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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 27.09.2012

PRONOUNCED ON: 17.01.2013

- + **ST.APPL. 4/2011**
COMMISSIONER OF VALUE ADDED TAX DELHI Petitioner
Versus
M/S. CARZONRENT INDIA PVT LTD Respondent
- + **ST.APPL. 5/2011**
COMMISSIONER VALUE ADDED TAX Petitioner
Versus
M/S. CARZONRENT INDIA PVT LTD Respondent
- + **ST.APPL. 6/2011**
COMMISSIONER VALUE ADDED TAX Petitioner
Versus
M/S. CARZONRENT INDIA PVT LTD Respondent
- + **ST.APPL. 7/2011, C.M. APPL. 10492/2011 & Cross Appeal 13377/2012**
COMMISSIONER VALUE ADDED TAX Petitioner
Versus
M/S. A L D AUTOMATIVE PVT LTD Respondent
- + **ST.APPL. 8/2011**
COMMISSIONER OF VALUE ADDED TAX Petitioner
Versus

M/S. L & T FINANCE LTD

..... Respondent

+

ST.APPL. 9/2011

COMMISSIONER VALUE ADDED TAX

..... Petitioner

Versus

M/S. DIGITECH SYSTEMS

..... Respondent

+

ST.APPL. 16/2011

CARZONRENT (INDIA) PVT LTD

..... Petitioner

Versus

COMMISSIONER OF VALUE ADDED TAX

..... Respondent

Through: Sh. Parag. P. Tripathi, Sr. Advocate with
Ms. Avnish Ahlawat and Ms. Monisha Handa,
Advocates, for VAT.

Through : Ms. Prem Lata Bansal, Sr. Advocate
with Sh. Ruchir Bhatia and Sh. Arnav Kumar,
Advocates.

Sh. Vineet Bhatia, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. The revenue assails, in Appeal Nos. STA 8-9/2011, the impugned order dated 14.12.1010 of the Appellate Tribunal Value Added Tax (the Tribunal, in short). Connected with these appeals are STA 4-6 of 2011 and STA 7 of 2011 where the revenue challenges the impugned orders dated 21.1.2011 and 27.1.2011 respectively, whereby the Tribunal had followed its

earlier order (dated 14.12.2011). In STA 16 of 2011, the assessee-dealer challenges the Tribunal's order dated 21.1.2011 to the extent that it holds that the dealer will avail input tax credit proportionately in accordance with Section 9(1) and Section 12(4) of the Delhi Value Added Tax Act, 2004 (in short, "the DVAT Act") read with Rule 4 of the Delhi Value Added Tax Rules, 2005 (hereafter, "the Rules"). Cross Objection No.13377/2012 (in STA No.7/2011) has also been filed by the assessee seeking the same relief.

2. This Court had framed questions "a"- "b" in the revenue's appeals, and question "c" in the assessee's appeal:

- a. *"Are the respondents/dealers entitled to claim input credit in terms of Section 9, regard being had to Entry (i) of Seventh Schedule to the Delhi Value Added Tax, 2004.*
- b. *In any event, are the respondents/dealers at all entitled to claim input tax credit, having regard to Section 9 of the Delhi Value Added Tax, 2004."*
- c. *Whether the Appellate Tribunal – VAT grossly erred in law in holding that a leasing company shall avail the Input Credit available to them on proportionate basis?"*

3. The facts are that assessee/dealers (hereafter "dealers") are engaged in the business of leasing cars/motor vehicles for which purpose they entered into contracts. Under the lease agreements, they are transfer the right to use, control and possession of the vehicles to their customers. Their claims for refund of input tax credit (ITC) under Section 9 of the Delhi Value Added Tax Act, 2004 (in short, "the Act") on cars used for making taxable sales were rejected; the objection hearing authority under the DVAT Act rejected their claims. They ultimately appealed to the Tribunal, which by the impugned orders set aside the orders dismissing the objections claiming

refund of ITC, and remanded the appeals back to concerned authority with a direction to decide the objections afresh in accordance with its (the Tribunal's) order dated 14.12.2010 (one of the impugned orders) in Appeal Nos. 562/ATVAT/08-09 and 520/ATVAT/08-09. Act.

