

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 13.04.2010
Judgment delivered on: 19.04.2010

+ ST.APPL. 3/2008, ST.APPL. 4/2008, ST.APPL. 5/2008,
ST.APPL.6/2008 & ST.APPL. 7/2008

Havell's India Ltd.

..... Appellant

versus

The Commissioner Value Added Tax & Anr.

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr S.K. Taneja

For the Respondent: Mrs Avnish Ahlawat, Ms Simran and
Mr Nitesh Kumar Singh

And

+ W.P.(C) 5430/2008

I.T.C. LTD. & ANR.

..... Petitioner

versus

COMMISSIONER OF VALUE ADDED TAX & ORS.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr R. Narain, Ms Sonu Bhatnagar,
Ms Mallika Joshi and Mr Siddharth

For the Respondent: Mr Rajesh Mahana, Mr Ramanand Roy
and Mrs Navneet Dhillion

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to
see the judgment? Yes

2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

V.K. JAIN, J.

1. By this common judgment, we will dispose of all the six matters referred above.
2. STA.3/2008 to 7/2008 are directed against a common order passed by the Appellate Tribunal, Value Added Tax, Delhi, whereby it upheld the order passed by the Appellate Authority. The following substantial questions of law were framed for consideration in these appeals:

(i) “Whether the Tribunal was correct in law in holding that an agent to whom the goods are transferred on consignment basis, is covered under the definition of ‘dealer’ under Section 2(j) of the Delhi Value Added Tax, 2004 and the transfer of goods to such an agent for consideration, whether received in advance or subsequently in consequence of sale of goods, shall amount to sale and be taxed accordingly?

(ii) Whether the Tribunal was correct in law in holding that the appellant in affecting sale of goods through its consignment agent who has paid due tax on the said sales to the Government, he is also liable to pay tax under the DVAT Act, 2004?”

3. Since the questions, as framed earlier, do not reflect true controversy involve in the appeals, we have reframed the

question as under and have heard the parties accordingly:

(i) “Whether in the facts and circumstances of the case, the Tribunal was correct in law in holding that the appellant was liable to pay VAT in respect of goods transferred by it to its agent on consignment basis?”

4. The brief facts, as noted by the Tribunal, are that the appellant company is engaged in sale of electronic goods and has appointed a Consignment Agent in Delhi. In the monthly returns filed by it, the appellant disclosed that certain goods, on which credit of input tax had been claimed by it, were physically transferred by it to the Consignment Agent, for sale through him. The Consignment Agent sold the goods of the appellant under a written agreement which provided that he would sell the goods on behalf of the appellant and would deposit the tax on its behalf. The VAT Officer rejected the claim of input tax credit and levied tax on the value of the goods transferred to the Consignment Agent. The order of the VAT Officer was upheld by the Appellate Authority, which dismissed the appeal and also upheld the notice of assessment of penalty, issued to the appellant under Section 33 Delhi Value Added Tax Act. While dismissing the appeal, the Tribunal was of the view that Value Added Tax is to be levied on the value of ‘every’ transfer, when the goods changes hands

from the original producer to the ultimate consumer.

5. In exercise of the power conferred upon him under Section 85 of Delhi Value Added Tax Act, 2005, the Commissioner of Value Added Tax issued a Notification No. F.4(3)/P-II/VAT/2005/1158 dated 2.12.2005 clarifying therein as under:

1. "The scheme of DVAT envisages taxing different stages in the production and distribution chain and allows set off for taxes paid at the earlier stages. Unlike the Central Sales Tax, 1956 wherein there is provision for transfer of goods by the dealer to his branch or his agent otherwise than by way of sale, in Delhi Value Added Tax 2004 there is no similar provision for intra-state transfer of goods to the branch or an agent without payment of tax. Under the DVAT Act, even an agent to whom goods are transferred on consignment basis are covered under the definition of "dealer" and transfer of goods to an agent for consideration, whether received in advance or subsequently on conclusion of sale of goods shall amount to sale and shall be taxed accordingly. However, the agent shall be eligible to claim input tax credit for taxes paid to the Principal. To sum-up all intra-state transfer of goods to an agent within Delhi on consignment without payment of tax is not allowed under the provisions of DVAT Act, 2004 and such intra-state transfers are covered under the definition of sale and are liable to tax as per provision contained in DVAT Act, 2004 from the day the DVAT Act came into force.

