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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16th July 2015
Decided on: 4th August 2015

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ST.APPL 29/2013

SONY INDIA PVT. LTD Petitioner
Through: Mr. Tarun Gulati, Advocate with
Mr. Tushal Gupta, Mr. Kishore Kunal, Mr. Shashi
Mathews, Advocates.
versus

THE COMMISSIONER OF TRADE & TAXES Respondent
Through: Mr. Gautam Narayan, Addl. Standing
counsel.

WITH

ST.APPL 31/2013

SONY INDIA PVT LTD Petitioner
Through: Mr. Tarun Gulati, Advocate with
Mr. Tushal Gupta, Mr. Kishore Kunal, Mr. Shashi
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versus

THE COMMISSIONER OF TRADE & TAXES Respondent
Through: Mr. Gautam Narayan, Addl. Standing
Counsel.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

Dr. S. Muralidhar, J.

1. These two appeals are directed against a common order dated 9th April 2013 passed by the Appellate Tribunal ('AT'), Value Added Tax ('VAT').

ST Appeal No. 31 of 2103 pertains to the period 1st April 2005 to 7th August 2005 and ST Appeal No. 29 of 2103 pertains to the period 30th November 2005 to 31st December 2007.

2. At the hearing of these appeals on 30th July 2013 (along with ST Appeal No.30 of 2013 which pertained to the period 8th August 2005 to 9th November 2005) the Court framed the following questions of law:

i) Whether the Tribunal was right in holding that Digital Still Image Video camera is not classified and covered by Entry No.41 or 41A (Description 15)?

ii) Whether the Tribunal was right in holding that there was deemed waiver of the application for pre-determination and if the Tribunal was wrong, effect thereof?

iii) Whether the Tribunal was justified in upholding levy of penalty and interest?

3. The Court by the said order observed that it was not inclined to stay the demand raised as it would examine whether digital still image video cameras ('DSCs') could be regarded as information technology products.

Background Facts

4. The Appellant is a registered dealer under the Delhi Value Added Tax Act, 2004 ('DVAT Act') and is engaged in the sale of wide range of electronic items and information technology ('IT') products across India including Delhi. The appeals concerns the sale by the Appellant of DSCs which according to the Appellant operate on a software system and the

pictures of which are processed by a computer system to which the DSCs can be attached through USB cable.

5. At the outset it requires to be noted that the dispute concerning the rate of VAT payable by the Appellant Assessee on the DSCs sold by it pertain to three distinct periods. The first is the period from 1st April 2005 to 7th August 2005. The second is the period from 8th August 2005 to 29th November 2005 and the third from 30th November 2005 to 31st December 2007.

6. As regards the period the period 8th August 2005 to 29th November 2005, the Appellant had filed ST Appeal No.30 of 2013. The said appeal was not pressed by the Appellant at the hearing since the Appellant adopted for the 'Delhi Tax Compliance Achievement Scheme 2013' and one of the contentions were availing of the benefit under the said scheme so that any appeal filed by the Assessee would have to be withdrawn. Accordingly, by order dated 9th July 2015, this Court dismissed ST Appeal No. 30 of 2013 as withdrawn. Consequently, the present judgment is in respect of ST Appeals 29 and 31 of 2013 pertaining to the periods 30th November 2005 to 31st December 2007 and 1st April 2005 to 7th August 2005 respectively.

The period 1st April to 7th August 2005

7. The facts relevant for the period between 1st April 2005 and 7th August 2005 (ST Appeal No. 31 /2013) are that the Appellant paid tax for the sale of DSCs @ 4%. The goods were covered under Entry 41 of Schedule III of DVAT Act. During the relevant period, Entries 41 and 41-A read as under:

Entry No.	Description
41	IT Products including computers, telephone and parts thereof, tele printer and wireless equipment and parts thereof.
41A	IT Products notified by the Ministry of IT as specified below:
Sr. No.	Description
(1)	(2)
(vii)	Transmission apparatus other than apparatus for radio or T.V. broadcasting

8. According to the Appellant since at the relevant time the expression 'IT product' was not defined in the DVAT Act, the definition in the Information Technology Agreement ('ITA') of the World Trade Organisation ('WTO'), to which India is a signatory, required to be referred to for ascertaining the definition. Under the ITA, the list of IT products includes DSCs under tariff heading 8525 40. It is stated in the Customs Tariff Act, 1975, as it was at the relevant time, the Central Government had classified DSCs under Entry 8525.40 which read as under:

"8525 40 - Still image video cameras and other video camera recorders; digital cameras".