4. The revenue contended before this Court that the dealers involved in the present appeals are not entitled to ITC on goods purchased, for making a sale. It was contended that motor vehicles are non-creditable goods in respect of which no tax credit can be availed. In support, counsel relied on Section 9(2)(b) read with Serial No 1 of the List of Non-Creditable Goods as provided in the Seventh Schedule to the Act. It was submitted that as motor vehicles fell within the ambit of Sl. No. 1, and did not fall within Sl. No. 2, it is ineligible for input tax credit. It was also argued that the leasing activity carried on by the assesseees does not qualify as "resale in unmodified form"; as a result, Sl. No. 2 of the list in the Seventh Schedule is not attracted. Counsel relied on the definition of "form" from The Law Lexicon (1982 Edn., P. Ramanatha Iyer) to contend that the visible aspect is important, and stands changed during use of a motor vehicle.

5. It was argued by Mr. Parag Tripathi, learned Senior Counsel for the revenue that in terms of Section 2(1)(zc)(vi) "sale price" includes, in relation to transfer of the right to use goods for any purpose, valuable consideration or hiring charges received or receivable for such transfer. Therefore, "purchase price" (which is to be construed accordingly) for the purpose of Section 9(1) would include just the hiring charges paid or payable for the acquisition of the right to use. The purchase price, therefore, does not include the purchase price of the goods involved in such transfer; since the

amount spent on the purchase of goods is not purchase price to arrive at the turnover of purchases, it is not eligible for input tax credit.

6. It was submitted that the object of providing input credit, under the DVAT is to provide relief where the underlying transaction of sale by the dealer comprehends some form of transformation, of the goods. In other words, if goods are not sold in modified form, there is no question of input credit. Reliance was placed on Section 105(2) of the Act to contend that under the Act, ITC is not available on goods used for the purpose of transfer, but is only available for purchases acquired in the form of a right. It was contended that this provision does not allow benefit of ITC in respect of goods transferred under right to use basis, rather it restricts the same.

7. Counsel for the dealers defended the impugned orders. It was argued that the Tribunal was correct in holding that cars/motor vehicles being dealt with by the dealers in the present appeals were entitled to claim credit, and were not non-creditable goods, as they fall within the exception, i.e. Sr. No. 2 of the List. It was contended that the word “resale” appearing in Serial No. 2,- which embodies the exception to the rule specified in Serial No. 1- has to be construed according to the definition of the word “sale” in section 2(1)(zc); that includes transfer of the right to use goods too. Therefore, Section 9(2)(b) is not attracted, and ITC would be available in respect of the leasing activity carried on by the assessee/dealers. Learned Senior counsel also relied on definition of “turnover of purchases” provided under section 2(zl).

8. As regards the finding in the impugned order- dated 14.12.2010- that ITC will be availed “*in accordance with Section 9(1) and Section 12(4) r/w Rule 4 of the Act proportionately*”, counsel for the assessee-dealers, in challenge, contended that such a concept was not envisaged under the Act or the Rules; that it was a creation of the Tribunal. It was argued that the Tribunal’s observation that eligibility and availment of ITC are two different concepts under the Act was erroneous as the Act nowhere draws such a distinction; when the legislature intended to make a distinction it would have expressly done so, like in the case of capital goods where a special provision has been enacted under Section 9(9) devising a complete mechanism.

9. It was argued that Rule 4(b) of the Rules was applicable only in cases of purchases occurring by way of transfer of a right to use goods; and that the Tribunal erred in invoking Rule 4(b). Consequently, when a dealer purchases an asset by way of acquiring the right to use the goods, he shall be entitled to only the tax credit which he has paid to the seller. Furthermore, urged counsel that in cases of outright purchases, the “turnover of purchase” would be the aggregate amount of purchase price paid or payable in a tax period.

10. The revenue, in response to the dealer’s arguments in its appeal, defended the proportionately rule mandated by the Tribunal by placing reliance on the language of Section 9(1). Counsel underlined that this provision uses the expression “*to the extent of proportion of the goods which have been put to sale*” which manifests the proportionality rule. In spirit of this principle in section 9- and pursuant to Section 12, which empowers the government to prescribe the time at which a dealer shall declare turnover of

purchases arising for a class of transactions, Rule 4(b) of the Rules again refers to the proportion of the sale price due and payable during the relevant tax period. Counsel further contended that the proportionality principle runs through the scheme of the Act. In this regard, he pointed out section 9(4), and Rule 6 made pursuant thereto -which prescribes that where purchased goods are partly used for the purposes of making sales under Section 9(1), and partly for other purposes, then tax credit is to be availed proportionately.

Re Question Nos 1 and 2: Are the cars in which the assessee-dealers deal non-creditable?