2. Transfer of goods by a dealer from his one

place of business to another place of business within Delhi is not sale and is not to be taxed provided all the places of business of the dealer within Delhi are covered in dealer's single registration under the DVAT Act 2004 and the dealer is filing one single return in one jurisdiction.

3. However, in case the branches are registered as independent dealers, a transfer by one such branch to another branch is transfer by one Principal to another Principal and such transfers are covered under the definition of sale and to be taxed accordingly.

4. The notification shall be treated as effective from the date the Delhi Value Added Tax Act came into effect.”

6. Though the notification was challenged before the Tribunal, it did not examine its validity and held that transfer of goods to an agent for a consideration, whether received in advance or subsequently, in consequence of sale, shall amount to sale and shall be taxed accordingly and in such case the Consignment Agent shall be eligible to claim input tax credit for the tax paid to the Principal. The Tribunal also held that appointment of Consignment Agent was contrary to the provisions of the Act.

7. In WP(C)543/2008, petitioner No.1 ITC Limited, which is engaged in the business of sale of apparels and other accessories, has appointed five Consignment Agents in NCT of

Delhi. It is alleged that the petitioner company transferred the goods from its warehouses to the Consignment Agents in Delhi, who sold those goods to the retailers/consumers, for and on behalf of and in the name of the petitioner company. It is further alleged that the title in the goods remains with the company till the goods are sold by the Consignment Agent and on sale by its agents, the company is entitled to entire sale proceeds and the Consignment Agent is paid commission at the agreed rate. The case of the petitioners is that there is no transaction of sale between the petitioner company and its Consignment Agents and, therefore, the transaction between the company and the Consignment Agents does not attract charging of Value Added Tax. The VAT Officer issued demand notices dated 9.6.2008 demanding tax in respect of the goods supplied by the petitioner to its Consignment Agents between April, 2005 and March, 2006. The VAT Officer relied upon the Advance Ruling published vide above referred Notification dated 2.12.2005 as well as the order of the Tribunal which is under challenge in STA 3/2008 to 7/2008. This is also the case of the petitioner that any demand of value added tax, on supply of goods by the petitioner to its Consignment Agents, would be unconstitutional being beyond the legislative

competence of the State, under Entry 54 of List II of Schedule 7 of the Constitution, which empowers the State to levy tax only on sale and not on such stock transfers by the Principal to his agent. The petitioners have, therefore, sought quashing of the demand notices as well as the impugned Advance Ruling, published vide notification dated 2.12.2005. The petitioners have also prayed that the provisions of Section 3(2), 2(1)(zc) and 2(1)(j) of DVAT Act be declared as unconstitutional and beyond the legislative competence of the State if they purport to levy tax in respect of transaction which does not amount to sale of goods.

8. The respondent has contested the petition and has taken a preliminary objection that the writ petition is not maintainable since it is open to the petitioner to file objections under Section 74 of the DVAT Act against the default assessment orders passed by VAT Officer. On merits, it has been alleged that transfer of property takes place from the petitioner to the Consignment Agents under an arrangement of deferred payment of consideration and such arrangements are not exempt as per the scheme of DVAT Act. It has been claimed that the Consignment Agents issue their invoices pay taxes on them and carry on business under their own TIN

number. It has also been stated that under DVAT Act, there is no provision for intra-State transfer of goods to the agents without payment of tax and since the Consignment Agent is covered under the definition of dealer, he is liable to pay tax on the goods transferred to him.

