

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 5th January, 2012.
Date of Decision: 23rd February, 2012*

+ STA 11 and 12/2011

JAISHREE EXPORTS Appellant
Through : Ms. Prem Lata Bansal, Sr. Advocate
With Mr.Ruchir Bhatia and Mr.Varun
Dubey, Advocates

Versus

COMMISSIONER TRADE & TAXES
DEPARTMENT Respondent
Through: Mr. A. K. Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

R.V. EASWAR, J.

1. These are two appeals filed by M/s Jaishree Exports which is a dealer registered under the Delhi Value Added Tax Act, 2004, (hereinafter referred to as “the Act”). The appellant is a recognized export house engaged in the business of exporting rice out of India. It purchases packing material for packing the rice which is exported out of India. Prior to the coming into force of the Act, the appellant was purchasing

the packing material without payment of sales tax on the strength of its registration by furnishing declarations in for ST-1/ST-49/Form-H. After the coming into force of the Act, w.e.f. 1.4.2005, initially the packing material was being purchased by the appellant on payment of tax (hereinafter referred to as “VAT”) and the input tax so paid on the purchases of the packing material was being claimed as a refund. However, it would appear that in the case of another dealer by the name Amar Products, the Commissioner, VAT gave a ruling that packing material can be purchased against Form-H also. Accordingly, under the Act which came into force from 1.4.2005, the appellant was also making purchase of packing materials on the basis of declaration filed in Form –H.

2. In respect of the tax paid by the appellant on the packing material after the introduction of the Act, it claimed input tax credit and asked for refund of the input tax on the ground that the packing material was used to pack rice which was exported out of India. The claim was made under Section 9 (1)(b) of the Act which provided that a dealer, who is registered under the Act, shall be entitled to tax credit in respect of the turnover of purchase occurring during the tax period when 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 sales which are not liable to tax under Section 7 of the Act. Section 7 provided that certain sales were not liable to VAT. Clause (c) of Section 7 provided that sales made in the course of import of the

goods into India or export of the goods out of the territory of India were not liable to tax. The claim of the appellant was thus made under Section 9 (1)(b) read with Section 7(c) of the Act on the footing that the packing material, on which it paid tax, was used to pack rice which was to be exported in a packed condition, and, therefore, the tax paid on the purchase of the packing material shall be refunded under these provisions. Before the VAT authorities, the appellant also relied on the “working guide” issued by the VAT Department in support of the claim for refund.

3. In the default assessment made under the Act by order dated 23.09.2008, the assessing authority (hereinafter referred to as “VATO”) rejected the claim of the appellant in the following words: -

“The dealer has claimed ITC for Rs.55003/- against purchase of packing material and claimed refund thereof. As per entry No.46 of First Schedule of DVAT Act 2004, rice is a tax free item and as per Section 9(7)(b) of said Act no input tax credit is allowed. Hence total demand of Rs.61883/- is assessed along with interest.

The dealer is hereby directed to pay tax of an amount of Rupees 76379/- (Seventy six thousand three hundred seventy nine only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 24-11-2008 for the following tax period:

<i>Tax Period</i>	<i>Amount (Rs.)</i>		
	<i>Tax</i>	<i>Interest</i>	<i>Total</i>
<i>FOURTH QUARTER, 2006-07</i>	<i>61883</i>	<i>14496</i>	<i>76379</i>

*Worksheet and Assessment Summary
are enclosed for reference.”*

The working sheet was attached to the aforesaid order explaining the calculations.