11. Before proceeding with the analysis of the rival contentions, it is relevant to note the Tribunal's reasoning on this issue from its impugned order dated 14.12.2010, which was followed in the later impugned orders. Its observations and findings are extracted as under:

“23. A careful perusal of the definition of word “sale” as given in section 2(1)(zc) shows that this definition uses the word “and includes”. Settled law is that when a definition clause uses the word “includes”, it extends the definition of that word to that extent. When the word “include” is used in words or phrases, it has to be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include. Thus by using the word “includes” the definition of the word “sale” gets a wider meaning. In this regard reference can be made to the judgments reported as Hamdard (Wakf) v. Dy. Labout Commissioner: (2007) 5 SCC 281 and Commercial Taxation Officer Udaipur v. Rajasthan Taxchem Ltd.: (2007) 3 SCC 124. Thus when transfer of goods on hire purchase or other system of payment of instalments covered by cl. (vi) of Section 2(1)(zc) is sale then the word “sales” occurring in

section 9(1)(A) of the Act cannot be understood as covering only normal sales and not sales other than normal sales i.e. deemed sales. It is significant to note that the words used in section 9(1) of the Act are “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”. By using the words “directly or indirectly”, the legislature has made its intention very clear that it is not distinguishing between normal sales or deemed sales so far as the provision contained in sec. 9 is concerned.

24... In our considered view appellants, will have to satisfy all the clauses of section 9(2) for claiming input tax credit. Clause (b) disallows input tax credit for the purchase of non-creditable goods, as contained in Schedule VII to the Act. A careful perusal of Schedule VII shows the restriction to claim input tax credit is on ‘goods’ other than tradable goods. Schedule VII restricts the claim of input tax credit on the

26. The term “resale” has not been defined in the Act. However, common parlance, it means to sell the purchased goods in unmodified form i.e. the contrition in which these goods were at the time of purchase. In a lease transaction, a vehicle or any other commercial goods after purchase are subjected to ‘sale’ by way of transfer of right to use and so there can be no doubt that leasing of goods means nothing but “resale” in unmodified form and so goods cannot be treated as non-creditable goods for leasing activity. Thus though nomenclature wise, leased goods (such as vehicles, equipment and computers) are in the nature of capital goods, which are described in the definition of “capital goods”, yet these cannot be considered as “capital goods” for the purposes of leasing activity because these goods are not “used” by the applicant in the process of trade or manufacture or works contract, which is an essential condition of the definition. Therefore, for the purposes of leasing under the Act, these goods are “trading goods” so far as the lessor is concerned; and might be termed as “capital goods” in the hands of the lessee in case he uses these goods in the process of trade or manufacture or works contract. We are fortified in our

conclusion from the intention of the legislature expressed through sec. 105 of the Act...

27. A careful perusal of section 105(2) (b) clearly shows that input tax credit has been allowed also the lessee, who acquires transfer of right to use goods, which is nothing but a deemed purchase. Thus it is clear that this Act does not distinguish between a 'purchaser' and a deemed 'purchaser'. When it is so, then to distinguish between a 'sale' and a 'deemed sale' would amount to taking a view not warranted by the Act. Further to allow the input tax credit to the lessee by virtue of section 105(2)(b), who is merely holding lawful possession without any title; and to restrict to the leasing company who is normal purchaser of the goods, will lead to unintended consequences.

32. In our considered view what appears from the reasoning of Ld. Commissioner is that her conception of 'deemed sale' is only for the purpose of charging VAT on transactions which are not sales in the traditional sense of the word 'sale' and the purpose of creating 'deemed sale' comes to end after collecting VAT. If it is so then the point arises for consideration is whether a transaction being other than a normal sale is deemed as a sale by virtue of 46th Amendment to the Constitution of India only for the purpose of levy of VAT and after this levy, this fiction comes to an end. In this regard it is useful to refer to a judgment reported as the Additional Income Officer, Circle 1, Salem & Another vs. E. Alfred : AIR 1962 SC 663. Facts of this case were that an assessee died intestate during his year of account. Legal representative of the deceased assessee was assessed to tax after notice u/s 24-B (2) of the Income Tax Act as if this LR was the assessee. This LR made a default in payment of tax and so a penalty was imposed upon him u/s 45(1) of the Act. The matter came up before the Apex Court. It was argued before Their Lordships that after the assessment was made on the LR, the legal fiction came to end and thereafter this LR remained a mere debtor to the department and therefore, penalty could not be imposed upon him u/s 46(1). Dealing with these arguments, Their Lordships held that when a thing is deemed to be something else, it is to be treated as if it is