9. Section 3 of Delhi Value Added Tax Act, which is the charging Section for VAT, to the extent it is relevant, provides as under:

“3. Imposition of tax

(2) Every dealer shall be liable to pay tax at the rates specified in Section 4 of this Act on every sale of goods effected by him—

(a) while he is a registered dealer under this Act or

(b) on and from the day on which he was required to be registered under this Act.”

10. It would, thus, be seen that the liability of a dealer to pay tax in terms of DVAT Act arises only in respect of the goods sold by him. ‘Sale’ has been defined under Section 2 (zc) of the Act which reads as under:

“(zc) “sale” with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one

government agency or department, whether of the central government or of any state government, to another) and includes-

- (i) a transfer of goods on hire purchase or other system of payment by installments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;
- (ii) supply of goods by a society (including a co-operative society), club, firm, or any association to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration, whether or not in the course of business;
- (iii) transfer of property in goods by an auctioneer referred to in sub-clause (vii) of clause (j) of this section, or sale of goods in the course of any other activity in the nature of banking, insurance who in the course of their main activity also sell goods repossessed or re-claimed;
- (iv) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (v) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (vi) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred

- payment or other valuable consideration;
- (vii) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;”

11. A careful analysis of the above referred definition would show that the following are the essential ingredients of sale as defined in the Act:

- (i) There should be transfer of property in goods by one person to another.
- (ii) The transfer should be for cash or for deferred payment or for some other valuable consideration.

What is noteworthy is that it is ‘transfer of property in goods’ and not ‘transfer of goods’, which constitutes sale within the meaning of Section 2(zc) of the Act, unless the transaction is otherwise covered under sub-clause (i) to (viii) of the clause. In the present case, there was no transfer of goods on hire purchase or any other system whereby payment was to be made on instalment, there was no supply of goods by a society, club, firm or any association to its members, there was no transfer of right to use the goods and there was no

supply, by way of or as part of any service and, in any case, the goods in question were not any food, drink or other article for human consumption. Sub-clause (viii) of section 2 (zc) is also not attracted, since the transaction does not come within the purview of sub-clause (ix) of clause (j) of Section 2. Therefore, the transaction between the Principal and the Consignment Agent would not constitute 'sale' unless there is transfer of property in the goods. Sub-clauses (iii), (iv) and (v) of clause (zc) of Section 2, which do not apply to transactions between the Principal and a Consignment Agent, in any case require transfer of property in the goods before the transaction can constitute sale within the meaning of the Act.

12. Transfer of property in goods implies that the ownership or title of the goods must necessarily get transferred from one person to another. In the appeals referred above, the facts, as recorded by AT VAT, do not indicate that the title or ownership of the goods got transferred from the appellant company to its Consignment Agent, when the goods were delivered to the agent on consignment basis. The Tribunal has recorded that the Consignment Agent was selling the goods of the appellant, which means that the title or ownership of the goods continued to vest in the appellant

company despite transfer of physical possession of the goods from the place of the appellant to the place of the Consignment Agent. The Tribunal has recorded that as per the written agreement between the appellant and its Consignment Agent, the goods were sold from the agent on behalf of the appellant. This term, in the contract between the appellant and its Consignment Agent, shows that the title or ownership in the goods continued to vest in the appellant company and the Agent was carrying out the sale for and on behalf of the appellant. It has been specifically noted by the Tribunal that the Consignment Agent deposits the tax on behalf of the appellant. This is yet another indicator of the fact that title in the goods continued to vest in the appellant company and that is why the tax was deposited by the Agent on its behalf and not on his own behalf. There is absolutely no finding by the Tribunal to the effect that property or title or ownership in the goods got transferred by the appellant to its agent either before or at the time of delivery of the goods to the Agent or at any time thereafter. Even the Revenue did not contend before the Tribunal that in fact the title or ownership in the goods was transferred to the agent along with physical transfer of the goods. Since there was no transfer of property in the goods

from the appellant to its Agent, the transaction between the parties cannot be said to be a transaction of 'sale' within the mean of Section 2 (zc) of the Act.

