007	1,50,134.00	33,688.00	-------	1,83,822.00
40006480910	01/04/2009	Sept,2007	1,41,448.00	29,995.00	-------	1,71,443.00
40057520910	15/04/2009	Sept, 2007	-------	---------	1,41,448.00	1,41,448.00
40006930910	15/04/2009	Oct.,2007	--------	--------	1,29,926.00	1,29,926.00
40006930910	01/04/2009	Oct.,2007	1,29,926.00	25,896.00	------	1,55,822.00
40057570910	15/04/2009	Nov,2007	--------	--------	1,15,154.00	1,15,154.00
40006990910	01/04/2009	Nov.,2007	1,15,154.00	21,532.00	--------	1,36,686.00
40160750910	21/05/2009	Dec.,2007	-------	------	1,28,780.00	1,28,780.00
40007150910	01/04/2009	Dec.,2007	1,28,780.00	22,439.00	--------	1,51,219.00
40160760910	21/05/2009	Jan.,2008	------	---------	1,42,261.00	1,42,261.00
40007860910	01/04/2009	Jan.,2008	1,42,261.00	22,976.00	----	1,65,237.00
40007910910	15/04/2009	Feb.,2008	--------	------	1,32,792.00	1,32,792.00
40007910910	01/04/2009	Feb.,2008	1,32,792.00	19,864.00	--------	1,52,656.00
40160770910	21/05/2009	Mar.,2008	--------	--------	1,57,521.00	1,57,521.00
40007950910	01/04/2009	Mar.,2008	1,57,521.00	21,557.00	---------	1,79,078.00
TOTAL			22,91,820.00	6,76,419.00	22,45,769.00	53,14,008.00

6. As is available from the impugned order, refund of input tax claimed by the dealer-assessee has been allowed and paid to the dealer, for the tax period June 2005, July 2005, August 2005, September 2005, May 2007, June 2007 and July 2007, but its claim for refund for the period from August 2007 to December 2007 and January 2008 to March 2008 has not been allowed or paid.

7. As regards the claims of the dealer for refund, which were not allowed, following objections were raised:-

> "1 The impugned orders passed by the VATO under the DVAT Act, 2004, are void ab initio and coercive in nature as the order requires the company to deposit a refund that has never been received and to deposit penalty and interest on non existent refunds.
> 2 Because the company still has not received the refund for the same tax period.
> 3 Because the VAT officer has disallowed the total input tax credit taken by the company while the tax credit has been taken on all the purchases including paper and other items, made during the tax period.

26/7

4 Because the clause 2 of the VIIth schedule of the DVAT Act, 2004 provides states that any entry in clause 1 [Other than Item (ii), (xiii), (xiv) and (xv) shall not be treated as non-credited goods if the item is purchased by a registered dealer for the purpose of re-sale in an unmodified form or use as raw material for processing or manufacturing of goods in Delhi, for sale by him in the ordinary course of his business.

5 Because the dealer has taken the tax credit on purchase of Paper, which is used as a major raw material in the company and is essential to make the deliverable product for clients. The paper is being used for production and it is not being used for administrative purpose.

6 Because the impugned order passed under DVAT Act, 2004 by the VATO is illegal, arbitrary and unsustainable in the eye of law having been done in violation of the principal of natural justice and equity and hence, be set aside."

8. In respect of the claims of refund of the dealer-assessee, which were allowed, following objections were raised by the dealer-objector:-

"1 The order passed by the VAT Officer under the Delhi Value Added Tax Act, 2004 is bad in law.

2 The VAT Officer had already allowed the refund and the company has already filed its all details of Sale and Purchases.

3 The VAT officer has disallowed the total input tax credit taken by the company while the tax credit has been taken on all the purchases including paper and other items, made during the tax period.

4 The clause of the VIIth schedule of the DVAT Act, 2004 provides states that any entry in clause 1 [Other than Item (ii), (xii), (xiv) and (xv) shall not be treated as non-credited goods if the item is purchased by a registered dealer for the purpose of re-sale in an unmodified form or use as raw material for processing or manufacturing of

26/7

goods in Delhi, for sale by him in the ordinary course of his business].

5 The dealer has taken the tax credit on purchase of Paper, which is used as a major raw material in the company and is essential to make the deliverable product for clients. The paper is being used for production and it is not being used for administrative purpose.

6 The impugned order passed under Delhi Value Added Tax Act, 2004 by the VAT Officer is illegal, arbitrary and unsustainable in the eye of law having been done in violation of the principal of natural justice and equity and hence, be set aside."

9. Before disposing of the objections, learned OHA is reported to have called comments from the Assessing Authority.

10. After hearing arguments put forth by counsel for the objector, and on perusal of the record, Learned OHA disposed of the objections by observing in the operative part as under:-

"12) In view of the facts and circumstances of the case and in the background of detail position explained herein above. I am of the opinion as under:-

(i) The imposition of tax and interest by VATO, W-92 and VATO, VAT Audit does not warrant any interference.

(ii) The penalty imposed by the Assessing Authority is reduced as per details given above.

(iii) The dealer will deposit the tax, interest and penalty within a month of issue of this order.

(iv) I order accordingly. File is consigned to record room."

11. Reasons recorded by learned OHA in the impugned order read as under:-

"9) I have heard the arguments put-forth by the Ld. Counsel and seen the grounds of objections. I have also seen the

notice of default assessment of Penalty, tax and interest issued by VATO Ward-92 and proceedings conducted by VATO-Vat Audit. The company claims to be work contractor engaged by M/s. Aptara Inc i.e. its parent company based in the US for the project based integrated content development solutions including software development, XML/SGML coding type setting/presentation of textual material in page form. The company uses the paper as a major raw material which is stated to be essential in making the product in a deliverables state. Along with paper, printers, cartridges/computer consumable and hire purchase of computer and printers are also used in process. Since the company has taken the Input Tax Credit on purchase of stationery items and the same is not allowed as per VIIth schedule of the DVAT Act, 2004, the VATO VAT Audit and VAT, Ward-92, has rightly passed the notices of default assessment of tax and interest. Similarly, the input tax credit on other consumable like cartridges or hiring charges of computer etc, cannot be given.

10) As regards, the tax imposed on refunds which are not received. The Company has claimed that VATO, VAT Audit has arbitrarily imposed Tax and Interest on the amount claimed as refund which has never been received by the party, I have perused the DVAT Audit Report for the period 01-04-2007 to 31.03.2008 and I am not inclined to interfere in the orders of Assessing Authority in these cases.

11) As far as the imposition of penalty is concerned, while keeping in mind the judgement of Hon'ble Supreme Court in Hindustan Steel Ltd. Vs State of Orissa, it is to say that penalty should be imposed upon a dealer when it is established that he has acted deliberately in defiance of law or guilty of conduct contumacious or dishonest or acted in conscious disregard of his obligation or has been gross negligent. In the instant case, the party has not withheld any information about use of paper/stationery for input tax credit benefit. The party received regular refunds in the months of June-05, July-05, August- 05 ,September- 05, May- 07,June-

07 & July- 07 time to time. The refund is released by the department upon full examination of the case and payment is made only after the complete satisfaction of the competent authority. The regular approval of refund to the party led the party to mistaken belief that they are entitled to benefit of input tax credit for the use of paper as consumable. It is also noticed that the department authorities were initially not clear about the legal provisions and, therefore, allowed refunds. The mistake was later rectified by Ward and Audit VATO. In these circumstances the party cannot be fully responsible and therefore cannot be penalized for filing false claim for taking benefit of input tax credit. In view of the judgments of Hon'ble Supreme Courts referred above, the ends of justice would be met if the Penalty in all the above cases reduced to Rs. 10,000/- per tax period for not filing correct returns."