that thing, though, in fact it is not. It is in this sense that legal representative becomes an assessee by the fiction and it is this fiction, which has to be fully worked out without allowing the mind to boggle. In view of the principle of law laid down in this judgment, there can be no hesitation in holding that a transaction which in fact is not a sale, being not a traditional sale, but is a sale as it is so deemed by virtue of 46th Amendment of the Constitution of India which has been incorporated in the definition of word “sale” in cl. (i) to cl. (vii) of section 2(1)(zc) of the Act, is a deemed sale not for limited purpose as conceived by the Ld. Commissioner but for all the purposes that are available to a transaction constituting a normal sale.

12. The VAT Act, 2004, by virtue of Section 3(1) compels all dealers registered- or obligated to be registered under the Act- to pay tax in the manner provided, under its provisions. Each dealer (Ref. Section 3(2)) has to pay tax “*at the rates specified in Section 4*” and in respect of “*every sale of goods effected by him*” as a registered dealer on any date from which he was required to be registered. Section 9 entitles tax credit to a registered dealer under the Act in respect of turn-over of purchases granted during the tax period when the purchase earned in the course of his activities as a dealer of the goods are to be used by him directly or indirectly “*for making sales liable to tax under Section 3*” or “*for making sales or which are not liable to tax under Section 7.*” Section 9(1) enables dealers to claim input tax credit. During the assessment years, in respect of which appeals have been presented, section 9(1) read as follows:

“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 purposes 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.”

This provision was amended by the DVAT (Amendment) Act, 2009 w.e.f. 1.4.2010 and the expression “where the purchase arises” was substituted by “to the extent of proportion of the goods which have been put to sale”. By DVAT (Second Amendment) Act, 2011, sub-section (1) was again amended w.e.f. 1.10.2011; this time the original provision being restored. Thus, the provision, as it exists now uses the expression “where the purchase arises” instead of “to the extent of proportion of the goods which have been put to sale”.

Section 9(2) lists situations when input tax credit cannot be allowed. It reads as follows:

“(a) in the case of the purchase of goods for goods purchased from a person who is not a registered dealer;

(b) for the purchase of non-creditable goods;

(c) for the purchase of goods which are to be incorporated into the structure of a building owned or occupied by the person;

Explanation.- This sub-section does not prevent a tax credit arising for goods and building materials that are purchased either for the purpose of re-sale in an unmodified form, or for the performance of a works contract on a building owned or occupied by another;

(d) for goods purchased from a dealer who has elected to pay tax under section 16 of this Act;

(e) for goods purchased from a casual trader;

(f) to the dealers or class of dealers specified in the Fifth Schedule except the entry no.1 of the said Schedule
(g) to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period.”

Non-creditable goods are listed in Schedule VII. The relevant entry from the list provided in Schedule VII reads as:

“1. Subject to clauses 2 and 3 of this Schedule, the following goods shall be “non-creditable goods” for the purposes of this Act:

i. All automobiles including commercial vehicles, and two and three wheelers and spares parts for repairs and maintenance and tyres and tubes thereof.

2. Any entry in clause 1 other than item (ii), (xiii), (xiv) and (xv) shall not be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of resale 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.” (emphasis supplied)

13. The goods in which the assessee-dealers deal are motor vehicles falling within Sr. No. 1 of the above-noted list. The question that therefore, arises is whether the leasing activity of motor vehicles as carried out by the assessee-dealers constitutes “resale in an unmodified form”. The term “sale” is defined in section 2(1)(zc) as:

“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-

(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;”

14. The term “re-sale” has not been defined. The dictionary meaning (of resale. Dictionary.com. *Collins English Dictionary - Complete & Unabridged 10th Edition*; Harper Collins Publishers -accessed on December 06, 2012. <http://dictionary.reference.com/browse/resale>) means the selling again of something purchased. It is therefore, clear that for the purposes of Section 2(1)(zc), the meaning of “sale” includes the transfer of the right to use goods; this includes leasing activity of the assessee-dealers. It clearly falls within the definition of “sale” because what is transferred is the right to use the car or motor vehicle- albeit for a limited duration. The argument of the revenue that “sale” here and “re-sale” mean different kinds of transactions, qualitatively, is unpersuasive. The statute here used the extended definition of “sale” which comprehends the right to lease the car. Absent indication to the contrary- in the statute, either through express provisions or by necessary implication, it is not open to the court to artificially divide the concept. It was held, in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* (1952 AC 109) that:

" if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is

emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs ".