9. It is stated that the Explanatory Notes to the harmonized System ('HSN') at the relevant time described DSCs as under:

"Digital cameras record images in digital form... Some digital cameras have the ability to record sequential images with or without an accompanying soundtrack, in a manner similar to video camera recorder. However, this recording capability is limited and it is not their primary function,"

10. The Central Board of Excise and Customs ('CBEC') had issued a notification dated 1st March 2005 which provided a list of IT products which are exempt from customs duty. This list included DSCs covered under tariff heading 8525 40. After the changes to the HSN classification post 1st January 2007 a further amended notification was also issued to substitute entry 8525 80 20 for the entry 8525 40 00.

Amendment to Entry 41 from 30th November 2005 onwards

11. An amendment was made to Entry 41 A of the Third Schedule to the DVAT Act with effect from 30th November 2005 as under:

Entry No.	Commodity		
41A	Information Technology products as per the description in column (2) below, as covered under the headings or sub-headings mentioned in column(3), as the case may be, of the Central Excise Tariff Act, 1985 (5 of 1986)		
	Sr.No. (1)	Description (2)	Central Excise Tariff Heading(3)
	15.	Transmission apparatus (other than apparatus for radio broadcasting, transmission apparatus incorporating reception apparatus, digital still image video cameras)	8525
	Note-(1) The Rules for the interpretation of the provisions of the Central Excise Tariff Act, 1985 read with the Explanatory Notes as updated from time to time published by the Customs Co-operation Council, Brussels apply for the interpretation of		

	this entry and the entry number 84 of this Schedule. Note-(2) Where any commodities are described against any heading or, as the case may be, sub-heading, and the description in this entry and in entry number 84 is different in any manner from the corresponding description in the Central Excise Tariff Act, 1985, then, only those commodities described in this entry and in the entry number 84 will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification. Note-(3) Subject to Note (2), for the purpose of any entry contained in this notification, where the description against any heading, or as the case may be, sub heading, matches fully with the corresponding description in the Central Excise Tariff, then all the commodities covered for the purposes of the said Tariff under that heading or sub-heading will be covered by the scope of this notification.
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Orders of the VATO

12. The Value Added Tax Officer ('VATO') by notice dated 1st December 2005 proceeded to assess the Appellant, for default in payment of tax for the aforementioned period i.e. 1st April 2005 to 7th August 2005. Under Section 32 of the DVAT Act, the VATO also issued notice dated 2nd December 2005 for assessment of penalty under Section 33 of the DVAT Act on the ground that the Appellant was liable to pay penalty under Section 86 (12) of the DVAT Act. The objection filed by the Appellant to the above notices was rejected by the Joint Commissioner-I, Value Added Tax Deptt. (KDU, Policy) by an order dated 16th May 2006 holding that the DSC was not covered in any schedule to the DVAT Act and was accordingly taxable at

12.5%. Aggrieved by the above order, the Appellant filed VAT Appeals No.36-40/ATVAT/06-07 and 323-332/ATVAT/08-09 in respect of the tax, interest and penalty.

13. As far as the period from 30th November 2005 to 31st December 2007, when the amended Entry 41A including Clause 15 was in force, the VATO by notice dated 13th December 2007 held the Appellant liable to pay VAT at 12.5% for the sale of DSCs and confirmed levy of differential tax together with interest. By order dated 3rd January 2008, the VATO separately held the Appellant liable to pay the penalty for the alleged deficiency in payment of taxes during the relevant period. The objections of the Appellant to the above order were rejected by the Additional Commissioner- III by order dated 29th August 2008. Against the said order the Appellant filed VAT Appeal Nos.419-420, 232-241 and 455-480, both in respect of the tax, interest and penalty before the AT.

Impugned order of the AT

14. By the common impugned order dated 9th April 2013, the AT held as follows:

(i) As regards the demand for the period from 1st April 2005 to 7th August 2005, no inference regarding deemed acceptance by the Commissioner of the determination application could be drawn since by filing an application on 6th July 2008, the said deemed acceptance of the determination application stood waived. However, the contention of the Revenue that the Appellant had withdrawn its application for determination in terms of the order dated 25th January 2006 passed by the Commissioner, could not be

established despite the cross-examination of Mr. A.K. Mitra, Chartered Accountant who appeared at the hearing on behalf of the Appellant.