12. Hence, these appeals.

13. Arguments heard. File perused.

Is it a case of works contract?

14. Counsel for appellant has argued that this is a case of export sales, where assessee entered into works contract and after having done processing, exported the material.

On behalf of the appellant, it has been contended that this is a case of 'works contract'. In this regard, reference has been made to the definition of 'works contract', as is available under DVAT Act and as per provisions of Rule 3 of DVAT Rules, 2005.

Counsel for the appellant has submitted that his argument is based on the word "processing" appearing in the definition of works contract, as this is a case where manuscript is typed on

26/7

a paper before the same is sold as goods and by way of export sales. He has categorically submitted that this is not a case of job work or labour.

Counsel for the appellant has contended that this is case of composite works contract, as a result whereof Rule 3 of the Rules does not come into application and Revenue authorities fell in error in levying tax in this case of export sales based on composite contract.

15. Case of the appellant, as put forth in the memorandum of appeal, dealer-appellant is engaged in the development of Electronic Media and E-learning products, software development and transformation of contents thereon, for and on behalf of its parent company namely, APTRA Inc. in United States.

The dealer claims that it receives written manuscripts from various authors in various forms, for transforming the contents of the said manuscripts on to the media in any form, to ultimately manufacture and sell E-learning products like E-books, software etc.

As claimed by the dealer-appellant, following steps are taken for finalization of the products:

(a) "All the hand written manuscripts are first got typed.
(b) These are then edited for English and spell check i.e. stage of pre-editing.
(c) Then the copyediting is done after which first proof is made.
(d) Then after completion of proof reading, revised proofs are prepared. The detailed technical note is attached.

(e) After these revised proofs are prepared, these are sent to the customers as per their requirements.

In between there are lot of other steps required technically that includes tables standardization, color art scan, redrawing art work, black & white or color hard copies."

16. As further claimed in the memorandum of appeal, the entire nature of work of the appellant is in the form of "deemed sale" covered by "works contract" as the dealer works on the property of the foreign buyer and by working in various ways, prepares finished product in the form of a software or E-learning and then sells or exports the finished products.

At the same time, dealer-appellant claims that it is in 100% export business. In other words, none of the products processed or manufactured by the dealer, is sold in Delhi or in India, either directly or through any agency/network.

17. Counsel for the Respondent has contended that neither this is a case of export of sales of goods nor a case of works contract and rather, this is a case of job work or labour work for services done by the appellant for the foreign company. In support of his contention, counsel for Revenue has referred to the terms and conditions of the Master Service Agreement produced on behalf of the appellant, for the first time, in the course of final arguments.

18. On the other hand, counsel for the appellant has contended that the Revenue cannot raise, for the first time, a new case by raising the above said argument. In this regard, counsel for the appellant has relied on decision in **State of Karnataka**

and others v. Pro Lab and others, decided by Hon'ble Apex Court on 30th January 2015 (complete citation not available in the copy of the decision provided by counsel for the appellant) and **Commissioner of Customs, Mumbai v. Toyo Engineering,** 2018 ACR 36 (SC).

19. **"Works Contract"** has been defined as u/s 2 (zo), which includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property.

Rule (3) of DVAT Rules, 2005 reads as under:

> "In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract and exclude-
>
> i. The charges towards labour, services and other like charges; and
> ii. The charges towards cost of land, if any, in civil works contracts, subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of above referred charges to the satisfaction of the Commissioner."

20. As regards the nomenclature of the agreement i.e. the Master Service Agreement between the parties, counsel for the appellant has submitted that giving of name of an agreement is of no significance and that rather, this is a case to composite services, and not services simpliciter, and accordingly a case of works contract.

26/7

To support this submission, counsel for the appellant has subsequently on 24/07/2023 provided to the Court Master, i.e. after conclusion of arguments, and in absence of counsel for the Respondent, copy of decision in case title as **Adiraj Manpower Services Pvt. Ltd. v. Commissioner of Central Excise Pune-II**, Civil Appeal No. 313/2021 decided by Hon'ble Apex Court on 18/02/2022.

21. In the written submissions, submitted by counsel for the appellant after the conclusion of the arguments, it has been submitted that this is a case of composite transaction of works contract in which, by the process of value addition because of use of paper etc., the dealer completed the works contract job.

22. Firstly, the agreement has been titled as " Master Services Agreement". Counsel for the appellant is not wrong in making submission that nomenclature of any agreement is of no significance and rather, terms and conditions of the agreement are of much significance to find out as to what was agreed to be done. But, on a careful perusal and analysis of the terms and conditions contained in the agreement dated 1st of October, 2003, its Annexures -Exhibits A and B, it can safely be said that the parties agreed that appellant was to provide technical services i.e. "Includes Services" and "Supplemental Services" as specified therein.

As per the agreement, the assessee has specialization in providing technical services such as computerized

2617

typesetting, data conversion, web page construction, data entry/keyboarding, copy editing, CAD/CAM/GIS mapping and software development. It was specified that the appellant was to provide such-above said services- to the foreign company. They agreed to be bound by the terms and conditions set out therein "in relation to the services".

23. It may be mentioned here that in the course of arguments on the application u/s 76(4) of DVAT Act, it was submitted on behalf of the appellant that agreement between the appellant and the foreign company shall be filed.

Only on 12/07/2023, copy of the said agreement has been filed.

24. The designation given to a transaction is certainly not a decisive factor, and the true effect of the agreement needs to be considered, taking into account the overall terms of the agreement and the relevant circumstances.

As per copy of this document, this is a renewal agreement arrived at between the appellant and Tech Enterprises, Inc ("Company"), a Fairfax based corporation having its registered office in USA.

As per terms and conditions of this agreement, both these companies are members of the Tech Books group of companies; the foreign company is engaged in providing electronic publishing services for any media format including web, online databases, E-books or even wireless devices,

26/7

whereas the dealer-appellant has specialisation in provision of technical services such as computerized typesetting, data conversion, web page construction, data entry/keyboarding, copy editing, CAD/CAM/GIS mapping and software development.

As per the renewal agreement, dealer-appellant company agreed to provide such services to the foreign company, where and when requested.

25. As is available from terms and conditions No. 1.1 to 1.4 (available in section 1), the agreement was in relation to the following services:

> "1.1 Included Services: In consideration of the payment by Company to TBI of the amounts due under this Agreement and any applicable SOW, TBI agrees that it will furnish to Company the specific services ("Services") described in Exhibit A.
>
> 1.2 Supplementary Services: TBI may provide Supplementary Service, subject to the availability and expertise of TBI personnel, at such additional cost for such Supplemental Services as agreed by both parties. Any Supplemental Services shall be provided in accordance with the terms and conditions of this Agreement and performed pursuant to an approved SOW in a format to be agreed by both parties. Such SOW shall be incorporated as additional exhibits to this Agreement and shall identify and provisions or requirements of this Agreement that shall not apply with respect to the particular services to be provided.
>
> 1.3 Service Level Requirements Document: Each SOW, will incorporate document(s) listing the service

level requirements to be met by TBI in providing the Services (the "Service Level Requirements Document"), as such document(s) may be modified and supplemented from time to time. The Service Level Requirements Document(s) and any modifications will be approved by TBI and Company. Upon approval, the Requirements Document and amendments thereto will be incorporated by reference into the SOW to which it applies.