15. In the present case, once it is held that the leasing of a car results in transfer of its right to use, the provisions of Section 9(1) would apply, because the cars were purchased by him, for the purpose of making sales (within the extended definition, i.e as leasing – or selling the right to use). The concept of right to use would cover a wide spectrum of transactions; most certainly, a lease of the article, for a limited period, would be comprehended within the meaning of “right to use”. Therefore, the Court rejects the first submission of the revenue, and holds that Question No. 1 has to be answered in favour of the assessee, and against the revenue.

16. The question next to be considered is whether the Act makes a distinction for the purposes of section 9(2), and Sl. No. 2 of List of Non-Creditable Goods as provided in Schedule VII, between “deemed sale”- stipulated under Section 2(1)(zc) (i)-(vii) and sale as explained by the main body of the definition. This Court is of the opinion that there can be no doubt that “resale” should be construed according to the definition of “sale” under the Act which includes the transfer of right to use goods. The fiction created in defining ‘sale’ as including transactions which otherwise, in the ordinary sense, would not have been but for the deeming provision, must apply as respect the entire Act, its Schedules, and the Rules made under the Act. The fiction has been created with respect to the term ‘sale’, and in our opinion, would definitely extend correspondingly to the word ‘resale’ as

well. This, in our opinion, is a logical extension of the principle that “*where the draftsmen uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning*” (Ref. *Central Bank of India v. Ravindra*, AIR 2001 SC 3095; pg. 310, *Principles of Statutory Interpretation*, G.P. Singh, Tenth Edition.) The reasoning of the Tribunal, and its reliance on the *Hamdard* case (supra) is upheld. This Court is also of the opinion that according to settled authorities when a legal fiction is created, the Court while interpreting it must enquire the purpose for it is so created (*State of Travancore v. Shanmugha Vilas Cashewnut Factory*, AIR 1953 SC 333). After ascertaining the purpose, “*full effect must be given to the statutory fiction and it should be carried to its logical conclusion*” and to that end “*it would be proper and even necessary to assume all those facts on which alone the fiction can operate.*” (*State of Bombay v. Pandurang Vinayak*, AIR 1953 SC 244 and *C.I.T., Delhi v. S. Teja Singh*, AIR 1959 SC 352).

17. Thus, leasing activity carried on by the assesseees does amount to resale. The remaining part of the question would turn upon the construction of the term “unmodified form”. The meaning of form from the Law Lexicon (supra) that the Revenue’s counsel relied on is:

“The word ‘form’ connotes a visible aspect such as shape or mode in which a thing exists or manifests itself, species, kind or variety. Rice in all forms would mean all kinds or variety of rice by species of rice, such as broken rice, kichidi rice, pichodi rice or rice, flour, etc. In this view of the matter there is no justification in holding that rice’ in item No. 1 of the exempted articles in Schedule I, Hyderabad General Sales Tax be interpreted as meaning cooked rice or biryani or pulao.

(Kayani & Co. v. Sales Tax Commissioner, AIR 1953 Hyd 252 at 253)

18. The following dictionary meanings of ‘form’ are also useful:

“The outer shape or structure of something, as distinguished from its substance or matter” - The Black’s Law Dictionary (7th Edn., Bryan A. Garner)

“1. A way in which a thing exists or appears; 2. A type or variety of something.” – Concise Oxford English Dictionary (10th Edn., Judy Pearsall)

“1. The shape or configuration of something as distinct from its colour, texture, etc; 2. The particular mode, appearance, etc in which a thing or person manifests itself: water in the form of ice” – [Dictionary.com](http://dictionary.reference.com/browse/form?s=t), sourced from <http://dictionary.reference.com/browse/form?s=t> on 10.12.2012 at 6 PM.

19. Having considered the meaning of the term ‘form’, this Court is of the view that in the context of applicability of value added tax on goods, ‘unmodified form’ would have to be mean that the goods remain in their original state. Mere change/modification by ordinary wear and tear would not amount to modification in form. Generally speaking, in our opinion, form would remain unmodified as long as the basic functionality, structure, and configuration remain unchanged. The revenue’s position here is that input credit can be availed only if the goods undergo some physical change or transformation, and the concept of modification eliminates a transaction which amounts to “right to use”. In other words, any sale or deemed resale of a product, which does not undergo some manufacture or process change, cannot claim input tax credit. A complete reading of the relevant entries of the seventh schedule in this case would disclose that while facially, motor

vehicles, *per se* are disentitled to input credit, significantly that entry (Sl. No.1) is subject to Entry No. 2. Entry 1 (i) (motor vehicles) is thus, subject to Entry 2, which, in its controlling part says “...*Any entry in clause 1 other than item (ii), (xiii), (xiv) and (xv) shall not be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of resale in an unmodified form.*” Therefore, an article purchased by a registered dealer cannot be denied input tax credit-