(ii) As regards the period between 1st April 2005 to 7th August 2005, relying on the judgment of the Karnataka High Court in ***Diebold Systems (P) Ltd. v. Commissioner of CT (2006) 144 STC 59***, it was held that in terms of the natural meaning of the language used in Entry 41, DSCs was not covered in the said entry as an IT product.

(iii) On the question whether under Entry 41 A Clause 15 DSCs was an IT product for the period with effect from 30th November 2005 onwards, the AT held against the Appellant. The AT held that the legislative intent was obvious in placing the closing bracket in the entry after the expression 'digital still image video camera' and therefore it stood excluded from the main entry pertaining to transmission apparatus. Since AT could not re-write what has been legislated, the contention of the Appellant that the product was covered by sub-Item No.15 of Entry 41 as it was in force with effect from 30th November 2005 till date was also held to be without reason.

Deemed determination by the Commissioner

15. As regards the period from 1st April 2005 to 7th August 2005, in respect of which ST Appeal No. 31 of 2013 has been filed, in addition to the common question whether the natural meaning of the language used in Entry 41 covered DSCs as an IT product, the Appellant has raised the question of deemed acceptance of the determination application of the Appellant under

Section 84 (5) read with Section 84 (6) of the DVAT Act and Rule 58(5) of the DVAT Rules.

16. The relevant facts are that on 8th August 2005, the Appellant filed an application before the Commissioner, Department of Trade and Taxes, Delhi under Section 84 of the DVAT Act for determination of the rate of VAT applicable on the sale of DSCs during the period between 1st April 2005 and 30th June 2005. The contention of the Appellant was that DSCs were IT products covered under Entries 41 and 41A of Schedule III of the DVAT and therefore exigible to the tax at the rate of 4%. The application was fixed for hearing on 25th January 2006. The Appellant's counsel sought adjournment as he was not available beyond 1 pm on that date. He was informed that the next date of hearing would be intimated later, but no subsequent date of hearing was indicated. It is contended by the Appellant that since the Commissioner failed to make any determination within the prescribed period, the proposed determination as indicated by the Appellant would be deemed to have been issued by the Commissioner.

17. Section 84 (2) of the DVAT Act permits the filing of a determination application "in respect of a proposed transaction, a transaction that is being undertaken, or a transaction has been concluded". Under Section 84 (3) an application for determination cannot be made after (a) The Commissioner has commenced the audit of a person pursuant to Section 58 of the Act or; (b) The Commissioner has issued an assessment for the tax period in which the transaction that is the subject of the determinable question occurred. Under Section 84(5), the Commissioner has to mandatorily decide the

determination application within the prescribed period. Under Rule 58 (5) of the DVAT Rules, the Commissioner is required to pass an order on the said application within the period of six months from the date of the submission of question, failing which Section 84(6) would apply.

18. Section 84(6) of the DVAT Act reads as under:

“ Where -

(a) the Commissioner fails to make a determination under this section within the time prescribed under sub-section (5) of this section;

(b) the person thereafter implements the transaction which is the subject of the application and in the manner described in the application; and

(c) the person has, in the application for the determination of the determinable question, indicated the answer to the determinable question which the person believes to be correct (in this section called the “proposed determination”);

the Commissioner shall be deemed for the purposes of this Act to have made and issued to the person on the day after the expiry of the prescribed period, a determination of the determinable question in the terms of the proposed determination.”

19. A careful perusal of Section 84(6) of the Act reveals that there are three conditions to be satisfied cumulatively; (a) the Commissioner must fail to decide the application for determination within a period of six months after it has been submitted; (b) After the said failure, the Assessee should implement the transaction which is the subject of the application, and “in the manner described in the application” and (c) the person has in the determination application indicated the answer to the determinable question

which the Assessee believes to be correct, (which in Section 84 is called 'proposed determination'). If all the above three conditions are not met then the deeming provision i.e. Commissioner having deemed to have issued the determination in terms of the proposed determination will not come into play.

20. In the present case while conditions (a) and (c) above were satisfied, condition (b) was not. The Court here concurs with the finding of the AT as far as condition (a) is concerned that the Appellant did not withdraw its determination application on 29th January 2006. The Court is also prepared to accept the plea of the Appellant that by merely filing another request application on 8th July 2008, it cannot be held to have waived the right to the deemed determination by the Commissioner. However, as far as condition (b) is concerned, it envisages the Assessee implementing the transaction in the manner described in the application. What condition (b) requires is that in respect of the transaction that has been concluded the Assessee should not yet have implemented the determination as proposed by the Assessee prior to the failure by the Commissioner to decide the application within the prescribed period.