1.4 TBI would be responsible for overall quality control on the services delivered to Company."

26. As per terms and conditions 2.1 (as available in section 2 of the agreement), said agreement was to be valid initially for a term of 3 years from the date of the signing of the said agreement.

Ex.A-Statement of Work – which is the part of the agreement clearly defined services in section 3 of the document. As per section 2 of this document, the appellant used to perform work of electronic publishing and pre press services including print ready files to printers and electronic deliverables for on-line publishing, in addition to serving the publishers; it also used to work with Corporate and information aggregators to convert data from one file format to another which include conversion of legacy material to electronic formats, conversion from one electronic to another for various needs of information processing, data management, storage,

26/7

archival and re-purposing of information for various end uses as required by the customers.

As per statement of work (SOW) Ex. A, the appellant company was to receive by way of compensation " for its services" equal to 100% of all costs and expenses incurred by the appellant company in the provision of the services in addition to other appropriate amount as specified in section 5 of SOW.

As regards financial terms, the renewal agreement contains section 8. Term and condition 8.1 provides that any and all amounts payable by the foreign company to the dealer-appellant shall be paid by the foreign company free from and net of all tax, duties and levies, without any deductions whatsoever.

27. As is available from section 9 (pertaining to the statements of work), term and condition 9.1 reads as under:

> "A SOW can specify a description of the Services, the term during which the Services are to be provided by TBI; the price or amount to be paid by Company for the Services, any applicable records, retention requirements; any Service Level Requirements applicable to TBI's performance of such Services. A SOW shall be substantially in the form of the sample SOW attached to this Agreement as Exhibit A."

28. Point 3.3 of Exhibit 'A' pertains to Service level Requirement/specifications. Same reads as under:

> "1. Systems required for processing, storage, supporting and transmitting data are, PCs, Macs, Unix and NT servers,

26/7

IPLC links and networks connecting various location in India and US.

2. The technology has been developed in-house with trained team of software developers, the various technologies that are used are:

> Microsoft technologies-visual basis 6 ASP. Net;

> Java Technologies-J2EE, Java.

>Databases-Oracle, SQL server.

> Design & Development- Microsoft visual studio.

> Publishing technologies- LaTex, Quark, Framemaker, In-design, Adobe PDF.

> Conversion technologies –XML, HTML, SGML."

29. Point 5 of Exhibit 'A' pertains to fees of service. It reads as under:

"The company shall pay TBI as compensation for its services an amount ("the TBI Compensation") equal to hundred per cent (100%) of all costs and expenses incurred by TBI in the provision of the services plus an appropriate amount of mark-up on the utilized capacity costs which will be decided on mutual agreements between the two parties, such costs and expenses including, without limitation, reasonable lawyers' fees and expenses in connection with agreements, payroll, general administrative and overhead expenses, travel and entertainment expenses of TBI's employees in the performance of the services and other general operating expenses of TBI (all of such costs and expense herein being called "Administrative Expenses").

Administrative Costs shall not include (a) foreign exchange loss arising on account of transactions between TBI and the Company or (b) fines or

penalties incurred by TBI by reason of the violation by TBI of any applicable law, ordinance, rule or regulation or (c) income or profits taxes payable by TBI. Further, from the Administrative Costs will be deducted any provision for expenses made by TBI in the earlier years and which have been reversed in the relevant year. The TBI Compensation shall be paid monthly, as earned, on a provisional basis, following the submission by TBI to the Company of an invoice with statement of the Administrative Costs incurred during the period for which the TBI Compensation is being paid. The TBI Compensation for the financial year 1st April to 31st March shall be adjusted by a supplementary invoice to give effect to the final figures of Administrative Costs a would be reflected in the financial statement of TBI. In the event of a dispute between the parties as to the amount of the TBI Compensation, the TBI Compensation shall be referred by either party to the auditors of TBI ("Auditors"). The Auditors shall have 15 working days to determine the correct amount of the TBI Compensation and, during such period, the Company and TBI shall make available to the auditors all information that the Auditors reasonably require in order to determine such correct amount. The Auditors shall act as expert and not as arbitrator, and their decision shall be final and binding (save in the case of manifest error). Following such decision, the Company shall pay forthwith the amount of TBI Compensation as determined by the Auditors to TBI. The costs of the Auditors shall be borne as the Auditors shall be borne as the Auditors shall direct, and, in the absence of such direction, shall be equally between the parties.

In the event that the supply of services by TBI to the company hereunder is subject to Value Added Tax, Service Ta or such other similar levy, TBI shall notify the Company thereof, and the Company shall (on production by TBI of a valid invoice in respect thereof) pay forthwith to TBI an amount equal to the amount of such tax."

As regards payment of taxes, it was specifically agreed as under:

> "In the event that the supply of services by TBI to the company hereunder is subject to Value Added Tax, Service Ta or such other similar levy, TBI shall notify the Company thereof, and the Company shall (on production by TBI of a valid invoice in respect thereof) pay forthwith to TBI an amount equal to the amount of such tax."

As is available from the Additional terms and conditions document –Exhibit 'B' - the dealer company was under an obligation to assign sufficient personnel to provide the Services as per the agreement and SOWs.

30. Appellant's own case is that it has been providing manuscript material to the foreign company in the form of software. It is not case of the appellant that any printed paper or hardcopy was supplied by it to the foreign company.

31. Appellant has not placed on record any material to suggest or explain use of paper. It is not case of the appellant that typed material was sent to the foreign company in the form of hard copy. In this regard, in the course of arguments, counsel for the respondent rightly argued that having regard to the nature of the job done by the appellant on the property of foreign buyer, when the work was so done submitting the material online i.e. in the form of soft copy, it cannot be said that it is a case of use of paper or a case of works contract.

32. For the first time in the written arguments, counsel for the appellant has simply mentioned about particulars of case titled as **Tata Consultancy Services v. State of Andhra Pradesh,** ((2005) 1 SCC, 308), to submit that as per said decision even an incorporeal or intangible property can be goods if put on a medium for transfer or marketing. Text of said decision has not been made available.

Present case is not a case of transfer of property in any goods and rather a case where on the material provided by the foreign company to the dealer-appellant, job work was done and then the material was communicated to the foreign company, in terms of specifications as contained in the Master Services Agreement.

While differentiating between a contract for work or service and a contract for sale of goods, it is to be noted that in the former there is the person performing work or rendering service on property in the thing produced as a whole, notwithstanding that a part or even the whole of the materials used by him may have been his property.

If the primary object of the contract is the carrying out of work by bestowal of labour and services and materials are incidentally used in execution of such work, then the contract is one for work and labour; that transfer of property in goods for a price is the linchpin of the definition of the 'sale'; where the main object of work undertaken by the payee of price is

2/6/17

not the transfer of a chattel qua chattel, the contract is one for work and labour.

To make a works contract transaction subject to tax, what is relevant is the passing of **"property in goods"** used in the execution of the works contract; that a transfer of property in goods under clause 29A (b) of Article 366 of the constitution is deemed to be sale of the goods involved in the execution of a works contract by the person making the transfer. In this regard, reference may be made to the decision in **Larsen and Tourbo Ltd. v. State of Karnataka**, (2013) 65 VST 1 (SC).

