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

Review No. 10/23
In Appeal Nos. 938-944/ATVAT/2010
& 946-967/ATVAT/2010
Date of Order: 27/09/2023

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

V.

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

ORDER

1. This order is to dispose of application filed by the dealer – appellant – applicant seeking review of judgment dated 26/07/2023 passed in appeals Nos. 938-944/ATVAT/2010 & 946-967/ATVAT/2010, whereby the appeals were dismissed as regards assessments of tax and interest, but, the appeals challenging levy of penalty were allowed.
2. Initially, the application was found suffering from deficiency as Sh. Rohan Pandey, DGM (Audit & Tax) of the company claimed

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himself to be authorized representative on the basis of resolution dated 11/01/2018 passed in the meeting of Board of Directors of the dealer – applicant, but, photocopy of certified true copy of said resolution revealed that Sh. Rohan Pandey was never authorized to represent the dealer before this Appellate Tribunal or in connection with the proceedings under Delhi Value Added Tax Act.

When confronted with this, Sh. Rohan Pandey admitted that he was never authorized to represent the applicant before this Appellate Tribunal or in the proceedings under DVAT Act or to file appeal or review application. Faced with this situation, he sought adjournment to file an application to place on record certified copy of another resolution i.e. dated 16/05/2023. Certified true copy of said resolution came to be filed on 24/08/2023. With the deficiency having been meet with, application was adjourned for preliminary hearing.

It may be mentioned here that in the meanwhile, dealer-applicant filed VAT Appeal No. 17/2023 before the Hon'ble High Court challenging the judgment passed by this Appellate Tribunal. Copy of order dated 04/09/2023 passed by the Hon'ble High Court in the said appeal came to be filed on 11/09/2023. On 26/09/2023, counsel for applicant placed on record copy of order dated 20/09/2023 passed by the Hon'ble High Court in another set of

VAT Appeal No. 18/2023 filed against the same judgment delivered by this Appellate Tribunal.

Both the appeals are pending before the Hon'ble High Court.

3. Counsel for the applicant has submitted that even though VAT Appeal No. 17/23 and VAT Appeal No. 18/23 have been filed by the appellant-applicant before the Hon'ble High Court challenging the judgment passed by this Appellate Tribunal while disposing of Appeals No. 938-944/ATVAT/10 & 946-947/ATVAT/10, present review application having already been filed, same is maintainable, as the appeals have not yet been decided by the Hon'ble High Court. On this point, counsel for the applicant has relied on decision in **Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh**, 1964 AIR 1372.

4. In Thungabhadra Industries Ltd.'s case (supra), while dealing with the provisions of order XLVII Rule 1 of C.P.C, Hon'ble Apex Court observed as under:

> "O. XLVII r. 1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order from which an appeal is allowed but from which no appeal has been preferred." In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of O. XLVII r. 1(1) did not stand in the way of the petition for review being entertained. Learned Counsel for the respondent did not contest this position. Nor could we read the judgment of the

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High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the 'terms of O. XLVII r. 1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of the jurisdiction of the Court hearing the review petition would come to an end."

Following are the other three cases cited by counsel for the applicant on the point of maintainability of the review application when the appeals are pending before the Hon'ble High Court:

1. **Kunhayammed & Ors v. State of Kerala & Anr.;** decided by Hon'ble Apex Court on 19/07/2000 (other particulars of the decision not provided);
2. **Kannegolla Naghabhushanam v. The Land Acquisition Officer,** AIR 1993 AP 209;
3. **Behari Lal and Anr. v. M.M. Gobardhan Lal and Ors.,** AIR 1948 All 353.

5. All the above three cases also pertain to applicability of order XLVII Rule 1(1) of C.P.C. and in the first mentioned two decisions, reliance was placed on decision in Thungabhadra Industries Ltd.'s case (supra).

It may be mentioned here that as per order dated 04/09/2023 passed in VAT Appeal No. 17/2023, only the following question of law has been framed by the Hon'ble High Court:

> "Whether stationary items as used by the appellant are eligible for credit in terms of S. No. 2 of the Seventh Schedule of the Delhi Value Added Tax Act, 2004?"

But, in view of the above decisions cited by counsel for the applicant, when the appeals are pending before the Hon'ble High Court, present review application filed before the filing of the appeals, is maintainable.

6. Applicant has alleged that the judgment suffers from factual and legal errors on the face of it and Tribunal needs to reconsider its decision.