21. In the present case, the application for determination was made on 8th August 2005 in respect of all transactions that took place between 1st April 2005 and 7th August 2005. Admittedly, the Appellant had already applied to those transactions the proposed determination of the rate tax at 4% . The Appellant did not wait to do that till such time the Commissioner failed to decide the application i.e., after the expiry of six months after 8th August

2005. In that view of the matter, with conditions (b) of Section 84 (6) of the Act not being complied with by the Appellant, the Commissioner could not be deemed to have issued the 'proposed determination'.

Did Entry 41 include DSCs for the period up to 7th August 2005?

22. The Court now turns to first substantial question that arises: whether for the period up to 7th August 2005 DSCs could be classified as IT products under Entry 41 in Schedule III to the DVAT Act? If the plea of the Appellant is accepted, and it is held that the term 'IT products' includes DSCs, then for the period under consideration the rate of VAT that would apply is 4%. If not, the rate would be 12.5%

23. During the aforementioned period 1st April 2005 to 7th August 2005, Entry 41 included IT products including computers, telephone and parts thereof, tele-printer and wireless equipment and parts thereof. Although DSCs do not find mention in Entry 41, it is urged by the Appellant that IT products listed in the ITA included DSCs under tariff heading 8525 40 and since that was binding, the broad terms 'IT products' should be construed to include DSCs. Reference is also made to an exemption notification issued by the CBEC exempting the IT products including DSCs covered under the tariff heading 8525 40 from payment of custom duty.

24. It is further pointed out by the Appellant that three other states i.e., Uttarakhand, Karnataka and Maharashtra have accepted the contention that DSCs are IT products. It is stated that the Authority for Clarification and Advance Ruling in terms of the AP VAT Act 2005 issued an order on the

application of the Appellant holding that DSCs attract the Harmonised System of Nomenclature ('HSN') Code 8525 and are liable to tax at 4% in accordance with Entry 39 (15) of Schedule IV of the AP VAT Act.

25. As far as the first contention is concerned, the Court finds that the term IT products has been described to include computers, peripherals etc but not DSCs which are distinct species as is apparent from Entry 8525 40 listed in the ITA. At the relevant time the legislature did not include DSCs in Entry 41. That change was to come about with effect from 20th November 2005 and this will be discussed hereafter. However for the period prior thereto, Entry 41 clearly did not include DSCs.

26. The decision of the Karnataka High Court in ***Diebold Systems (P) Ltd. vs. Commissioner of C.T. [2006] 144 STC 59 (Kar)***, which has been referred to by the AT in the impugned order, does support the case of the Revenue as far as the period between 1st April to 7th August 2005 is concerned. There the Court was examining the question whether an ATM machine was a 'computer' with reference to Entry 20 (2) (b) of Part C of the Second Schedule to the Karnataka VAT Act, 2003 captioned 'Computer Terminals'. The Assessee there sought to rely on the definition of the expression 'computers' in the Information Technology Act, 2000 in support of the plea for an expanded interpretation of the term for the purposes of VAT as well. Negating that contention the Court held that "going by the principles of common parlance as applicable to be interpretation of entries under the KST Act", an ATM "cannot be classified as computer terminal for the purpose of the Act, when it is not specifically included in the entry

relating to computer terminals." It was held that if the common parlance test is applied, then ATMs would be considered as electronic devices and not computer peripherals.

27. Applying the above test, it can safely be concluded that as regards the period 1st April to 7th August 2005, since Entry 41 only talked of IT products in the broad sense of including computers, telephone and parts thereof, tele-printer and wireless equipment and parts thereof etc. and not DSCs, the plea of the Appellant that DSCs are IT products must fail.

28. As regards the second contention, the Court observes that the wording of Entry 15 of Schedule IV of Serial No. 39 of the VAT legislation of Andhra Pradesh reads different from Entries 41 or 41A of Schedule III to the DVAT as it stood at the relevant time i.e. prior to 29 November 2005. The corresponding entries in the legislations in Uttarakhand and Maharashtra also read differently. As far as the Karnataka VAT Act 2003 is concerned, Schedule III of the said Act in Entry 53 mentions 'IT products including telecommunication equipments as may be notified'. Thereafter by a separate notification various kinds of IT products were notified for the concessional rate of duty @ 4%. The product at Serial No. 15 of this notification more or less reads like Clause 15 under Entry 41A of the DVAT Act with effect from 29th November 2005 but without the brackets.