(i) unless it falls within Item (ii), (xiv) and (xv) – of Entry 1- (in which case, tax credit is denied). As a corollary, all other articles – *including* motor vehicles, which fall in Item (i), are entitled to tax credit;

(ii) The purchasing dealers’ acquisition of an article, for resale in an unmodified form does not disentitle input tax credit for it unless it falls within Item (ii),(xiv) and (xv).

20. Therefore, the articles in which the assessee deals with fall within the provisions of Sr. No 2 and are thus creditable goods. As a result of this discussion, it is held that the view taken by the Tribunal in favour of the assessee is correct; no interference is called for in regard to the impugned orders. Question Nos. (a) and (b) are answered against the revenue and in favour of the assessee dealer accordingly.

Question No. (c)

21. The assessee contended that the impugned orders of the Tribunal, to the extent they hold that input credit can be availed only in proportion to the tax paid, is not borne out by the statute, and there is no express limitation in

that regard in Section 9, warranting such interpretation. Reliance was placed upon *Vyasa Bank v. Commissioner of Income Tax*, (2008) 17 VST 122 (Ori) to argue that when assessee leased out goods, it amounted to “deemed sale”. The Court held that no tax can be imposed by way of subsequent lease rent in respect of the same goods under the Orissa Sales Tax Act; reliance was also placed on *I.T. C. Classic Finance and Services v. Commissioner of Commercial Taxes*, 1995 (1) ALT 563 and *Bharat Sanchar Nigam Ltd. and Anr. v. Union of India (UOI) and Ors.*, AIR 2006 SC 1383.

22. This Court in *Jaishree Exports Vs. Commissioner Trade & Taxes Department* (STA Nos.11-12/2011, decided on 23-2-2012) outlined the general scheme of the provisions of the DVAT Act, and the dealers’ rights and obligations in filing returns and claiming credit, in the following terms:

“11. 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.”

23. The relevant provisions of the Act are also reproduced hereunder:

Definitions:

(r) “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;

(zd) “sale price” means the amount paid or payable as valuable consideration for any sale,

including-

(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;

(ii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;

(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;

(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;

(v) amount of duties levied or leviable on the goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962), or the Punjab Excise Act, 1914 (1 of 1914) as extended to the National Capital Territory of Delhi whether such duties are payable by the seller or any other person; and

(vi) amount received or receivable by the seller by way of deposit (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental to or ancillary to the sale of goods;

(vii) in relation to works contract means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract; less -

(a) any sum allowed as discount which goes to reduce the sale price according to the practice, normally, prevailing in trade;

(b) the cost of freight or delivery or the cost of installation in cases where such cost is separately charged;

and the words “purchase price” with all their grammatical variations and cognate expressions, shall be construed accordingly;

*[***]*

[PROVIDED that an amount equal to the increase in the price of petrol (including the duties and levies charged thereon by the Central Government) taking effect from the 3rd June, 2012 shall not form part of the

sale price of petrol sold on or after the date of the commencement of the Delhi Value Added Tax (Third Amendment) Act, 2012 till such date as the Government may, by notification in the official Gazette, direct or if the price of petrol falls below the sale price prior to 3rd June, 2012, whichever is earlier:

PROVIDED FURTHER that if the price of petrol further increases from the level of price as on 3rd June, 2012, the aforesaid proviso shall not have any effect on such further increase:

PROVIDED ALSO that if the price of petrol declines but remains above the price prevailing prior to 3rd June, 2012, the aforesaid proviso shall have effect to the extent to the remaining increase:

PROVIDED ALSO that the aforesaid proviso shall not take effect till the benefit is passed on to the consumers.]

Explanation.- A dealer's sale price always includes the tax payable by it on making the sale, if any;

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(zl) "turnover of purchases" means the aggregate of the amounts of purchase price paid or payable by a person in any tax period [excluding] any input tax;

(zm) "turnover" means the aggregate of the amounts of sale price received or receivable by the person in any tax period, reduced by any tax for which the person is liable under Section 3 of this Act;

(zn) "value of goods" means the fair market value of the goods at that time including insurance charges, excise duties, countervailing duties, tax paid or payable under the Central Sales Tax Act, 1956 (74 of 1956) in respect of the sale, transport charges, freight charges and all other charges incidental to the transaction of the goods.

