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IN THE HIGH COURT OF DELHI AT NEW DELHI

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VAT APPEAL 1/2016

**TRIUMPH MOTORS (A UNIT OF KHUSHI TRADERS
PVT LTD)**

..... Appellant

Through: Mr. Ashok Babbar with Mr. V.K.
Sabharwal and Mr. Bharat Tripathi,
Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent

Through: Mr. Gautam Narayan, Additional
Standing counsel with Mr. R.A. Iyer, Advocate
along with Mr. Kaushal Kishore, Assistant
Commissioner (Ward 204), Mr. Akshay Allagh,
LA, VAT.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR**

ORDER
02.05.2017

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Dr. S. Muralidhar, J.:

1. This appeal under Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') by the Appellant, M/s. Triumph Motors, a unit of Khushi Traders Private Limited, a duly registered company under the DVAT Act, challenges the impugned order dated 29th July 2015 passed by the Appellate Tribunal, Value Added Tax, Delhi ('AT') dismissing the appeal No. 1424-1431/ATVAT/12-13 pertaining to the Financial Year (FY) 2010-11.

2. While admitting this appeal on 9th January 2017, the following question of law was framed for consideration:

“Did the Tribunal err in law in holding that the Appellant/Assessee was not entitled to claim exemption for the subject goods by virtue of Section 6 (3) in the circumstances of the case.”

3. The facts in brief are that the Appellant is engaged in trading of new cars and their spares. A notice of default of tax and interest under Section 32 of the DVAT Act in respect of the FY 2010-11 was issued by the Value Added Tax Officer (‘VATO’), Ward No. 204, on 2nd April 2012 for the period October 2010-11 creating a demand of Rs. 1,77,266.

4. In the said notice it was noted that the Appellant had sold a car on 13th October 2010 for the period October 2010-11 in the sum of Rs. 10,51,000, which had been used by it as a demo car. It was further noted that the Appellant had not paid any VAT on this sale on the ground that the sale was covered under Section 6 (3) of the DVAT Act. The notice noted the contention of the Appellant that ‘Capital Goods’ under Section 2(1) (f) of the DVAT Act included plant, machinery and equipment used, directly or indirectly, in the process of trade or manufacturing and that the demo car was in the nature of a plant, machinery and equipment which was directly used for the main business, i.e. selling cars. It was noted that the Appellant had contended that it had not claimed any input tax credit (‘ITC’) on the demo cars at the time of their purchase. It was specifically noted by the VATO in the said notice that this fact had been verified from the records of the dealer and that the demo car was used exclusively for the purpose of making local sales only. The Appellant accordingly contended that the sale

of the demo cars was exempt from VAT. The notice then proceeded to conclude that the contention of the dealer to avoid payment of VAT on the sale of car being a fixed asset was rejected. It was taxed @ 12.5%. The resultant tax deficiency of Rs. 1,31,375 together with interest @ 15% per annum was attracted. The Appellant was directed to pay the aggregate sum of Rs. 1,77,266. Simultaneously, an order of default assessment of penalty under Section 33 of the DVAT Act was also passed.

5. Similar notices of default assessments of tax, interest and penalty were issued on 22nd March 2012 for the periods February 2010-11 and March 2010-11 and on 2nd April 2012 for the period December 2010-11.

6. Aggrieved by the above notices of default assessments of tax, interest and penalty, objections were filed by the Appellant before the Objection Hearing Authority ('OHA'). By the order dated 15th October 2012 the OHA dismissed the objections.

7. The Appellant next filed Appeal Nos. 1424-1431/ATVAT/12-13 before the AT. By the order dated 28th August 2014, the AT affirmed the order of the OHA by holding that

“the capital assets used in the definition of business is a greater concept than capital goods which include goods as well. Here, in the present case, the Appellant has sold the car for which he purchased the same although after using the same as demo car which used cannot be said to be exclusively for purpose other than making non-tax sale of goods. After using the demo car which are subject matter of sale in the present case, those very cars have been sold by the Appellant which car he used for making the tax sale of other cars and hence cannot claim exemption of the sale of those demo car under Section 6(3) of the DVAT Act.”