13. In our view, the Tribunal was wrong in saying that Value Added Tax is payable on 'every' transfer till the goods reach the ultimate consumer. If that were to be so then mere physical transfer of goods from the place of the Principal, to the place of the Agent, without being coupled with transfer of ownership in those goods, would constitute what the Tribunal termed as 'transfer'. Tax is payable only if the transfer of goods constitutes sale within the meaning of Section 2(zc) of the Act and mere physical transfer of goods from the premises of the Principal to the premises of the Agent, without transfer of title in the goods, from the Principal to the Agent, will not amount to sale and, consequently, will not be liable to payment of Value Added Tax under Section 3(2) of the Act. Even if the Consignment Agent is covered under the definition of dealer under Section 2(j) of the Act, that by itself will not attract payment of Value Added Tax unless the physical transfer of goods to the 'Dealer' is coupled with transfer of ownership in those goods to him so as to constitute a 'sale' within the meaning of Section 2(zc)

14. We have examined the terms and conditions of the Agreement for Consignment executed between the appellant and its Consignment Agent. The relevant terms and conditions of the agreement read as under:

“1. General

1.04 That the title of the goods shall rest with the principal and agent shall not create any charge or lien or hypothecate such goods lying in their custody in any manner, and the principal alone shall have the right to hypothecate or create a charge or lien on such goods lying in the agent's custody.

2. That the Agents shall:

2.03 Maintain separate books of accounts, i.e., bill register, Challan Register, Stock Register, Debtor's Register, Bank Register etc., of any other files and the books of accounts opened for scrutiny of the Principal from time to time.

2.04 Deposit all collections made in Consignment account in a separate Bank account which is to be operated jointly.

2.12 Sell the goods to their other customers only as per Company policy. For any excess discounts a written approval from the principal is a must. At month end the agent shall send the sale detail showing separately the sale made with excess discount along with copy of approvals.

2.14 Maintain proper records of the

receipts, despatches and sales returns, remittance and any other reports in the prescribed format as per the statutory requirements under any statute/law for the time being in force and/ or as per the instructions of the principal.

2.15 Send monthly updated statement of

Receipts

Dispatches

Sales returns

Stock positions

Collections

Money transferred to Head Office or

Any other report

By 3rd of next month. The Agent shall also provide the information/report as required by the principal for any shorter period.

2.16 Shall provide facilities for monthly authentication of the stocks in the presence of at least one direction/authorized person of the principal and the agent. Such authentication shall have to be signed by the respective directors/authorized persons.

2.17 Shall allow the persons authorized by the principal to inspect and verify the stocks at any time with or without prior notice to the agent.

3. That the agent shall not:

3.05 Effect any change in the constitution of their organization without the written consent of the principal.

4. Insurance:

4.01 That Principal shall insure at its own cost the stocks held by the agent at the agent's godown for the value of the stock for fire, theft, riot, earthquake, floods, damage etc., as well as transit insurance. For this, Agent shall keep the Principal informed about any expected or otherwise increase/decrease in stocks.

5. Consideration:

5.01 In consideration of the services provided by the agent, the agent shall be entitled to receive a commission as follows which will be settled on a monthly basis on the net material value of sales effected from Delhi depot and from Principal directly to the area of Delhi.