33. A perusal of copies of returns submitted on behalf of the appellant, in the course of final arguments, would reveal that in the columns meant for work contract no such turnover has been shown therein.

Furthermore, in the copies of the invoices submitted on behalf of the appellant, in the course of final arguments, following words have been used to depict as to for what the agreed fees has been paid:

> "Electronic Documents Relating To Software Development
>
> Agreed fees for the month of June'05 as per the terms of Master Service Agreement."

There is not even a whisper in the claim of the appellant put forth before the Revenue Authorities and in the memorandum of the appeal that any amount was shown as works contract turnover, or to explain as to why no turnover was shown in

the works contract column or to explain as to why the amount was shown in the invoices as the agreed fees as per terms of Master Service Agreement and not as price on account of transfer of any property in any goods by the appellant to the foreign company. In absence thereof, there is no merit in the contention raised by counsel for the appellant that this is a case of works contract and not a case of job work or service. The decision in Tata Consultancy Services (supra) is of no assistance to the appellant.

34. It may be mentioned here that for the first time, in the written arguments submitted on 24/07/2023 i.e. after conclusion of arguments and in absence of counsel for the Respondent, under issue No. 2, counsel for the appellant has mentioned two decisions titled as **Mohinder Singh gill & Anr. v. The Chief Eletion Commissioner, New Delhi and Ors.,** (1978) 1 SCC 405 & **Moons Technologies Ltd. & Ors. v. Union of India & Ors.**, (2019) 18 SCC 401, and that too without providing full text thereof/Appellate Tribunal or to counsel for the Respondent.

In this respect, having regard to para 8 of Mohinder Singh Gills' case, as reproduced in the written arguments, in view of the above discussion, said decision does not come to the aid of the appellant.

35. It may be mentioned here that whenever, any decision is to be cited, it is to be cited in the course of arguments so that

the opposite counsel is able to go through the decision and put forth his arguments/submissions in reply. Above said 4 decisions were not cited by the counsel for the appellant at the time of final arguments.

36. In **Jai Shree Exports v. Commissioner, Trade and Taxes,** decided by our own Hon'ble High Court on 23/02/2012 (complete particulars of the citation not available in the copy of decision relied on by counsel for the appellant), the appellant, a recognized export house, was engaged in the business of exporting rice out of India. It also used to purchase packing material for packing of the rice which was exported out of India in respect of the tax paid by the appellant on the packing material. After DVAT Act, 2004 came into force the dealer therein, claimed Input Tax Credit and also refund of the Input Tax Credit on the ground that the packing material was used for packing rice which was exported out of India.

Therein, the claim was made u/s 9(1)(b) of the DVAT Act which entitles a registered dealer to tax credit in respect of turnover of purchases, when the purchase arise in the course of his activity as a dealer and the goods are to be used by him directly or indirectly for the purpose of making sales which are not liable to tax u/s 7 of DVAT Act.

One of the questions before the Hon'ble High Court, for adjudication, was as to whether a dealer registered under the

2617

provisions of DVAT Act is entitled to claim ITC u/s 9 of the Act on the turnover of purchases of goods for exports out of India.

Therein, Hon'ble High Court set aside the decision taken by the VAT Authorities rejecting its claim of tax credit in respect of turnover of purchase of packing material.

37. As noticed above, that case pertained to export sale of rice. Herein, this is not a case of sale of goods or of works contract and rather, a case of job work done by the dealer-appellant for the foreign company, as discussed above.

Therefore, decision in Jai Shree Export's case (supra) does not come to the aid of the appellant.

38. In **State of Karnataka and others v. M/s Pro lab and others**, decided by Hon'ble Apex Court on 30th, January 2015, constitutional validity of Entry 25 of Schedule VI to the Karnataka Sales Tax Act, 1957 was the subject matter of the appeal. Said entry was inserted in the Act thereby providing levy of tax for processing and supply of photographs, photo prints and photo negatives.

As per judgment passed by Hon'ble High Court, said entry was held to be unconstitutional. Special leave petition was dismissed by the Apex Court, following its judgment in the case of **Rainbow Colour Lab and Another v. State of Madhya Pradesh and others.** The aforesaid decision in Rainbow Colour Lab's case (supra) was followed by another

26/7

judgment by Hon'ble Apex Court in the case of ACC Ltd. v. Commissioner of Customs, wherein Hon'ble Apex Court expressed doubt about the correctness of law in Rainbow colour's case.

After the decision in ACC Ltd.'s case a circular instruction was issued by the Commissioner of Commercial Taxes to the assessing authorities to proceed with the assessments as per Entry 25. Said instructions were challenged before the Hon'ble High Court of Karnataka. Hon'ble High Court allowed the writ petition holding that provisions once declared unconstitutional could not be brought to life by mere administrative instructions. It led to enactment of Karnataka States Laws Act, 2004, thereby reintroducing Entry 25. On challenge this amendment was held unconstitutional by the judgment passed by the Hon'ble High Court.

Hon'ble Apex Court set aside the judgment passed by the Hon'ble High Court while holding that entry 25 of Schedule VI of the Act was constitutionally valid.

39. Therein, while relying on decision in Gannon Dunkerley – II, Hon'ble Apex Court observed that by virtue of clause 29-A of Article 366 of the Constitution, State Legislature is empowered to segregate the goods part of the Works Contract and impose sales tax thereupon and further that

26/7

Sales Tax being a subject-matter into the State List, the State Legislature has the competence to legislate over the subject. Reliance was placed on decision in **Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu and Others,** wherein it was observed that a transfer of property in goods under Clause (29A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a Works Contract by the person, making the transfer and the purchase of those goods, by the person, to whom such transfer is made.

40. Further, it was observed in Kone Elevator India Pvt. Ltd.'s case (supra) that even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract, for the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract.

Job Work

41. Job work is the outsourcing of activities by the principal manufacturer. The work done by the job worker may either amount to manufacture or can even be a service activity. Further, a manufacturer can send his goods to a job worker at any point in time. Be it at the initial stage, the intermediate

stage or even at the final stage. The principal manufacturer might send either raw materials, semi-finished goods or even finished goods to the job worker.

In this way, job work is any process undertaken by a person on any item belonging to another person'.

Herein, the agreement is a job work agreement, in which there is specification of the job to be done or performed by the appellant for the foreign company details.

From the agreement, it can be gathered that on its basis specific orders were to be placed. Those specific orders would have revealed further details/ specifications of the job work to be done and the time stipulations by which the work was to be completed. But, for the reasons best known to the appellant, it has opted to withhold the same. Therefore, it is not clear as to what output was to be generated, and what were the delivery schedules.

The fact that the appellant was a job worker is evident from the terms and conditions already reproduced and discussed above.

There is a specific mention in the agreement of (i) the nature of the process of work which was to be carried out by the appellant; (ii) provisions for maintaining the quality of work; (b) the nature of the facilities to be utilised; (c) the infrastructure deployed to generate the work; (iv) specifications in regard to the work to be performed; and (v)

consequences which ensue in the event of a breach of the contractual obligation.

The decision in Adiraj's case relied upon by the appellant also do not help the appellant. Therein, though ostensibly, the agreement contained a provision for payment on the basis of the rates mentioned in Schedule II, the agreement had to be read as a composite whole. On reading the agreement as a whole, Hon'ble Court found that it was apparent that the contract was a pure and simple a contract for the provision of contract labour. Therein, an attempt was made to camouflage the contract as a contract for job work to avail of the exemption from the payment of service tax.