29. The upshot of the above discussion is that the wording of the Entry 41 in the DVAT Act prior to 29th November 2005 cannot be read in the manner suggested by the Appellant. Prior to the change brought about with effect

from 30th November 2005, DSCs were not part of IT products. The entry as it read could not be said to have included DSCs.

30. While the impugned order of the AT upholding the determination of the VAT and interest thereon is therefore not interfered with, the Court is of the view that since there was a reasonable doubt as regards the applicability of Entry 41 to DSCs, the Appellant's plea that it acted *bona fide* in charging tax at 4% deserves acceptance. In other words, the conduct of the Appellant cannot be characterised as a deliberate attempt to avoid paying the applicable rate of VAT so as to warrant the levy of penalty.

Conclusion as regards ST App 31 of 2013

31. In respect of ST Appeal No. 31 of 2013, in respect of the period from 1st April 2005 to 7th August 2005, the three questions of law are answered as under:

(i) The AT was right in holding that DSCs is not classified and covered by Entry No 41 or 41A;

(ii) Although the AT was not right in holding that there was a waiver of the deemed application for predetermination, the Appellant would nevertheless not have been able to avail of the benefit of Section 84(6) of the Act, since the Appellant did not satisfy condition (b) under Section 84 (6) of the DVAT Act.

iii) As far as the issue of penalty and interest is concerned, the decision of the AT in regard to levy of interest is upheld. However, the levy of penalty on the Appellant appears not to be justified since the Appellant was under the *bona fide* belief that it was entitled to charge the concessional rate of tax at 4%.

(iv) Resultantly, as far ST Appeal No.31 of 2013 for the period 1st April 2005 to 7th August 2005 is concerned, the determination of tax and interest by the VATO is upheld, but the levy of penalty and the corresponding interest on such penalty amount is hereby set aside.

The period 30th November 2005 to 31st December 2007

32. Now turning to ST Appeal No. 29 of 2013 for the period 30th November 2005 to 31st December 2007, the question arises whether DSCs is included in IT products under Entry 41-A Clause 15?

33. What is significant is the mention in the amended Entry 41-A of the Central Excise Tariff Act heading 8525. This corresponds to the classification of IT products on the basis of the HSN. It is pointed out that under the ITA dated 1st September 2000 the DSCs were classified under 8525 40 and described as under:

Product description	Classification	Classification rationale
Digital still camera fitted with a Charge Coupled Device (CCD) and based on video camera recorder technology. It records, processes and stores images in digital format.	8525.40	GIRs 1 and 6

It features a built-in, high resolution. 1.8” colour LCD screen that is used as a viewfinder when shooting images and as a monitor when viewing recorded or uploaded images. The images can be transferred to an automatic data processing machine by means of an optional accessory package for viewing and storing on an automatic data processing machine. For this purpose it has been designed with built-in digital input and output connection ports. It is also designed with a connection port for video cables so that the images can be transferred directly to a TV or a VCR. It can also deliver its stored images to labels by connecting to a label printer specifically designed for use with the digital camera.		
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34. Further, the Custom Tariff Act also specifically mentions DSCs as falling under tariff heading 8525 8020 and this is under the overall description under Chapter 85 relating to ITA bound expositions. By a circular dated 10th September 2007, there was a clarification issued by the CBEC on exemption to DSCs. There was a doubt whether the entry covered “such digital cameras which are capable of both still image figure as well as video shooting”. The circular clarified that DSCs fall under tariff item 8525 8020 but DSCs that can take still images and moving images like camcorder and video recorder would fall under 8525 8030.

The White Paper

35. However, for the purposes of the present appeal what is significant is a White Paper of state level value added tax prepared by the Empowered

Committee of State Finance Minister dated 17th January 2005 which formed the basis for the change system of taxation under the VAT. A copy of the White Paper has been shown to the Court. The 'Preface' to the White Paper explains the rationale for the uniform system of the VAT which was to avoid unhealthy competition and have certain features of VAT common to all the States. The said features were to constitute the basic design of VAT. It was expected that at the same time, the States would have freedom for appropriate variations consistent with the basic design. The White Paper was a collective attempt of the States to strike a balance between this need for commonality and the desired federal flexibility in the VAT structure.