8. As regards the contention of the Appellant that it had not claimed tax credit in respect of demo car under Section 9 of the DVAT Act, it was held by the AT that the car in question was purchased for the business by the Appellant and later very car was used as demo car subject to resale in an unmodified form. Therefore, the said demo car ceased to be treated as non-creditable goods and as such the Appellant was within his rights to claim ITC. In such a scenario, if the ITC was not claimed in respect of such a capital goods/goods/capital assets under Section 9 of the DVAT Act, no benefit thereof would enure to the Appellant to seek exemption of tax of such an item to which he could otherwise claim tax credit. It was further held that no interference was called for with the order of penalty as well.

9. After the order was passed by the AT on 28th August 2014, this Court delivered a judgment dated 23rd December 2014, in a batch of appeals, of which the lead case was ST. APPL. No. 35 of 2014 (*Anand Decors v. Commissioner of Trade and Taxes, New Delhi*). There, the Appellants were registered dealers under the DVAT and were engaged in various businesses other than trading of cars. Such Appellants had sold cars that had been purchased by them in their own names after paying VAT. They had not availed/been granted ITC of the VAT paid on the motor vehicles at the time of purchase. The question that arose was whether VAT was payable on the sale of such cars by the Appellants and whether the benefit of Section 6 (3) of the DVAT Act was available to them.

10. In those cases the AT had held that the sale price of the used cars should

be included in the taxable or business turnover of the Appellant/Assessee in view of the wide and broad definition of the term 'business' under Section 2 (d) of the DVAT Act. The decision of this Court in ***Panacea Biotech Limited v. Commissioner of Trade and Taxes and Ors. (2013) 59 VST 524 (Del)*** was distinguished. After analysing the various provisions of the Act, the Division Bench of this Court in ***Anand Decors v. Commissioner of Trade and Taxes, New Delhi*** (*supra*) held as under:

- (a) the motor vehicle would be a capital good as defined in Section 2(f) and purchase thereof would form part of the business, but ITC of VAT paid would not be available.
- (b) If the capital goods are used for purposes of taxed and non-taxed sale of goods, the requirement of claiming exemption under Section 6 (3) of the DVAT would stand satisfied.
- (c) the four conditions stipulated in Section 6 (3) of the DVAT Act, in order to claim exemption, were:
 - (i) there should be sale of capital goods;
 - (ii) the said capital goods have been used by the dealer from the time of purchase till sale;
 - (iii) the purpose for which the capital goods were used should be for making sale of taxable goods or taxable goods and non-taxable goods. The capital goods should not be exclusively used for making sale of non-taxable goods.

(iv) The dealer should not have taken tax credit in respect of such capital goods under Section 9.

11. This Court in ***Anand Decors v. Commissioner of Trade and Taxes, New Delhi*** (*supra*) also rejected the contention of the Department that motor vehicles are not capital goods within the meaning of Section 2 (f) of the DVAT Act. It was held that Section 2 (f) used the expression ‘directly or indirectly’ following the words ‘plant, machinery or equipment’ to reflect “the wider meaning which they wanted to give to the expression ‘capital goods’.” It was further held that “the word ‘plant’ or ‘machinery’ is not restricted only to mechanical processes or apparatus.

12. The Appellant filed a rectification application before the AT seeking reconsideration of its judgment dated 28th August 2014 in light of the above decision of this Court in ***Anand Decors v. Commissioner of Trade and Taxes, New Delhi*** (*supra*). The Appellant cited previous instances where the AT had rectified its orders in view of a subsequent decision of this Court or the Supreme Court. Nevertheless, by the impugned order dated 29th July 2015, the AT rejected the rectification application primarily on the ground that when it delivered its judgment dated 28th August 2014, the decision of this Court in ***Anand Decors v. Commissioner of Trade and Taxes, New Delhi*** (*supra*) had not yet been pronounced.