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Section 9

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(3) The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods shall be the amount of input tax arising in the tax period reduced in the manner described in sub-sections [(4) , (6) and (10)] of this section.

(4) Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately.

(5) The method used by a dealer to determine the extent to which the goods are used in the manner specified in sub-section (4) of this section, shall be fair and reasonable in the circumstances:

PROVIDED that the Commissioner may -

(a) after giving reasons in writing, reject the method adopted by the dealer and calculate the amount of tax credit; and

(b) prescribe methods for calculating the amount of tax credit or the amount of any adjustment or reduction of a tax credit in certain instances.

Explanation.- A person may object in the manner referred to in section 74 of this Act to a decision of the Commissioner to reject a method of calculating a tax credit.

(6) [Notwithstanding anything contained to the contrary in sub-section (1), where –]

(a) a dealer has purchased goods (other than capital goods) for which a tax credit arises under sub-section (1) of this section;

(b) the goods or goods manufactured out of such goods are to be exported from Delhi by way of transfer to a –

(i) non-resident consignment agent; or

(ii) non-resident branch of the dealer; and

(c) the transfer will not be by way of a sale made in Delhi;

the amount of the tax credit shall be reduced by the prescribed percentage.

(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.]

(8) The tax credit may be claimed by a dealer only if he holds a tax invoice at the time the prescribed return for the tax period is furnished.

(9)(a) Notwithstanding anything contained to the contrary in sub-sections (1) and (3) and subject to sub-section (2), tax credit in respect of capital goods shall be allowed as follows: -

(i) 1/3rd of the input tax on such capital goods arising in the tax period, in the same tax period;

(ii) balance 2/3rd of such input tax, in equal proportions in two immediately successive financial years :

PROVIDED that, where the dealer sells such capital goods, the dealer shall be allowed as tax credit, the

balance amount of the input tax, if any, in respect of such capital goods as has not been earlier availed as tax credit, such tax credit shall be allowed in the tax period in which such capital goods are sold and only after adjusting the output tax payable by him:

[PROVIDED FURTHER that where the dealer transfers such capital goods from Delhi otherwise than by way of sale before the expiry of three years from the date of purchase, he shall, after claiming the balance amount of input tax, if any, not availed earlier in respect of such capital goods, reduce the input tax credit by the prescribed percentage of the purchase price of such capital goods and make adjustments in the input tax credit in the tax period in which these capital goods are so transferred:

PROVIDED ALSO that where a dealer has purchased capital goods and the capital goods are to be used partly for the purpose of making sales referred to in sub-section (1) of this section and partly for other purposes, the amount of tax credit shall be reduced proportionately:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed if such capital goods are used exclusively for the purpose of making sale of exempted goods specified in the first schedule:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed on that part of the value of such capital goods which represents the amount of input tax on such capital goods, which the dealer claims as depreciation under section 32 of the Income Tax Act, 1961 (43 of 1961).

(b) If any capital goods in respect of which tax credit is allowed under clause (a) of this sub-section is transferred to any other person otherwise than by way of sale at the fair market value before the expiry of a period of five years from the date of purchase, the tax credit claimed in respect of such purchase shall be [reversed] in the tax period during which such transfer takes place.]

24. From the provisions reproduced above, it can be seen that:

- (a) input tax means *the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under the Act* (according to Section 2 (r);
- (b) sale price (Section 2 (zd) means *in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable*;
- (c) The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods is “*the amount of input tax arising in the tax period*” (Section 9 (3));
- (d) Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately.
- (e) Tax credit is inadmissible where the purchase of goods is from an unregistered dealer or where purchase of goods are for use exclusively for the manufacture, processing or packing of goods specified in the First Schedule (Section 9 (7));
- (f) Tax credit is admissible in a proportionate manner, only in respect of capital goods (Section 9 (9)).