36. In para 1.4 of the White Paper, the methodology adopted by the Empowered Committee in preparing the White Paper has been explained. One of the tasks was to harmonise the tax structure “through implementation of uniform floor rates of sales tax and discontinuation of sales tax related incentive schemes”. With a view to simplifying the tax structure the Empowered Committee recommended that there should basically be only two rates of VAT i.e. 4% and 12.5%, plus a specific category of tax exempted goods and a special VAT rate of 1% only for gold and silver ornaments etc. It was suggested that “under 4% VAT rate category, there will be the largest number of goods (about 270), common for all the States, comprising of items of basic necessities such as medicines and drugs, all agricultural and industrial inputs, capital goods and declared goods”.

37. The list of goods with 4% floor rate as finalized by the Empowered Committee of State Finance Minister contains about 41 items under the table

“Goods with 4% Floor Rate”. A copy of this is to be found in Annexure-1, Discussion Paper of the National Institute of Public Finance & Policy New Delhi, published in May 2001 under the tile ‘Road Map for National and Sub-National VATs in India’ prepared by Mahesh C. Purohit. Entry 14 in this list, lists out IT products. Sub-item 85.25 reads as under:

“85.25 Transmission apparatus other than apparatus for radio broadcasting or TV broadcasting, transmission apparatus incorporating reception apparatus, digital still image video cameras.”

38. The above entry three types of IT products i.e. (i) transmission apparatus other than apparatus for radio broadcasting or TV broadcasting; (ii) transmission apparatus incorporating reception apparatus; (iii) digital still image video cameras.

Corresponding entries of other state legislations

39. This Court has been shown VAT legislations of the States and in particular, the legislations of Andhra Pradesh, Assam, Bihar, Gujarat, Karnataka, Maharashtra, Mizoram and Orissa. The above basic entry in the list finalised by the Empowered Committee has been more or less reproduced in the same manner in many of the said state legislations. For instance in the VAT legislation of Andhra Pradesh, Entry 15 in Schedule IV reads as:

“(15) Transmission apparatus other than apparatus for radio or T.V. broadcasting, transmission apparatus incorporating reception apparatus, digital still video cameras

- (a) Transmission apparatus incorporating reception apparatus
- (b) Communication jamming equipment

- (c) Wireless Microphone
- (d) Still image video cameras & other video camera recorders; digital cameras.”

40. Entry 15 in Part B of Schedule II of Assam VAT legislation reproduces Entry 85.25 of the list prepared by the Empowered Committee. In other words there is absolutely no change including the placement of commas. Turning to the Bihar legislation, Part II of Schedule III has Entry 14 which reproduces the entry as per the Empowered Committee with one addition of ‘cellular telephone’. The Gujarat legislation has separate sub-entries under Entry No. 45, dealing with IT in Schedule II. The sub-heading No. 8525.50 contains all categories of transmission apparatus and there is a separate entry for ‘still image video cameras and digital cameras’. The Karnataka legislation again reproduces Sub-item 85.25 of the Empowered Committee list as Entry 15 of the table to a notification under Entry 36 of the III Schedule to the VAT Act. While the same three categories are retained, they are separated by semi colon rather than commas. The Maharashtra legislation reproduces Sub-item 85.25 as it is. The Mizoram legislation again reproduces Sub-item 85.25 as recommended by the Empowered Committee. The Orissa VAT Amendment Act 2005 which encloses Entry 69(O) in Part II reproduces the exact wording of Sub-item 85.25.

41. The above narration is useful in understanding that there is a uniform adoption by several states of the entries as recommended by the Empowered Committee particularly with reference to IT products. Secondly, it shows that 'digital still image video camera' was not understood as a sub-species of 'transmission apparatus' but as a separate equipment in itself.

Background to the change in the DVAT Act

42. In order to understand how the change came to be brought about in the DVAT Act with effect from 30th November 2005, this Court called for the original file. This is because the bracket preceding the words ‘other than’ in Item 15 of Entry 41 A, closing with the bracket after the words ‘digital still image video cameras’ is certainly unique to the Delhi statute. The exercise was to find whether this was a mere misprint.

43. When the file was produced before the Court on 11th November 2014, the Court noted as under:

‘Relevant file has been produced. As per the said file the bracketed portion end with the words “digital still image video cameras” but there is no coma between digital still image and video cameras.

It is stated that the learned senior counsel who is appearing for the appellant is held up. He had mentioned the matters in the morning. Appeals are accordingly adjourned to 12th February, 2015. Appeals will not be treated as part-heard.’