In para No. 2 of the application, it has been alleged that it was argued by the counsel for the Revenue that the transaction did not amount to works contract, but only a service transaction, and the Tribunal "perhaps without appreciating the law in this regard, came to the conclusion that the transaction is job work", and as such said observations "are not based on any law"; and further that the authorities below did not debate this issue.

On this review application, counsel for the applicant has submitted that this is a case of "Works Contract", pertaining to transaction of

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composite supply of goods and services and not a case of only of supply of services or that of job work. Further, it has been submitted that had it been a case of job work or only a case of supply of services, the applicant was not entitled to the relief prayed as per its claim. Therefore, the contention is that the judgment deserves to be reviewed to the benefit of the applicant.

7. In this regard, to point out as to what was argued on behalf of the Revenue, para 17 of the judgment passed by this Appellate Tribunal needs to be reproduced. Same reads as under:

> "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."

8. As regards findings recorded on the above issue, relevant paragraphs of the judgment read as under:

> "30. Appellant's own case is that it has been providing manuscript material to the foreign company in the form of softcopy. 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."

As noticed above, this Appellate Tribunal found that it was not a case of works contract. Therefore, the averment in the application that on behalf of the respondent it was argued that the transaction did not amount to works contract, but only a service transaction, is not correct. Furthermore, for the detailed reasons recorded in the judgment while arriving at the findings, that this is not a case of works contract, there is no merit in the contention raised by counsel for the applicant that on this point the judgment suffers from error apparent from the record.

9. Another ground averred in the application is that this Appellate Tribunal "did not fully appreciate the import of the agreement between the appellant and the foreign buyers", whereas the authorities below never adjudicated this agreement or called for this agreement, and as such ~~this~~ observation made relating to the agreement was perhaps not called for.

However, in the course of arguments on this review application, counsel for the applicant has raised a point different from the

above averment, by submitting that Tribunal could not ask for production of the agreement between the applicant and the foreign dealer.

Counsel for the applicant has submitted that no relief can be granted when no prayer or pleading is made by a party, thereby depriving the other party of an opportunity to oppose or resist such relief, the reason being that otherwise it would lead to miscarriage of justice. On this point, counsel for the applicant has placed reliance on following 2 decisions:

> "1. **Akella Lalitha v. Kondha Hanumantha Rao**, decided by Hon'ble Apex Court on 28/07/2022 (full citation of the case not provided)
>
> 2. **Jeevan Diesels & Electricals Ltd. v. Commissioner of Central Excise, Customs & Service Tax, Bengaluru**, 2017 (2) TMI 58, decided by Hon'ble High Court of Karnataka.

Further, it has been submitted that neither Revenue could make a new case and that too for the first time nor Tribunal could consider the matter from a different aspect, and rather the Tribunal should have remanded the matter to the authorities below for fresh consideration, in case the agreement was to be considered.

While arguing on the review application reference has also been made to an extract from **Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi and Ors.,** (1978) 1

SCC 405, made available on a loose paper. On the same paper, it has been mentioned that "a reference may now be made to para 100 and 102 of 63 Moons Technologies Ltd. Supreme Court of India Moons Technologies Ltd. v. Union of India on 30 April, 2019", and an extract of para 100 has been made available wherein para 8 from the decision in Mohinder Singh Gill's case (supra) finds reference. Even at the time of final arguments, as mentioned in the judgment, full text of these two cases was not provided on behalf of the appellant. Having regard to para 8 of Mohinder Singh Gill's case extracted in Moons Technologies Ltd.'s case, this Appellate Tribunal observed that the said decision did not come to the aid of the appellant.

Herein, suffice it to state that reasons were recorded in the judgment while deciding the appeals and the decision was not supplemented by fresh reasons.

10. Applicant has also asserted in the review application that in view of the observations made by this Tribunal in para No. 21 of the judgment, that in the written submissions, counsel for the appellant submitted that this is a case of works contract by way of composite transactions, the whole case needs to be appreciated afresh.

11. Counsel for the applicant has submitted that in Pro Labs' case (**State of Karnataka and others v. M/s Pro Lab and Others,**

decided by Hon'ble Supreme Court on 30/01/2015) the view that in a case of works contract, ~~terms of~~ principle of dominant intention of the parties, as discernible from terms and conditions of a contract, was applicable, was not accepted, but this Appellate Tribunal has not correctly appreciated said decision while deciding the appeals.

It has also been submitted by counsel for the applicant that this is not a case of job work as the manuscript, which used to be received by the dealer-appellant from the foreign company was typed on paper and then supplied to the foreign supplier, but this Appellate Tribunal has recorded wrong findings in para 41 of the judgment, to the effect that this is a case of job work, and as such the same requires review.