4. In the working sheets also, similar reasons were given by the VATO for rejecting the appellant's claim for refund. A similar order would appear to have been passed for the first quarter of the tax period 2006-07 for the month of November, 2007.
5. The appellant filed objections on 28.11.2008 against the orders of the VATO before the Joint Commissioner, Zone V, New Delhi. Before this authority the appellant submitted that it claimed tax credit on non-taxed sales in accordance with Section 9(1) of the Act and further submitted that the specifications for packing material were provided by the purchaser (of the rice). Several authorities were also relied upon in support of the submissions. The Joint Commissioner, however, rejected the appellant's submissions, observing as under: -

“I have heard the arguments submitted by the counsel and also gone through the documents placed on the record. The dealer exports rice which an exempted commodity under First Schedule of Delhi V AT Act. Although the section 9(b) of Act allow the input tax credit on sales which are not liable to tax under section 7 of the Act but not such tax credit shall be allowed for purchase of goods which are used exclusively for packing of goods specified in First Schedule. It has been specifically provided u/s 9 clause 7(b) that for removal of doubt, no tax credit shall be allowed for the purchase of goods

which are used exclusively for the manufacturing, processing or packing of goods specified in the First Schedule. The rice being a First Schedule item, no ITC can be allowed for its packing material. Accordingly, the default assessment order levying tax and interest are upheld. However, in view of the submissions regarding penalty, I am of the opinion that penalty u/s 89(1) is not leviable with reference to exports being made by the dealer. However, the penalty pertaining to the period 1/4/06 to 30/6/06 is upheld to the extent of Rs.477/- and for the period 1/1/07 to 31/3/07 is upheld to the extent of Rs.6883/- being in connection with sale of DEPB licence by the dealer. The penalty u/s 86(9) for the period 1/1/07 to 31/3/07 is also upheld.

Ordered accordingly.”

6. Aggrieved by the order of the Joint Commissioner the appellant-dealer filed appeals before the Tribunal, VAT (hereinafter referred to as “the tribunal”). By a consolidated order dated 18.3.2011, which is the impugned order, the tribunal upheld the view taken by the VAT authorities. In this order, the claim of the appellant in respect of the entire dispute was dealt with by the tribunal. A perusal of the order of the tribunal shows that there is not much of discussion as to the merits/ de-merits of the claim of the appellant though the contentions of the appellant have been recorded in detail in paragraph 11 of the impugned order. All that the tribunal has stated in paragraph 17 of its order is that the Id. VATO was justified in disallowing the claim of input tax audit on purchase of packing material but the liability of the appellant to deposit tax equivalent to the input tax-audit claim could not be upheld. Identical observations have been made in paragraphs

18 and 19, in which different segments of the tax period in dispute have been dealt with.

7. Aggrieved by the aforesaid order passed by the Tribunal, the appellant has preferred the present appeals.
8. By order dated 14.10.2011 the following substantial questions of law were framed for adjudication.
 - (i) Whether a dealer registered under the provisions of the Delhi Value Added Tax Act, 2004 is entitled to claim Input Tax Credit under Section 9 of the Income Tax Act, 1961 on the turnover of purchases of goods for exports out of India?
 - (ii) Whether the order of the Appellate Tribunal, VAT is contrary to and in violation of Article 286 of the Constitution of India and Section 7 of the Delhi Value Added Tax Act, 2004?

It may be clarified that the reference to Section 9 of the Income Tax Act, 1961 in the first question appears to be a mistake. Reference actually is to Section 9 of the Delhi Value Added Tax Act, 2004. The question may be read as corrected.

9. Section 3 of the Act is the charging section. It imposes tax on every dealer, who is registered or required to be registered under the Act. The tax is calculated in accordance with the provisions of the Act. The rates at which the tax is to be paid are specified in Section 4 of the Act. Section 3(2) provides that every dealer shall be liable to pay tax at the rates specified in Section 4 of the Act on every sale of goods

effected by him as a registered dealer or from the date on which he was required to be registered under the Act. The other sub-sections of Section 3 of the Act are not relevant for our purpose. Section 4 of the Act prescribes the rates of tax and Section 5 defines “taxable turnover”. Section 6 of the Act provides for sale that is exempt from tax. It is necessary to reproduce Section 6 for the purpose of the present appeals. It is as follows: -