44. At the stage of the final hearing while arguments were in progress, the Court again asked the original file to be produced so that it could understand how the White Paper of the Empowered Committee was processed by the Respondent, as well as “the notes that led to the drafting of the relevant entries of the DVAT Act”. At the hearing on 16th July 2015, the file was produced by the Respondent. There is a note in the file prepared on 10th October 2005, with specific reference to amendment to the Third Schedule

of the DVAT Act. Under para (M) (ii), it is noted that a representation has been received from “Progressive Channels Association of Information Technology” pointing out two ambiguities in Entry No. 41A and that important IT peripherals such as routers, modems and multiplexers etc. were not covered under the description of IT products in the absence of HSN codes. They were thus taxable at the rate of 12.5% instead of 4% unlike the states of Maharashtra, West Bengal and Andhra Pradesh which have provided HSN code pertaining to IT products. The note then proposes: “In order to avoid confusion in I.T. sector, it is proposed to adopt the same description of I.T. products as adopted by Maharashtra and provide HSN codes along with the items describing I.T. products”. In other words the proposal was that the description as adopted by Maharashtra and the corresponding HSN codes should be adopted for Delhi as well.

45. The draft notifications incorporating the changes by way of amendment along with the draft Cabinet Note was placed before the Legislative Council for being placed before the Council of Ministers. The Cabinet Note repeats what is stated in the note and appends the proposed substitute entries at Serial No. 41A. Serial No. 15 in the Cabinet Note contains two brackets, one before the opening bracket before the words ‘other than’ and the other closing bracket after the words ‘video cameras’. There is no indication on what basis the brackets were added when the original entry as proposed by the Empowered Committee as well as the Maharashtra legislation do not contain any brackets at those places. The Cabinet Note appears to have received the approval on 21st November 2005. The amendment was notified on 30th November 2005 in the Gazette. The file, therefore, is unhelpful in

knowing the real reasons why the brackets were added particularly when the intention of following the Maharashtra legislation is evident from the notes on file.

46. To recapitulate as far as Entry 15 to the notification issued under the Maharashtra VAT Act 2002, Entry 85.25 is a replica of the corresponding entry as proposed by the Empowered Committee. That being the factual position the inescapable conclusion is that the addition of bracket in Item 15 of Entry 41-A was, apart from being totally uncalled for and unintended, without any particular rationale. It appears that the insertion of the brackets before the words 'other than' and after the words '... video cameras' was not as a result of a conscious decision.

47. However, as a result of the addition of the brackets an entirely new and unintended meaning has been sought to be given to Item 15 of Entry 41 A. In other words, the entry is sought to be read by the Department as essentially containing only one item, viz., 'transmission apparatus' with all other items contained in the brackets that immediately follow the said words as being excluded from the entry.

Interpreting Item 15 of Entry 41-A

48. As rightly pointed out by Mr. Tarun Gulati, learned counsel for the Appellant, it appears that this was a mistake. The brackets, if at all should have been closed immediately after the expression 'radio broadcasting' or after the words 'reception apparatus'. This is because the first two items described in entry, viz., 'transmission apparatus other than apparatus for

radio broadcasting or TV broadcasting' and 'transmission apparatus incorporating reception apparatus' can be said to belong the same species, i.e. transmission apparatus 'digital still image video cameras', cannot by any stretch of imagination can be construed to be a sub-species of 'transmission apparatus'. Therefore the exclusion of such item from 'transmission apparatus' makes no sense at all. A 'transmission apparatus' refers to something which is capable of receiving the transmission signals. For e.g., a walkie talkie set or a cellular phone. A DSC does neither. It falls outside the category of transmission apparatus. This explains why in some state legislations, following the description in the list prepared by the Empowered Committee, these items have been separated by commas or a semi-colon.

49. It was sought to be argued by Mr. Gautam Narayan, learned counsel for the Respondent, that it is not open to the Court in these appeals particularly when it is not considering a challenge to the constitutional validity of the entry in the legislation, to omit any part of the entry as that would virtually amount to re-writing the entry itself. He submitted that under the garb of interpretation, the Court should not read the entry in such a way that it renders the brackets, which have been consciously inserted, otiose. He referred to the decision of this Court in *N.G. Sheth v. CBI 151 (2008) DLT 789*, which discusses the implications of use of the phrase 'other than'. He submitted that although the brackets may be superfluous they were meant to emphasise the exclusion of all items within the brackets from the main entry, viz., transmission apparatus.