Counsel for the applicant has also submitted that this Appellate Tribunal did not follow the decision by Hon'ble Apex Court in **Commissioner of Customs, Mumbai v. Toyo Engineering,** 2018 ACR 36 (SC), while deciding the appeals.

12. It may be mentioned here that in para No. 18 of the judgment in appeals, this Appellate Tribunal observed that complete citation of decision in Pro Lab's case was not provided by counsel for the appellant.

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13. Counsel for the applicant has referred to section 254(2) of Income Tax Act, 1962 and submitted that no party appearing before the Tribunal, be it an assessee or the department, shall suffer on account of any mistake committed by the Tribunal. In this regard, counsel for the applicant has placed reliance on decision in **Commissioner of Income Tax v. Subodhchandra S. Patel**, decided by Hon'ble High Court of Gujarat on 07/08/2003 (full citation of the case not provided).

14. To explain the expression "mistake apparent from the record", as appearing in section 254(2) of Income Tax Act, counsel for the applicant has relied on decision in **Vyline Glass Works Ltd. v. Assistant Commissioner of Wealth Tax**, decided by Hon'ble High Court of Madras on 11/03/2015 (full citation of the case not provided) and also relied on decision in **Deputy Commissioner of Income Tax v. Alert Detective Force, Bangalore**, decided by Hon'ble Appellate Tribunal of Income Tax of Bangalore on 17/02/2023 (full citation of the case not provided).

15. On these points, for ready reference, the observations made by this Appellate Tribunal need to be extracted. Same read as under:

> "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.

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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 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, 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, 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, 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

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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 softcopy. 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."

As noticed above, the applicant is also feeling aggrieved as this Appellate Tribunal has taken into consideration the terms and conditions of the agreement, whereas the appellant wished that this Appellate Tribunal should not have looked into it at all.

When it is the applicant itself which produced the agreement on record in the course of final arguments on appeals, and the Appellate Tribunal is required and empowered to make complete and final resolution of the matter before it, as desired by the legislature under Sub-section (7) of Section 76 of DVAT Act, there is no merit in the contention put forth by counsel for the applicant that

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the Appellate Tribunal could not refer to the terms and conditions available in the agreement, to decide the points in issue.

In view of the above discussion, observations and findings, in case the applicant is feeling aggrieved by the same while alleging that Appellate Tribunal "did not fully appreciate the import of the agreement between the appellant and the foreign buyers", the appropriate remedy was not by way of review, but by filing appeal before the Hon'ble High Court, which the applicant has subsequently filed.

16. In para 32 of the judgment this Appellate Tribunal observed that copy of the decision in **Tata Consultancy Services v. State of Andhra Pradesh,** (2005) 1 SCC 308, was not provided by counsel for the appellant.

As regards this observation, surprisingly, in the review application, applicant has asserted that the Appellate Tribunal should have called for the same and also that said judgment is known in all circles, and as such the same could not be rejected only on this ground.

What was observed in para 32 of the judgment by this Appellate Tribunal, is reproduced for ready reference. It reads as under:

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

Suffice it to say that it was for the counsel to provide the decision relied on, to support the contention. Even otherwise, it cannot be said that this Appellate Tribunal did not consider the argument advanced on the said point.

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17. Applicant has asserted in the review application that "true import of the decision by Delhi High Court in Jai Shree's case has not been fully appreciated".

In this regard, relevant paragraphs of the judgment by this Appellate Tribunal need to be reproduced. Same read as under:

> "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 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."

18. In view of the above observations, reasons and findings recorded by this Appellate Tribunal as regards the decision in Jai Shree Exports case not coming to the aid of the appellant, same do not call for review, the reason being that in case a party feels that some wrong finding as been recorded, the appropriate remedy is to go in appeal, to which the appellant has actually resorted to subsequently.

19. As regards decision in Pro Lab's and others, this Appellate Tribunal, recorded following observations in para 38 to 40:

"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 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 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."

20. Ultimately, in para 44, this Appellate Tribunal clearly observed that the decision in Commissioner of Customs' case (supra), cited by counsel for the appellant, did not come to the assistance of the appellant. Therefore, there is no merit in the contention raised by counsel for the applicant that the decision in the said case was not considered and applied.

21. Applicant has asserted in the review application that this Appellate Tribunal observed in the judgment that the case of the Prestige Engg. v. CCE Meerut was not argued at the time of hearing, but this observation is not correct as the principle of law was argued.

In the course of arguments on the review application, this ground has not been agitated or argued. Even otherwise, this Appellate Tribunal correctly recorded the above said observation in the judgment.