Herein, an attempt has been made to interpret the contract as a works contract to avail of the benefit in the form of tax credit. The reasoning given by the authorities below do not suffer from any error. There is no merit in the contention of counsel for the appellant that the impugned order is an order without reasons.

42. It may be mentioned here that only in the written submission, for the first time, counsel for the appellant has referred to the following observation made by Hon'ble Apex Court in **Prestige Engineering India Ltd. CCE Meerut,** 1994 (9) TMI 66, when the job work contributed his own material to the goods supplied by the customer and engaged in manufacturing, the activity was not one of job work.

However, minor additions by the job worker would not take away the fact that the activity was one of job work.

At the cost of repetition, it may be observed that above said decision was not cited by the counsel for the appellant at the time of final arguments. In other words, he has referred to said decision for the first time only in the written submissions.

Be that as it may, as discussed above, this is not a case of contribution of any material by the appellant, or transfer of any property in any goods and admittedly the appellant is not engaged in the manufacturing, the said decision does not come to the aid of the appellant.

43. From the above terms and conditions of the agreement, the contents of Exihibit 'A' and Service Level Requirement/specifications and the term and condition pertaining to payments of fees agreed to be made by the foreign company to the appellant, it cannot be said that this is a case of works contract.

44. Herein, as per impugned assessment dated 26/06/2009, in respect of tax period June 2005-06, the Assessing Authority specified therein that it was a case of specified services rendered by the dealer-assessee on the data provided by the foreign customer and as per specifications/instructions given by the said foreign customers.

26/7

Indisputably, the services were rendered by the dealer-assessee, on the data provided by the foreign company/customer and that too by transmitting material online and in the form of software and not in the form of hard copies.

The decision in Commissioner of Customs' case (supra), cited by counsel for the appellant, does not come to the assistance of the appellant.

Conclusion

45. In view of the above fact and the terms and conditions of the Master Service Agreement, it can safely be said that this is case of job work by the dealer-appellant to the foreign companies.

46. In the given facts and circumstance, and the material made available, there is no merit in the contention raised by counsel for the appellant that the arguments advanced by the Revenue that this is a case of job work, is new case put forth by the counsel representing the Revenue, for the first time. Similarly, there is no merit in the contention raised by counsel for the appellant that this is a case of composite service and not a case of services simpliciter, or that this is a case of works contract.

Rejection of Claim of Tax Credit

47. While challenging rejection of ITC claim of the assessee, counsel for the appellant has referred to section 9 of DVAT Act, and particularly, clause (b) of sub-section (1) of section 9, and contended that since the appellant was entitled to ITC, he was entitled to refund but the Revenue authorities passed contradictory orders by allowing ITC claim and refund in some cases and while rejecting ITC claim and denying refund in the others.

The contention is that this is not a case of purchase of stationery as none of the items like paper, ink or cartridge, and computers which were hired by the appellant could be termed to be stationery. The contention is that actually this is a case of sale of goods as manuscript material provided by the foreign company, was typed on paper before being sold by way of export sales.

It has also been submitted on behalf of appellant that paper is not a consumable and that by observing that paper is a consumable, the Assessing Authority went wrong.

On this point, counsel for appellant has relied on following decisions:

1. **Collector of Central Excise, New v. Ballarpur Industries Ltd.,** AIR 1990, (SC) 196;
2. **Collector of Central Excise v. Eastend Paper Industries Ltd.,** AIR 1990 (SC) 1893;

2/47

3. **J. K. Cotton Spinning and Weaving Nulls Company Ltd. v. Sales Tax Officer,** (1965) 16 STC 563 (SC);
4. **Reliance Industries Ltd. v. Assistant Commissioner of Sales Tax**, 106 (2008) CLT 245; and
5. **State of Karnataka and others v. M/s Pro lab and others,** decided by Hon'ble Supreme Court on 30/01/2015 (Complete citation not available in the copy of the decision submitted by counsel for the appellant).

48. As per case of the dealer-appellant, appellant cannot carry on its work/business without paper, which is a key raw material. It purchases manuscripts and transforms the same into e-learning products and sends to the media material in the form of software – copy.

49. Appellant further claims that the paper and other products like, ink cartridges and computer consumables, are also major raw materials, without which finished products cannot be put in a deliverable state.

In addition to purchases of said raw material, appellant claims that it hired various products.

50. On behalf of the appellant, it has been submitted that raw material can be defined as those goods which are used as ingredients in the manufacturer of other goods, and this expression also includes processing material, consumable stores and material used in the packing of the goods so manufactured, but does not include fuel for the purpose of generation of electricity.

51. On the other hand, counsel for the respondent has contended that department has not levied tax on any export sale; that this is a case of doing job work or labour for providing of service by the appellant to the foreign company, the appellant having done job work or put in labour so as to provide services; and that this is not a case of sale of any goods by the appellant.

To support his contention, counsel for respondent has referred to the terms and conditions as available in the copy of agreement between the assessee-appellant and the foreign company dated 1st of October, 2003, which the appellant has placed on record before this Appellate Tribunal only in the course of final arguments.

As regards the decisions relied on behalf of the appellant, counsel for Revenue has contended that same are not applicable to the given facts of this matter and are distinguishable on facts.

In the course of arguments, counsel for the Revenue also submitted that as regards computers and printers, purchased on hire basis, no tax credit can be allowed to the dealer – appellant as the dealer – appellant has not placed on record any material to suggest that any of these items ~~were produced~~ was purchased as capital goods. Ultimately, impugned assessments and the impugned order have been defended to be correct and in accordance with law.

52. Counsel for the appellant has not referred to any document to suggest that computers and printers were purchased and shown by it in the statements, as capital goods.

53. While referring to contents of clause 1 (ix) of Seventh Schedule, which depicts stationery items as a non-creditable goods, it has been submitted on behalf of the assessee that the subject item could not be treated as non-creditable goods for the aforesaid reasons.

As pointed out by the counsel for the appellant, word "consumable" has not be defined in DVAT Act. It has also been submitted that "paper" is not a consumable item, which could be subjected to tax.

Reliance has also been placed on provisions of section 9 of DVAT Act as regards allowing of full Input-Tax-Credit, where there is export of a finished product.

Further, reliance has been placed on provisions of The Seventh Schedule available under DVAT Act to contend that it allows purchase of material for the purpose of re-sale in an unmodified form or if the material is used as raw material for processing or manufacturing of goods in, Delhi for sell by him in ordinary course of its business.

54. In the assessments, learned Assessing Authority observed that the Assessee claimed refund of stationery items consumed in the course of executing specified services on the data provided by the foreign customers, as per their instructions.

Learned OHA held that the objector had taken ITC on purchase of stationary items but the same was not allowed as per Seventh Schedule. He further held that Input Tax Credit on other consumables items like cartridges or hiring charges of computers etc could not be given. Accordingly, he upheld the default assessments.

55. No doubt, printers and computers do not fall in the category of stationery items.

56. At this stage, relevant provisions on Tax Credit being necessary. Same need ready reference.

Section 2 (r) of DVAT Act defines "input tax" in relation to the purchase of goods, means the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under this Act.

Section 2(ra) of DVAT Act defines "manufacture" as under:

> "Manufacture with its grammatical variations and cognate expressions, means producing, making extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods, but does not include any such process or mode of manufacture as may be prescribed."