50. In the first place, the submission on behalf of the Respondent that insertion of the brackets was conscious does not appear to be borne out from the notes in the original file of the Respondent or the Cabinet Note containing the proposed amended provision which was placed before the Council of Ministers for approval. As already discussed, the intention was to amend the Entry to bring it in line with the Maharashtra law and also to adopt the HSN classification. Neither the HSN classification (which is fully adopted by the Empowered Committee) nor the entry in the Maharashtra statute contains any brackets preceding the words ‘other than’ or succeeding the words ‘video cameras’. The addition of brackets appears to be unintended. Secondly, there can be no doubt that DSCs are not transmission apparatus and therefore the brackets could not have brought out the unintended result of excluding such equipment, viz., DSCs from the first item viz., ‘transmission apparatus’.

51. In the present case, the brackets really do not serve any particular purpose at all other than to bring out an anomaly which was unintended. To accept the brackets as they are and to try to make some sense out of it would result in acknowledging that DSCs belong to the species of transmission apparatus which it obviously is not. In *Dadaji v. Sukhdeobabu (1980) 1 SCC 621*, the Supreme Court explained in the context of an ambiguity in Entry 18 of para 5 of Part VII (A) of the Scheduled Castes and Scheduled Tribes Order (Amendment) Act that “punctuation marks by themselves do not control the meaning of a statute when its meaning is otherwise obvious”. In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. Pvt. Ltd. (2010) 8 SCC 241* the Supreme Court dealt with at length on the basic rules

of interpretation of statutes. While the general rule was that provisions which are clear and unambiguous should be given their plain and normal meaning “without adding or rejecting any words”, there was an exception to that general rule. It was observed as under:

“Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions the courts may instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions”.

52. The Court referred to the following passage in Maxwell on Interpretation of Statutes (12th Edn., pg 228):

“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language

and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used".

53. In *CIT v. National Taj Traders (1980) 1 SCC 370*, it was held that one of the instances where the Court could depart from the rule of not supplying omissions was "If literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature". Quoting the opinion of Lord Reid in *Luke vs. IRC (1966 AC 557)*, it was said 'Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction'.

54. In the present case the Court is persuaded to adopt the above approach in order to achieve the "obvious intention and produce a rational construction". The Court is therefore of the view that the correct way to read Article 15 in Entry 41A of the Third Schedule to the DVAT Act is to read it without the two brackets and to read it in a manner that the item 'digital still image video cameras' is not excluded from the ambit of Entry 15. The interpretation suggested by the Respondent would have the anomalous result of totally excluding the said item from the entry and that clearly was not the intended result. The Cabinet Note itself was triggered by the representation of the industry regarding exclusion of certain kinds of IT products. Also the intention was to adopt the Maharashtra pattern which did not exclude DSCs.

The uniform pattern adopted by several states to bring the statutes in line with the nomenclature as suggested by the Empowered Committee meant that DSCs were not to be excluded from the list of items which would be subject to 4% tax.

55. For all of the above reasons, the Court accepts the contentions of the Appellant and holds that for the period between 30th November 2005 to 31st December 2007 the Appellant would be liable to pay 4% tax and not 12.5% on the turnover of sales of DSCs. The decision to the contrary of the AT, OHA and the VATO are hereby set aside.

56. As a result, neither interest nor penalty would be liable to be paid for the aforementioned period. Consequently, the impugned orders to the extent it require the Appellant to pay interest and penalty on the differential amount of tax is also hereby set aside.

Summary of conclusions

57. To summarize the conclusions in both appeals:

(i) For the period 1st April 2005 to 7th August 2005, the Appellant cannot take advantage of Section 86 of the DVAT Act as there is no deemed determination by the Commissioner accepting the proposed determination of the Appellant in terms of Section 84 (5) read with Section 84(6) of the DVAT Act;

(ii) For the period between 1st April 2005 to 7th August 2005, DSCs cannot be said to fall within the ambit of IT products under Entry 41 to Schedule III to the DVAT Act;

(iii) While the Appellant would be required to pay interest on the differential amount of tax, it is not liable to pay any penalty in terms of Section 86 (12) of the DVAT Act for the period 1st April 2005 to 7th August 2005;

(iv) For the period 30th November 2005 to 31st December 2007, in terms of Clause 15 of Entry 41A in the Schedule of DVAT Act, the DSCs would be eligible for 4% VAT and not 12.5% VAT. In other words, the Appellant is not required to pay any further tax on the sales turnover of DSCs beyond 4% already paid by it;

(v) The demand of the differential tax, interest and penalty as levied by the VATO and affirmed by the OHA and the AT for the aforementioned period 30th November 2005 to 31st December 2007 is hereby set aside.

58. The appeals are disposed of in the above terms with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 4, 2015
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