Switchgear items	3%
Cable	3%
Wires	3%
Meters	3%

15. Clause 1.04 of the agreement leaves no doubt that the ownership and title in such goods continues to vest in the appellant and the Agent has no right or title in them, as is evident from the prohibition against hypothecation of such goods or creation of any charge or lien on them by the Agent, while specifically retaining such right with the appellant. The requirement to deposit all the sale proceeds in a separate bank account, to be jointly operated by the parties also indicates

that property in the goods did not pass to the Consignment Agent and that is why the sale proceeds were to be kept in a separate Bank account. Conferring a right upon the appellant to scrutinize the account books and requiring the Agent to send monthly statements of all receipts, dispatches, sales, stock position, etc. to the appellant, in terms of clause 2.15 of the agreement is yet another term which shows that title in the goods did not pass to the Consignment Agent and that is why he was required to send all these statements to the appellant for the purpose of rendering true and complete account of the sales effected by him on behalf of the appellant. Had the title in the goods passed to the Consignment Agent, there would have been no reason for him to agree for monthly authentication of the stock in the presence of a representative of the appellant in terms of clause 2.16 of the agreement and to agree for inspection and verification of the record by the authorized representative of the appellant without even a prior notice to the Consignment Agent, in terms of clause 2.17 of the agreement. The requirement of insurance at the cost of the appellant also shows that the ownership in the goods continue to vest in the appellant company and that is why it had to insure the stock kept in the premises of the

Consignment Agent, at its own cost. Obviously, it is the appellant and not the Consignment Agent who would have suffered loss in case of any damage or destruction of the stock kept in the premises of the Consignment Agent.

16. Therefore, we have no hesitation in holding that under the terms and conditions of the agreement between the appellant and its Consignment Agent Guptajee & Co., the property in the goods transferred by the appellant to the Consignment Agent and kept in his premises did not get transferred to the Agent.

17. As regards the Notification No. F.4(3)/P-II/VAT/2005/1158 dated 2.12.2005, a perusal of the document would show that this is an Advance Ruling given by the Commissioner of Value Added Tax under Section 85 of the Act, which provides that the Commissioner may by notification in the Official Gazette, publish his ruling on the answer to any question involving the interpretation of the Act or application of the Act to a class of persons or a class of transactions. Obviously, the ruling of the Commissioner needs to be based upon a correct interpretation of the provisions of the Act and it cannot either substitute or supplement the provisions of the Act. It is not open to the Commissioner, while publishing a

ruling in terms of Section 85 of the Act to take a view contrary to the provision of the Act or to add to its provisions. Hence, the Commissioner cannot classify a transaction as sale if such a transaction otherwise does not constitute 'sale' within the purview of the Act. The Commissioner cannot, by way of Advance Ruling, say that a transaction between the Principal and his Agent will necessarily amount to sale in every case, even if it does not amount to sale within the meaning of Section 2(zc) or any other provision such as Section 17 of the Act which deals with transactions between 'related parties'. It is not permissible to levy and collect Value Added Tax merely on the strength of the Advance Ruling published by the Commissioner under Section 85 of the Act when the transaction does not constitute sale within the meaning of the Act.

18. In **State of Madras Vs. Gannon Dunkerley & Co.(Madras) Limited** : (1958) 9 STC 353 (SC), it was held by the Supreme Court that the expression 'sale of goods' in Entry 48 in List II of Schedule 7 of Government of India Act, 1935 cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930, its

essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. Thus, passing of property in the movable goods was held to be an essential ingredients of sale.

19. Article 366 of the Constitution which defines certain expressions used in the Constitution was amended by Constitution (46th Amendment) Act, 1982 so as to include certain transactions within the expression 'tax on sale or purchase of goods' used in Entry 54 in the II List of the Schedule 7 of the Constitution and to provide that such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods, by the person making transfer, delivery or supply and of purchase of those goods by the person to whom such transfer, delivery or supply is made. None of these transactions includes a transaction involving a mere physical transfer of goods by the Principal to its Consignment Agent, without being coupled with transfer of property in those goods from the Principal to the Agent. In any case since the transactions which are the subject matter of STA 3/2008 to 7/2008 do not constitute 'sale' as defined in the Act, it is not permissible for the respondent to levy Value Added Tax on the said goods.