57. Sub-section (1) of Section 9 of DVAT Act reads as under:

> "Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period [where the purchase arises] in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making-

(a) Sales which are liable to tax under section 3 of this Act; or

(b) Sales which are not liable to tax under section 7 of this Act.

Explanation- Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries."

Under sub-section (2) of section 9, no tax credit shall be allowed in the case of purchase of non-creditable goods.

58. So far as consumables are concerned, Seventh Schedule depicts list of non-creditable goods. Entry (ix) of clause 1 of the said list includes "stationery items" as non-creditable goods.

Other items which find mentioned in entry (ix) of clause 1 are office equipments, furniture, carpets, advertisement and publicity materials, sanitation equipments, fixtures including electrical fixtures and fittings, generators and electrical installation.

59. Entry No. (xi) of clause 1 pertains to computers other than those used for the purpose in normal business.

60. Entry at clause 2 of Seventh Schedule provides that any entry in clause 1 [other than item (ii), (xiii), (xiv) and (xv)] shall not be treated as non-creditable goods.

Clause 2 of Seventh Schedule came to be amended vide notification No. dated 30/11/2005 to substitute words "other than item (ii), (xiii), (xiv) and (xv).

2/6/17

Before amendment the clause 2 of Seventh Schedule read as under:

> "(2) Any item in clause 1 [other than Item (ii)] shall not to be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of re-sale in an unmodified form or use as raw material for processing or manufacturing of goods for sale by him in Delhi in the ordinary course of his business."

After the amendment, said provision reads as under:

> "(2) Any item in clause other than Item (ii), (xiii), (xiv) and (xv) shall not to be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of re-sale in an unmodified form or use as raw material for processing or manufacturing of goods, in Delhi, for sale by him in the ordinary course of his business."

For the reasons mentioned therein, stationary items having been included in item (ix), is not covered by clause 2. In other words, in view of clause 2 of the Seventh Schedule, stationary items are not covered by clause 2.

61. So far as denial of input tax credit of the payment is considered, as held above, this is not a case of sale of goods by the dealer – appellant to the foreign company and, rather this is case of job work done by the dealer – appellant by providing services under the agreement. In the given facts and circumstances, when it is not a case of sale of goods, provisions of section 9(1) of DVAT Act do not come into application.

62. Where a dealer is exclusively engaged in doing job work, like the present case, sub-section (7) of Section 9 of DVAT Act provides that no tax credit shall be allowed for any purchase of consumables or of capital goods. Clause (c) of sub-section (7) of Section 9 of DVAT Act reads as under:

> "(7) for the removal of doubt, no tax credit shall be allowed for-
>
> (a) xxxx
>
> (b) xxxx
>
> (c) any purchase of consumables or of capital good were the dealer is exclusively engaged in doing job work or labour work and is not engaged in the business of manufacturing of goods for sale by him and incidental to the business of job work or labour work, obtains any waste or scrap goods which are sold by him."

63. The expression "consumable" suggests that the commodity which is said to have been consumed loses its complete character, nature and identity in manufacture of other goods, with a different and distinct character, nature and identity. At the cost of repetition, it may be mentioned here that in course of arguments, counsel for the appellant clearly submitted that the dealer – appellant is not a manufacturer.

64. Since the dealer – appellant herein was exclusively engaged in doing job work in relation to the foreign company, in view of what was agreed between them as per Master Service Agreement, provision of sub-section (7) of Section 9 of DVAT Act do not come into application in this case.

65. In **Collector of Central Excise, New v. Ballarpur Industries Ltd.,** AIR 1990, (SC) 196, the short point for consideration in the appeal before the Hon'ble Apex Court as to whether the Respondent-Manufacturer, The Ballarpur Industries Ltd.-- was entitled to the benefit of Central Govement's Notification No. 105/ 82-CE dated 28.2.1982 a question which in turn, depends on whether Sodium Sulphate could be said to have been used as "Raw-Material" in the manufacture of 'paper' and 'paper-board'.

Respondent therein, was a manufacturer of paper and paper boards in the process relating to which "Sodium Sulphate" was used "in the chemical recovery cycle of Sodium Sulphate which forms an essential constituent of Sulphate cooking liquor used in the digestion operation."

66. Hon'ble Apex Court upheld the view taken by the Tribunal in arriving at the conclusion that Sodium Sulphate was used in the manufacture of paper as raw material within the meaning of notification dated 28/02/1982 vide which the Central Government granted exemption from so much of the duty of the excise leviable thereon as is equivalent of duty of excise already paid on the inputs, to all excisable goods on which the duty of excise was leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944, were used as raw material or component parts.

Hon'ble Apex Court observed as under:

> "The expression "Raw- Material" is not a defined term. The meaning to be given to it is the ordinary and well-accepted connotation in the common parlance of those who deal with the matter. The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end-product; those which as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its absence in the end product, but the dependance of the endproduct for its essential presence at the delivery and of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

67. In **Collector of Central Excise v. Eastend Paper Industries Ltd.,** AIR 1990 (SC) 1893, also relied on in Ballarpur

Industries Ltd.'s case (supra), Hon'ble Apex Court observed as under:-

> "... where any particular process, this Court further emphasized, is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process would fall within the expression 'in the manufacture of goods'...."

Therein, respondent used to manufacture different varieties of printing paper including wrapping paper falling under Item No. 17(1) of the erstwhile Central Excise Tariff. It was case of the respondent that there was no infringement of the impugned provision of central excise tariff and no duty was required to be paid on the excisable goods if it was captively consumed or utilised in the same factory as component part of the finished goods falling under the same tariff item and specified in Rule 56(a) of the Central Excise Rules, 1944.

It was submitted therein that wrapped paper manufactured was captively consumed and utilised as component part of other varieties of paper and further that wrapping of finished product by wrapping paper is a process incidental and ancillary to the completion of manufactured product under section 2(f) of the Act and wrapping is used as a component part of finished excisable goods attracting the benefit of the notification No. 18A-83-CE dated 09/07/1983.

2017

The Collector (Appeals) had observed in the order that when wrapping paper was used for making paper reams/reals, it lost its original identity as wrapping paper and became a part of the paper ream/real and as such available for the benefit of amended Rules. Revenue disputed this finding of the Collector (Appeals) by contending that wrapping paper was not utilised or consumed in the manufacture of other paper. It was contended on behalf of the Revenue that in order to be non-dutiable, the wrapping paper must be either component part or raw material and must be consumed or utilised in the manufacture of the finished products, and further that wrapping paper cannot be deemed to be component part because it did not become an integral part of the packed paper.

In Eastend Paper Industries Ltd.'s case (supra), Hon'ble Apex Court observed that to be able to be marketed or to be marketable, in the light of facts in the appeals, that it was an essential requirement to be goods, to be wrapped in paper that anything required to make the goods marketable, must form part of the manufacture and any raw material or any materials used for the same would be component part for the end product.

In **J. K. Cotton Spinning and Weaving Nulls Company Ltd. v. Sales Tax Officer,** (1965) 16 STC 563 (SC), Hon'ble

Apex Court, while considering the expression "in the manufacture or processing of goods for sale" in the context of Sales Tax Law, observed that though the concept is different under the excise law, upheld that manufacturer of goods issued normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Hon'ble Apex Court further emphasised that where any particular process is so integrally connected with the ultimate production of goods, that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression "in the manufacture of goods".