25. The entire *regime* of principles for granting input credit is contained in Section 9 (3), (4), (6) and (10). The general principle that tax credit is admissible, in respect of the *input tax*, is stated in Section 9(3). Section 9(4) visualizes a situation where credit is partly admissible, in respect of some transactions. It states that input credit would be proportionate to the extent

the dealer is uses the goods for the purpose of sale under Section 9 (1). Clearly, the allusion to proportion does not refer to the nature or type of sale. Section 9 (6) says that where a dealer purchases goods that are entitled to credit, the amount of tax credit shall be reduced by a prescribed percentage. Section 9 (9) is by far the most important provision. It enacts the principle of proportionate grant of input credit, in point of time, but only in respect of capital goods. The omission to enact a similar provision in respect of different categories of sale transactions (such as, for instance, the sale of the right to use) on the one hand, and the enactment of Section 2 (zd) (iii) which specifically deals with sale price in respect of transfer of the right to use, coupled with Section 2 (zm) (“turnover”) – which states that turnover is aggregate of sale price, point to legislative deliberation that the theory of proportionality, of the kind, sought to be propounded by the revenue, - and accepted by the Tribunal, has no statutory basis. Once the legislature entitles the assessee – as in this case, to a certain benefit – of input credit, and puts in place a mechanism for working it out, which expressly provides one kind of proportional input credit, to a class of transactions, i.e. in relation to capital goods, it is not permissible for the Court to read into the statute another such proportional rule, without statutory sanction.

26. The reference to Section 12 (4) in this context, is unhelpful to the revenue, because that provision merely enables the Government to frame rules prescribing the time at which a dealer shall treat the (a) turnover; (b) turnover of purchases; and (c) adjustment of tax or adjustment to a tax credit; as arising for a class of transactions.

27. Next to be considered is the impact of Rule 4, which states as follows:

“4. When turnover arises in a tax period For the purposes of sub-section (4) of section 12, the amount of turnover or turnover of purchases arising in the tax period in the case of a sale or purchase occurring –

(a) by means of an instalment sale or hire purchase of goods made in the tax period, is the total amount of the sale price that will be due and payable under the agreement, including the amount of any option fee paid or that may be payable;

(b) by the transfer of a right to use goods, not being a hire purchase agreement or instalment sale agreement, is the proportion of the sale price that is due and payable during the relevant tax period;

(c) by means of transfer of property in goods (whether as goods or in some other form) under a works contract executed or under execution in the tax period, is the consideration received or receivable by the dealer for such transfer of property in goods (whether as goods or in some other form) during the relevant tax period.

28. This Court is of the opinion that while the Tribunal was correct in holding that the manner of grant of credit can be regulated by virtue of Section 12 (4), it fell into error in holding that Rule 4 regulated the grant of credit. Rule 4 merely visualizes three situations in respect of the method of calculating the *“amount of turnover or turnover of purchases arising in the tax period in the case of a sale or purchase occurring..”* Its reference, to sale by transfer of right to use, again is only in respect of the extent of sale for the concerned tax period. However, it does not support the conclusion that credit is admissible in respect of different periods, spreading over, as it were, the credit which a dealer can so enjoy for the duration of the agreement proportionately staggering payment of the amounts of input tax deductible towards credit. This appears to be an innovation suggested by the revenue, accepted somewhat readily by the Tribunal. When a dealer, who is involved

in leasing business, purchases cars, the point at which credit can be claimed is the tax period when he makes the purchase. The amount of tax – on the purchase so made- can be claimed as a credit, in the turnover which he is obliged to declare to the VAT authorities. That turnover would be the total lease rental received by him, for the corresponding tax period (when the purchase is made by him), as well as any other VATable transaction he may be engaged in. Thus, the question of spreading over his credit, proportionately or otherwise, is unfeasible and in any case not borne out by the VAT Act or the Rules. There is no warrant for such method. On the contrary, as held earlier, the presence of Section 9(9) and other clear terms is a pointer to the contrary. This question, therefore, is answered in favour of the assessee, and against the revenue.

29. It is further clarified that the interpretation that has been put to the relevant provisions while deciding Question no. (c) would remain same for both the versions of section 9(1). The original-unamended section 9(1) is applicable in the present case since first amendment [DVAT (Amendment) Act, 2009] came into effect from 1.4.2010, after the assessment years in all the appeals which are in adjudication before this Court. However, in this Court's opinion and for reasons already discussed above, the fate of these appeals would have been no different even if sub-clause (1) contained the words "to the extent of proportion of the goods which have been put to sale" instead of the expression "where the purchase arises".

30. In view of the above discussion, the revenue's appeals – STA Nos. 4-9/2011 fail and are dismissed. The appeal of the assessee, i.e. STA 16 and Cross Objection/Cross Appeal no 13377 of 2012 (presented by the assessee

in STA 7/2011) are allowed. In the circumstances, there shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 17, 2013