In this regard, suffice it to state that the applicant admits that the said decision was not relied on or referred to at the time of arguments and came to be inserted only in the written submissions. The fact also remains that this Appellate Tribunal considered the said decision while passing judgment on the point/issue involved.

In this regard, relevant portion of the judgment needs to be extracted for ready reference. Same reads as under:

> "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."

22. In the review application, applicant has alleged that the revenue did not bring on record anything to show that this is a case of job work; that the very definition of 'works contract' as contained in Article 366(29)(A)(b) wherein word 'involved' occurs, was explained to contend that it was not a case of job work; that services and job work have distinct meaning in law, but this Tribunal observed in para 44 that according to Assessing Authority it is a contract for providing service; that decision of the Commissioner, Customs should have been considered to understand the meaning of job work; and that when in para 46 of the judgment, the Tribunal observed that this is a contract for providing services simpliciter, there is legal error apparent on face of the order.

23. In this regard, relevant paragraphs of the judgment by this Appellate Tribunal need to be reproduced. Same reads as under:

"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.

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 softcopy 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."

24. In view of the above observations, reasons and findings, it can safely be said that the Appellate Tribunal did not find any 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", and as such, it cannot be said that there is any legal error apparent on face of the record on the said point.

25. Applicant has further alleged in the review application that "the arguments noted by this Tribunal in para 51 & 52 are really not understood" and that there was no question of counsel for the appellant "stating or not stating" that computers hired on Right to Use basis, and not purchased, were capital goods.

In this regard, relevant paragraphs of the judgment passed by this Appellate Tribunal need to be reproduced. Same read as under:

> "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

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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 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).

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.

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."

26. In view of the above reasons and findings recorded by this Appellate Tribunal, the assertion in the review application that the arguments noted by this Tribunal in para 51 & 52 "are really not understood" and that there was no question of counsel for the appellant "stating or not stating" that computers hired on Right to Use basis, and not purchased, were capital goods, is without any basis and does not call for any review.

27. Having regard to the reasons recorded by this Appellate Tribunal, the other assertion in the application that 7th schedule has not been appreciated based on the arguments advanced before the Tribunal, is also without any basis.

28. Applicant has asserted in the review application that the Tribunal did not appreciate the principle of law laid down in Adiraj Manpower Services Pvt. Ltd's case i.e. **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 and ACC's case i.e. **ACC Ltd. v. Commissioner of Customs**.

ACC's case found mentioned in M/s Pro Lab's case. On this point, suffice it to say that the Appellate Tribunal has discussed the

decision in Adiraj Manpower Services Pvt. Ltd's case cited and given reasons as to why particular decision was not of any help to the appellant.

29. Counsel for the applicant has submitted that the authorities below had earlier allowed refund to the applicant in one set of matters but declined claim of refund in the other set of matters. Counsel has further submitted that no demand of tax and interest could be raised in the matters in which claim of refund of the applicant was disallowed and that in the given situation, the judgment deserves to be reviewed because of this mistake apparent from the record.

While disposing of the appeals, this point was dealt with in para No. 87 to 89 of the decision. The judgment does not call for any review on this point.

30. Counsel for the applicant has contended that so far as occurring of default to pay tax is concerned, decision in J.K. Synthetics' case has not been appreciated.

Said decision was cited on the point of interest as levied by the Assessing Authority while framing assessment. While dealing with this point and discussing the said decision, this Appellate Tribunal observed in the manner as:

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" 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."

In view of the above reasons, the contention raised by counsel for the applicant on this point is without merit and the decision does not call for any review.

31. Applicant has asserted in the review application that the observations made in para No. 35 need to be considered in the light of the fact that the issue was raised by counsel for the appellant

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and name of the case was also referred, and as such this could not be a ground for rejecting a decision.

Following are the observations made by this Appellate Tribunal in para 35 of the judgment:

> "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."

The above said observations were made just to mention about duty of a counsel at the time the matter is argued.

As regards the assertion in the review application that about decision in Mohinder Singh Gill's case, this Tribunal has failed to appreciate the true import of the rule of law and the written submissions made in this regard, suffice it to state that reasons have been recorded by this Appellate Tribunal before arriving at the findings, and accordingly, there is no point of review of the judgment.

32. No other point has been argued on the review application.

33. In view of the above discussion, after preliminary hearing, this review application is hereby dismissed *in limine*.

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34. File be consigned to the record room. Copy of the order be placed in the connected appeal files. Copy of the order be supplied as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 27/09/2023.

Narinder Kumar 27/9/2023

Narinder Kumar
Member (Judicial)