“6. Sale exempt from tax

- (1) The sale of goods listed in the First Schedule shall be exempt from tax subject to the conditions and exceptions set out therein.*
- (2) The dealers or class of dealers specified in the Fifth Schedule shall be exempt from payment of tax on all sales of goods effected by them subject to such conditions as may be prescribed.*
- (3) Where a dealer sells capital goods which he has used since the time of purchase exclusively for purposes other than making non-taxed sale of goods, and has not claimed a tax credit in respect of such capital goods under section 9, the sale of such capital goods shall be exempt from tax.”*

10. Section 7 of the Act provides for certain sales not liable to tax. Since this section is also relevant for our purpose, it is re-produced below: -

“7. Certain sales not liable to tax

Nothing contained in this Act or the rules made thereunder shall be deemed to impose or authorise the imposition of tax on any sale of goods when such sale takes place -

*(a) in the course of inter-state trade or commerce;
or*

(b) outside Delhi; or

(c) in the course of import of the goods into or export of the goods out of, the territory of India.

(d) in accordance with the notification issued by the Central Government in exercise of its powers under section 3 of the Foreign Aircraft (Exemption from Taxes and Duties on Fuel) Act, 2002 (36 of 2002), no tax shall be levied on sales of the fuel and lubricants which are filled into receptacles forming part of any aircraft registered in a country other than India, if-

(i) the said country is a party to the Convention on International and Civil Aviation, 1944; and

(ii) the said country has entered into an Air Services agreement with India; and

(iii) the aircraft is operating on a scheduled or non-scheduled service to or from India.]

Explanation. - Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 (74 of 1956) shall apply for determining whether or not a particular sale takes

place in the manner indicated in clause (a), clause (b) or clause (c) of this section.”

11. Section 9 provides for tax credit to be given to a dealer for purchases effected during the tax period. Since this section is also relevant for our purpose, the same is reproduced below to the extent relevant: -

“9. Tax credit

(1) 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.

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(7) For the removal of doubt, no tax credit shall be allowed for -

- (a) the purchase of goods from an unregistered dealer;*
- (b) the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule.*
- (c) any purchase of consumables or of capital goods where 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.”*

12. A conjoint and harmonious reading of the above provisions discloses the following position. A dealer is liable to pay tax at the prescribed rates on every sale of goods effected by him. There are certain sales, which are liable to tax but have been granted exemption from tax and these goods are listed in the First Schedule to the Act. There are certain sales which are not liable to tax at all under the Act and these are the sales mentioned in Section 7. There is a difference between sales that are not liable to tax and sales which are liable to tax, but which have been given exemption from the levy of the tax subject to the conditions and exceptions set out in the First Schedule. A dealer is entitled to tax credit under Section 9(1) in respect of the purchases made by him during the tax period, which are used by him, directly or indirectly for the purpose of making sales which are liable to tax under Section 3 of the Act and also to effect sales which are not liable

to tax under Section 7. Section 3, which is the charging section, imposes tax on every dealer in respect of every sale of goods effected by him. Some of the goods which are listed in the First Schedule to the Act are granted exemption from the levy of sales tax under Section 6(1). The sales which are referred to in Section 7 are not liable to tax at all. Such sales are outside the purview of the Act and they cannot be brought under the purview of the Act at all. Section 9, however, allows tax credit in respect of inputs used to effect both types of sales, that is, sales which are liable to tax and which are not liable to tax. Ex-hypothesi, sales which are merely granted exemption under the provisions of Section 6(1) of the Act do not enjoy the benefit of input tax credit under Section 9(1) of the Act. The First Schedule to the Act lists several goods, the sale of which are merely exempted from tax subject to the conditions and exceptions set out therein. Therefore, Section 9(7)(b) of the Act, when it says that no tax credit shall be allowed for the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule, refers only to the sale of exempted goods within the meaning of Section 6(1) of the Act and does not refer to sales which are not liable to tax at all by virtue of the provisions of Section 7.