Therein, the appellant company used to manufacture for sale, cotton textile, tiles and other commodities. By order dated 09/08/1962, the Sales Tax Officer directed the appellant company for deletion of certain items from the registration certificate in respect of the following items:

> "Drawing material, photographic material, building material including lime and cement (except cement used in manufacture of tiles for re-sale), electricals. iron and steel and coal", and called upon the Company to surrender the certificate of registration within three days for making the proposed amendments."

Therein, when the matter was before the Hon'ble High Court, it was observed that in order that "electrical equipment" should fall within the terms of Rule 13, it must be an

ingredient of the finished goods to be prepared, or "it must be a commodity which is used in the creation of goods". As regard these observations, Hon'ble Apex Court observed that if, having regard to normal conditions prevalent in the industry, production of the finished goods would be difficult without the use of electrical equipment, the equipment would be regarded as intended for use in the manufacture of goods for sale and such a test, was satisfied by the expression "electricals". Hon'ble Apex court however specified that Ibis, of course not include electrical equipment not directly connected with the process of manufacture. Accordingly, Hon'ble Apex Court set aside the order passed by Hon'ble High Court.

68. In **Reliance Industries Ltd. v. Assistant Commissioner of Sales Tax**, 106 (2008) CLT 245, legality of the order passed by the Assistant Commissioner u/s 30 of the Orissa Value Added Tax Act, 2004 was in question as thereby claim of the petitioner that furnace oil qualified to be an "input" for the purpose of availing input tax credit, was rejected and tax demand was raised.

Petitioner company used to manufacture Polyester Staple Fibres through Orissa Poly-fibres limited on job-work basis, out of mono-ethylene glycol and pure teraph-thallic acid subject materials were bought outside the State of Orissa

either by way of stock transfer or by way of inter-State trade or commerce. The petitioner claimed ITC.

The Sales Tax Officer issued letter to the petitioner directing to pay a certain sum on the ground that claim made by the petitioner for input tax credit on furnace oil was not admissible.

Ultimately, an order of suspension of registration certificate was issued on the ground that the petitioner had knowingly furnished incorrect particulars claiming input tax credit on furnace oil which was allegedly not a consumable directly used in manufacturing process, but was used as a fuel for burning.

69. Hon'ble Orissa High Court was of the considered view that furnace oil, which is used in the processing and manufacturing of Polyester Staple Fibres, was to be treated as an "input" as defined in Section 2(25) of the DVAT Act and the input tax which has been paid on purchase of furnace oil can be claimed as input tax credit u/s 2(27) of the VAT Act against the tax payable on finished product, i.e., Polyester Staple Fibres.

70. Therein, u/s 2(25), "input" was defined as any goods purchased by dealer in course of his business for resale or for use in execution of works contract, in processing or manufacturing where, such goods directly goes into the

composition of finished products and includes consumable directly used in such processing or manufacturing.

71. Hon'ble High Court of the view that the inclusive definition does not refer to any goods which must be used in processing or manufacturing, where such goods directly go into composition of finished products, and further that as per inclusive definition, the only requirement is that the consumables are directly used in such processing or manufacturing.

72. As regards, "consumables", Hon'ble High Court went on to observe that same need not to be required to directly go into the composition of finished products and further that the very expression "consumables" postulates that such articles are destroyed or used upon the processing or manufacturing of goods and it is due to this reason that the legislature did not insist upon the requirement which appears in the earlier clauses that such goods must go into composition of finished products.

In view of the above discussions, the decisions cited by counsel for the appellant to explain 'consumables' or 'raw material' and grant of ITC do not came to the aid of the appellant.

73. It may be mentioned here that in the written submissions, put forth after the conclusion of the final arguments and in absence of counsel for the respondent, counsel for the

appellant has referred to some of the text of the decision in **Commissioner of Sales Tax, U.P. v. Modi Sugar Mills Ltd.**, (1961) 2 SCR 189, without supplying the complete text or copy thereof to counsel for the respondent.

Reference to this decision is on the point that a taxing statute must be interpreted in the light of what is clearly expressed and further that it is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency.

In this regard, suffice it to say that the provisions of DVAT Act are being applied to the given facts and circumstances and no assumed deficiency is being supplied.

Conclusion

74. In view of the above discussion, it is held that assessee – objector was not entitled to tax credit on the aforesaid transactions.

Levy of Tax and Interest

75. On behalf of the appellant, it has been contended that while framing assessments, the Assessing Authority mentioned three reasons for framing the same, but did not tick mark the particular reason which led him to frame the assessments.

76. The first sentence of the default assessments of tax and interest is about the satisfaction recorded by the Assessing Authority.

77. In this sentence, the Assessing Authority, no doubt, mentioned that the dealer furnished incomplete return or incorrect return or furnished a return that did not comply with the requirements of DVAT Act, and did not tick mark the specific reason out of the said three reasons, but it is significant to note that in the same sentence, the Assessing Authority expressed that his satisfaction was based on the reasons specified in the assessment.

From the said reasons available in the default assessment, it cannot be said that no specific reason has been mentioned in the assessments.

Even, otherwise while filing objections against the assessments, the dealer did not raise any such objection.

Due to the reasons recorded in each assessment, by the Assessing Authority, there is no merit in the contention raised by counsel for the appellant on this point.

78. Another contention raised by counsel for the appellant is that this is a case where appellant-assessee makes local purchases and then exports the items purchased, in an unmodified form, and as such assessee was not liable to any tax.

79. As further claimed by the appellant, it applied for refunds to the tune of Rs. 23,12,973/- in accordance with law, and the department allowed refunds for the month of June, July, August and September-2005 and May, June and July-2007,

but rejected its claim for refund to the tune of Rs. 10,58,887/-. Appellant claims that even during Audit, the auditor had rejected Input Tax claimed by it.

80. One of the submissions put forth by counsel for the appellant is that it was a case of refund, while the appellant-assessee was dealing in export of goods, and not a case of any local sale or interstate sale, and as such, department could not levy any tax or penalty. The contention is that in case it was found by the department that assessee was not entitled to refund of the amount, department could disallow the same, but could not levy VAT. In this regard, reference has been made to Clause (c) of section 7 of DVAT Act which provides a sale taking place in the course of import of the goods into or export of the goods out of, the territory of India is not liable to tax. Reference has also been made to provisions of section 3, 4 and 5(1) of Central Sales Tax Act, 1956 (CST Act).

81. It has also been submitted that at the time of arguments on the application u/s 76(4) of DVAT Act, it was conceded by counsel for the respondent that no demand could have been legally created. In this regard, reference was made to order passed on application u/s 76(4) of DVAT Act and particularly the one passed by the learned Chairman of the Appellate Tribunal.

82. In this regard, counsel for the respondent has rightly submitted that whatever is observed in the order disposing of such an

26/7

application i.e., u/s 76(4) of DVAT Act, is the prima facie observation and as such, no observation made therein is of any assistance to the appellant on merits.

83. As per order u/s 76(4) of DVAT Act, particularly delivered by the then learned Chairman of the Appellate Tribunal, counsel for the Revenue though submitted that in the case where refunds were not given, at best what the department could have done was to disallow the ITC and not create demand of Tax, Interest and Penalty. The second limb of the submission made by learned counsel for the Revenue, at that time, was that the demands in question could not stand because it is not even a case of sale.

84. Significantly, while replying the contention raised by counsel for the respondent, counsel for the appellant very candidly submitted that whatever observations is made in the order u/s 76(4) of DVAT Act same is only on the basis of prime facie view.