20. In **Bharat Sanchar Nigam Limited & Another Vs. Union of India & Others** : (2006) 145 3 SCC 1, the Supreme Court held that its decision in the case of Gannon Dunkerley (supra) survives the 46th Constitutional Amendment with regard to the definition of 'sale' for the purpose of the Constitution in general and for the purpose of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29A) operate.

21. In **Sri Tirumala Venkateswara Timber & Bamboo Firm Vs. Commercial Tax Officer** : (1968) 21 STC 312, Explanation III to Andhra Pradesh General Sales Tax Act, 1957 was under consideration. The said Explanation-III read as under:

“Explanation III: -- Notwithstanding anything contained in this Act or in the Indian Sale of Goods Act, 1930 (Central Act 3 of 1930), two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place—

(1) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or

(2) when the goods are transferred from the seller to a buying agent and from the buying agent ____ principal, if the agent is found in either of the cases aforesaid.—

(i) to have sold the goods at one rate and to have passed on the sale proceeds to

his principal at another rate; or
(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate; or
(iii) not to have accounted to his principal for the entire collections or deductions made by him, in the sales or purchases effected by him on behalf of his principal; or
(iv) to have acted for a fictitious or non-existent principal;”

The Supreme Court held that the real effect of the third Explanation is to impose the tax only when there was a transfer of title to the goods and not where there is a mere contract of agency.

It was further held that the phrase ‘goods are transferred’ in clause 1 & 2 of Explanation III on a proper construction meant ‘title to the goods is transferred’. During the course of judgment, the Supreme Court, inter alia, noted as under:

“As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who

is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship.”

22. In **Bhopal Sugar Industries Limited Vs. STO,** **Bhopal** : 1997 (40) STC 42, the Supreme Court, while considering the definition of ‘sale’ given in Madhya Pradesh Sale of Motor Sprit Taxation Act, 1957, which defined ‘sale’, noted that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised and once this happens, the buyer becomes the owner of the property and the seller has no vestige of title left in the property. It was further noted that in a contract of agency, the agent takes delivery of the property, does not sell it as his own property and sells the same as the property of the Principal and under his instructions and directions. Since the agent is not the owner of goods, if any loss is suffered by the agent, he is to be indemnified by the Principal.

23. For the reasons given in the preceding paragraphs, we are of the view that the Tribunal was not correct in law in

holding that the appellant company was liable to pay Value Added Tax in respect of the goods physically transferred by it to its Consignment Agent. The question of law is therefore answered in the negative. The impugned order is, accordingly, liable to be set aside.

24. Coming to WP(C)5430/2008, admittedly, the respondents raised demand in respect of the supplies made by the petitioner No.1 to its Consignment Agents without going into the question as to whether property in the goods supplied by the petitioner No.1 to its Consignment Agents stood transferred to the Agents or not and whether the transactions between petitioner No.1 and its Consignment Agents amounted to sale under the provisions of the Act, or not. The demand has been raised on the strength of the Notification No. F.4(3)/P-II/ VAT/2005/1158 dated 2.12.2005 published by Commissioner of Value Added Tax, on the assumption that every supply made by the Principal to a Consignment Agent attracts levy of Value Added Tax. As held by us, the transaction between the Principal and Consignment Agent does not constitute 'sale' within the meaning of Section 2(zc) of the Act unless it is coupled with transfer of property in the goods from the Principal to the Consignment Agent. Hence, it

was not open to the respondent to demand Value Added Tax unless either the property in the goods supplied by petitioner No.1 to its Consignment Agents got transferred to the Agents or the transaction between the parties amounted to sale within the meaning of some other provision of the Act. In fact, a perusal of the demand notices issued by the Department of Trade and Taxes would show that it has relied upon the decision of the Tribunal in the case of Havell's India Limited, which has not found favour with us.