13. Section 7, as we have already noted, refers to sales not liable to tax. In the present case, it is not in dispute that the packed rice is exported by the dealer out of the territory of India. Clause (c) of Section 7 of the Act provides that any sale which takes place in the course of import of the goods into or export of the goods out of the territory of

India will not be liable to tax under the Act. The opening words of Section 7 are important and they make the provisions of the Act and the rules inapplicable to sales in the course of import of the goods into or export of the goods out of the territory of India. The result is that such sales are outside the purview of the Act. Tax credit under Section 9(1)(b) is, however, available in the case of goods purchased and used by a dealer, directly or indirectly, for the purpose of making sale of goods in the course of export of the goods out of India. The First Schedule to the Act cannot, in the very nature of things, apply to sales in the course of export out of India, which are not liable to tax at all under the Act. If this is the correct legal position discernible from a conjoint and harmonious reading of the provisions of the Act referred to above, it follows that the appellant cannot be denied input tax credit in respect of purchase of packing material which are used by him for the purposes of exporting rice out of India which falls outside the purview of the Act because it represents sale in the course of export of the goods out of India. It is not in dispute that the specifications for the packing material were provided by the purchaser of the rice from the appellant. The rice cannot, therefore, be sent in an unpacked condition. It has been so pleaded by the appellant before the Joint Commissioner and the said plea has not been found incorrect or false. Therefore, it cannot be disputed that the packing materials purchased by the appellant are used for packing rice which are exported out of India. In such a factual situation, the VAT authorities were not justified or correct in law in holding that the appellant-dealer

was not entitled to the tax credit in respect of turnover of purchases of the packing material in the tax period under dispute.

14. It is now necessary to refer to Article 286(1) of the Constitution of India. It says that no law of a State shall impose, or authorize the imposition of tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State and (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Clause (2) enables Parliament to make law formulating the principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). Therefore, a State Government is not competent to impose a tax on the sale or purchase of goods which takes place in the course of import of the goods into or export of the goods out of, the territory of India. When the Legislature of a State is thus not competent to levy tax in the above circumstances, it hardly needs mention that such purchases or sales are not liable to tax under the VAT Act. It is not a case of mere exemption from tax granted by the Act in accordance with Section 6(1) of the Act. There is a constitutional embargo. “Taxes on imports and exports”, referred to in Entry 92A of List I of the Seventh Schedule to the Constitution, are exclusively Union subjects. Article 286 is intended to ensure that the sales tax imposed by the State does not interfere with imports and inter-state trade and commerce, which are matters of national concern and the taxation of which is beyond the competence of the State. Section 7(c) of the Act is in conformity with Article 286(1) of the Constitution of India. It is not a case of a

mere exemption granted under Section 6(1) of the Act in accordance with the conditions and exceptions set out in the First Schedule to the Act. Sales in the course of export do not, and because of the constitutional mandate cannot, fall under the charging Section 3 of the Act. Therefore, Section 9(7)(b) of the Act cannot apply to such sales. This clause applies only to purchase of goods which are exclusively used for the manufacture, processing or packing of the goods specified in the First Schedule which are liable to tax, if sold, but are not taxed because of the exemption granted to the sale of these goods under Section 6(1). It is to be noted that the same goods which are mentioned in the First Schedule to the Act can, depending upon the legal and factual situation, be either exempt from tax or be not liable to tax at all. Take for example the present case itself. The appellant dealer is not liable to pay VAT on the sale of rice because the sale is in the course of export out of India. The same rice, if it is sold within the State, would become liable to tax, though no tax would be payable because of the exemption granted under Section 6(1) of the Act. It is competent for the State Legislature to make amendment or modify the entries in the First Schedule to the Act to either withdraw the exemption granted to the goods or add more items that would be exempt from tax or change the conditions and exceptions set out therein, subject to which the exemption is granted. Such modifications or amendments cannot, however, be made to Section 7(c) of the Act by the State Government to provide for levy of tax on the sale of the goods, even though they are mentioned in the First

Schedule to the Act, if they are made in the course of export of the goods out of the territory of India, because of Article 286(1).

15. For the above reasons we hold that the appellant dealer is entitled to the input tax credit on the purchase of packing material by virtue of Section 9(1)(b) of the Act. We accordingly answer the substantial questions of law in the affirmative and allow the appeals with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

FEBRUARY 23, 2012

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