85. Here, at the time of final arguments, counsel for the parties have raised respective contentions and those have been considered for adjudication of the controversy. Counsel presently representing the Revenue has not adopted any of the above argument advanced by earlier counsel at the time of arguments on application u/s 76(4) of the Act. In the given situation, no reliance can be placed on the submissions put

forth by counsel for the Revenue at the time the application u/s 76(4) of DVAT Act was heard and decided.

Conclusion

86. As already discussed, dealer-assessee was not entitled to claim input tax credit. However, the dealer had claimed ITC. In the given situation, the department had no option but to set the things straight by disallowing the tax credit and in taking steps to undo the same after framing assessments. Accordingly, there is no merit in contention raised by counsel for the appellant.

Refund

87. Counsel of the dealer-appellant has submitted that it has been dealing in exports which, under DVAT Act are 'zero rated' and in respect of all the Inputs used for making such exports, full Input Tax Credit is allowed, but in this matter the department did not at all touch the refund claim or decide the said claims, even though period has been specified for disposal of the refund claims.

On the point that dealer is entitled to refund even in case of export of exempted goods, reliance has been placed on decision in **J.K. Cotton Spinning and Weaving Mills Company Ltd. v. Sales Tax Officer**, (1965) 16 STC 563.

88. On the other hand, counsel for the Revenue has contended that vide impugned assessments tax credit has been

disallowed and no question of refund was involved so far as the framing of assessments are concerned.

89. Counsel for the Revenue has rightly contended that while framing assessments, the Assessing Authority dealt with the point of input tax credit and rejected the same.

Section 32 pertains to framing of assessments. Separate procedure has been provided to deal with refund claims.

In the given situation, even though as claimed admitted on behalf the appellant, no order has so far been passed in connection with refund or its rejection, there is no merit in the contention raised by counsel for the appellant that that on this ground the impugned assessments deserve to be set aside.

Penalty

90. Contention raised on behalf of the appellant is that no notice was served by the department upon the assessee before framing of assessment of penalty, and as such, this is a case of violation of principles of natural justice. In this regard, reliance has been placed on decision in **Bansal Dye Chem v. Commissioner of VAT**, ST. Appeal 29 of 2015, decided on 24.9.2015 by our own Hon'ble High Court.

It may be mentioned here that only while submitting written arguments, counsel for the appellant has for the first time made reference to decision in **Railway Catering and Tourism Corporation Ltd. Govt. of NCT** of Delhi 48

261

DSTC J-316, without supplying the full text and also without supplying its copy of the full text, to counsel for the respondent, and simply reproducing the following observation made by the Hon'ble High Court:

> "We feel that the petitioner ought to have been given an opportunity, if hearing before the penalty orders could have been passed."

91. As regards the contention raised by learned counsel for the appellant that no notice was issued by the Assessing Authority to the appellant before imposition of penalty u/s 33 or 86(10) of the Act, and the two decisions cited by learned counsel for the appellant, it is pertinent to mention here that in view of decision in Sales Tax Bar Association (Regd.) Vs. GNCTD, WP (C) No. 4236/2012, by our own Hon'ble High Court, also relied on by learned counsel for the Revenue, no notice was required to be issued to the appellant before passing orders of penalty.

In Bansal Dye's case (supra), our own Hon'ble Court observed that penalty order u/s 86(10) of the Act was passed by the Assessing Officer, without service of prior notice of penalty on the Assessee and also without affording the Assessee an opportunity of being heard on the point of imposition of penalty, and as a result, set aside the impugned order holding that the said order was unsustainable in law. Therein, it was also observed that the very nature of the

proceedings under section 33 of the DVAT Act read with Rule 36(2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order, that this entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the assessee an opportunity of being heard prior to passing the penalty order and further that the imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case.

In that case, the premises of the Assessee were surveyed and it was found that there was variation in cash and stock, and as a result, the Assessing Officer enhanced the gross profit and levied tax, interest and also penalty. In that case, the Assessee had paid tax, interest and penalty, and it questioned the penalty order, inter alia, on the ground that no opportunity of hearing was afforded on the point of penalty before the passing of the order.

In Sales Tax Bar Association's case (supra), our own Hon'ble High Court clearly observed that the scheme of the statute (DVAT Act) itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. As further

held, with such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal.

In Bansal Dye's case (supra), it was seen that on the basis of survey, a notice was issued to the Assessee under section 59 of the Act as regards the assessment of tax, but the Assessee did not participate in the assessment proceedings and accordingly, notice of default assessment of Tax and interest was issued by the Assessing Officer. On the same day, the Assessing Officer passed the order of penalty, without service of prior notice on the Assessee.

Undisputedly, the decision in Sales Tax Bar Association's case on the relevant point of opportunity of being heard, before assessment of penalty, was not referred to by learned counsel for the petitioner or the respondent in Bansal Dye's case (supra).

Even otherwise, here the appellant filed objections before learned OHA, and the learned OHA disposed of the objections after providing to the dealer – appellant opportunity of being heard. In this way, we find that this is a case where impugned order came to be passed by Learned OHA, after affording reasonable opportunity of being heard, in terms of decision in Sales Tax Bar Association's case.

In the given situation, in view of decision in Sales Tax Bar Association Case, decisions cited by counsel for the appellant do not come to the aid of the appellant.

92. As regards the refunds earlier allowed to the assessee in the months of June, July, August and September-2005 and May, June and July-2007, learned OHA observed that regular approval of refund to the assessee led the assessee to mistaken belief that it was entitled to benefit of ITC for the use of 'paper' as consumable. Learned OHA further noticed that department authorities were initially not clear about the legal provisions and allowed the refunds, but the mistake was later-on rectified by the Ward-VATO (Audit). Having regard to all this and the decisions by Hon'ble Apex Court, learned OHA reduced the penalty to Rs. 10,000/- per tax period for not filing correct return.

93. In the given facts and circumstances, I find that the Assessing Authority should not have imposed any penalty and learned OHA should have set aside the assessments of penalty. It is ordered accordingly.

Interest

94. On the point of interest, at the time of final arguments, no argument was advanced by counsel for the appellant. Only for the first time, in the written submissions, extract from the decision in **J. K. Synthetics Ltd. v. Commerical Taxes**

Officer, decided by Hon'ble Apex Court on 09/05/1994, has been produced.

95. On this point, it may be mentioned that decision in J.K. Synthetic Mills Ltd's case pertained to the period prior to amendment. In this regard, Hon'ble Court made it very clear by making observation therein.

With the enactment of DVAT Act, in the year 2004, provisions as regards grant or levy of interest, in the form of section 42 (1) to (5) have been introduced. As per sub-section (2), when a person is in default in making the payment of any tax, penalty or other amount due under this Act, he shall, in addition to the amount assessed, be liable to pay simple interest on such amount, from the date of such default.

96. In view of the above provision, the above said decision does not come to the aid of the appellant, and the contention raised by counsel for the appellant is hereby rejected.

Result

97. In view of the above discussions and findings, the appeals challenging assessments of penalty are allowed and impugned assessments and the impugned order on the point of penalty are set aside.

2617

98. As regards challenge to the default assessments of tax and interest and the impugned order in respect thereof, all the appeals in this regard are hereby dismissed.

99. File be consigned to the record room. Copy of the judgment be placed in the connected appeal file. Copy of the judgment be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date : 26/07/2023.

Narinder Kumar
26/7/2023

Narinder Kumar
Member (Judicial)