25. During the course of arguments, it was contended before us that neither Consignment Agents nor supply on consignment basis is recognized by Delhi Value Added Tax Act, 2004. In our view, it is absolutely immaterial that the Act does not deal with appointment of Consignment Agents or supply of goods on consignment basis. So long as the transaction between the Principal and Consignment Agent or between any two persons, does not amount to a sale within the meaning of Section 2(zc) or any other provisions of the Act it is not open to the Department to insist upon payment of Value Added Tax on such a transaction. The Act does not declare supply of goods on consignment basis to be illegal and does not deem such supply to be a sale. Our attention has not

been drawn to any provision of the Act declaring such transactions to be 'sale' of goods. In the absence of any provision to this effect in the Act and considering the definition of 'sale' given in Section 2(zc) of the Act, such transactions do not attract payment of Value Added Tax in Delhi.

26. The respondents have pleaded that the writ petition filed by ITC Limited & Another is not maintainable since it is open to them to file objections under Section 74 of the Act. We, however, find that the demand notice issued by the respondent relies upon the Advance Ruling published by the Commissioner vide Notification No. F.4(3)/P-II / VAT /2005 / 1158 dated 2.12.2005 and the 5th proviso to Section 74 (1) of the Act specifically provides that no objection shall be made to the Commissioner against an order under Section 84 or Section 85 of the Act, if the Commissioner has not delegated his power under the said section to other Value Added Tax Authorities. Therefore, we cannot say that petitioner instead of filing writ petition should file objections under Section 74(1) of the Act before the Commissioner against his own ruling. So long as the Advance Ruling published by the Commissioner stands in its present form, no useful purpose would be served by directing the petitioners to file objections before the

Commissioner, who, in view of his own Ruling, is bound to dismiss such objections.

27. Since we have come to the conclusion that a transaction involving mere physical transfer of goods by the Principal to its Consignment Agent unless coupled by transfer of title or property in the goods to the Agent, does not constitute sale under the provisions of Delhi Value Added Tax Act, we need not examine the contention that the State Legislature is not competent to levy tax on a transaction where the goods are physically transferred from the Principal to the consignment Agent but the property or title in the goods continues to vest in the Principal.

28. The Notification No. F.4(3)/P-II/VAT/2005/1158 dated 2.12.2005 issued by Commissioner, Value Added Tax to the extent it requires payment of Value Added Tax on the supplies made by a Principal to a Consignment Agent, even if such supply is not coupled with transfer of property in the goods to the Consignment Agent and the transaction between the parties otherwise does not amount to 'sale' in terms of the provisions of Delhi Value Added Tax, 2004, is, therefore, liable to be set aside. Since demand notices to the writ petitioner have been issued, without examining as to whether the

property in the goods transferred from the possession of petitioner No.1 ITC Limited to its Consignment Agents, also got transferred to the Agents or not, the same are also liable to be quashed.

Conclusions:

1. The Tribunal, in the facts and circumstances of the case, was not correct in law in holding that the appellant was liable to pay VAT in respect of goods transferred by its to its agent on consignment basis. The impugned order is, therefore, set aside.

2. Notification No. F.4(3)/P-II/VAT/2005/1158 dated 2.12.2005 issued by Commissioner, Value Added Tax to the extent it requires payment of Value Added Tax on the supplies made by a Principal to a Consignment Agent, even if such supply is not coupled with transfer of property in the goods to the Consignment Agent and the transaction between the parties otherwise does not amount to 'sale' in terms of the provisions of Delhi Value Added Tax, 2004 is quashed. The demand notices impugned in the writ petition are hereby quashed. It will, however, be open to the Department to examine the nature of the transactions between the petitioner Company and its Consignment Agents in the light of

observations made in this judgment and thereafter proceed in accordance with law if it comes to the conclusion that the transactions between them constitute 'sale' within the meaning of Delhi Value Added Tax Act, 2004.

The appeals as well as the writ petition stand disposed of.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

APRIL 19, 2010/RS