13. Thereafter the present appeal was filed. On 27th January 2016, the following order was passed by the Court:

"5. Mr Gautam Narayan, Additional Standing Counsel appearing for the Respondent sought to distinguish the judgment of this Court dated 23rd December, 2014 in *ST. APPL. 35/2014 (Anand Decors v. Commissioner of Trade & Taxes, New Delhi)* in its applicability to the facts of the present case. His contention was that the demo car was sold by the Appellant could not be considered as 'capital goods' within the meaning of Section 2(f) of the Delhi Value Added Tax Act, 2004.

6. On the other hand, Mr. Babbar, learned counsel for the Appellant sought to contend that the demo car is not sold as part of the trade of the Appellant who is a car dealer.

7. It is directed that Appellant will file an affidavit clarifying as to when and in what circumstances the demo car gets registered in the name of the dealer, and whether he continues, till such time the demo car is sold, as its registered owner. The affidavit be filed at least one week prior to the next date of hearing. The Respondent can also file a note of submissions on this aspect."

14. Pursuant to the above order the Appellant filed an additional affidavit on 29th March 2016 *inter alia* setting out the details of the demo cars purchased in its own name in 2009-10 and 2010-11 and those sold and also enclosing copies of the Registration Certificates (RC) of such demo cars. On 12th July 2016 the Additional Commissioner, Department of Trade and Taxes filed a short affidavit *inter alia* enclosing copies of the returns filed by the Appellant for the years 2009-10 and 2010-11. Thereafter on 9th January 2017 this Court admitted the appeal and framed the question of law as has been set out in para 2 hereinabove.

15. Mr. Ashok Babbar, learned counsel appearing for the Appellant pointed out that the decision of this Court in *Anand Decors (supra)* covers the case in favour of the Appellant on all fours. The cars in question were capital

assets. They had been purchased by the Appellant/Assessee in its own name after paying VAT. They were used as demo cars i.e. for the purpose of the business of the Appellant. the Appellant/Assessee has not claimed ITC as regards VAT already paid at the time of purchase the car. Consequently, the four conditions for being eligible to the benefit under Section 6 (3) of the DVAT Act as explained by this Court in *Anand Decors (supra)* stood fulfilled in the present case. There was no justification whatsoever for the AT to have declined to re-examine its order dated 28th August 2014 in light of the decision of this Court in *Anand Decors (supra)*.

16. In reply, it was pointed out by Mr. Gautam Narayan, learned Additional Standing counsel for the Department that the case on hand is distinguishable from the case of *Anand Decors (supra)*. There none of the dealers or traders traded in cars but in commodities other than cars. Therefore in that case the cars purchased and used for the purpose of business were treated as capital goods. There was a distinction between capital goods and capital assets as noted in the *Anand Decors (supra)*. Secondly, he pointed out that at least in one instance the car purportedly purchased for use of the Appellant for its business was sold within one month thereafter at a premium. Therefore, it cannot be accepted that what was being sold were the capital goods or assets of the Appellant. Referring to the affidavit dated 29th March 2016 Mr Narayan pointed out that as many as 9 cars purportedly used as demo cars were sold between 28th February 2010 and 22nd March 2010. In 2010-11, 12 cars were bought in the Appellant's name between 5th April 2010 and 30th November 2010 of which one was sold.

17. Referring to the short affidavit of the Respondent, Mr. Narayan pointed out that in the returns filed by the Appellant for 2010-11 in the column R 6.1 the 'capital goods' figure was mentioned as zero. Further under the column R 6.2 (9) titled 'exempted purchases', there was no specific mention of purchase of capital goods after paying VAT. The failure by the Appellant to disclose the full and correct particulars in the above columns disentitled it to relief under Section 6 (3) of the DVAT Act. Mr Narayan contended that under Rule 28 of the Delhi Value Added Tax Rules 2005 ('Rules'), the Appellant was bound to furnish the complete returns in the prescribed Form DVAT-16.

18. This Court first takes up examination of the relevant provisions of the DVAT Act 2004. Section 2 (d) of the DVAT Act which defines 'business' read with Explanation (1) thereof which clarifies that "any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be business." Section 2 (f) defines 'capital goods' to mean "plant, machinery and equipment used, directly or indirectly, in the process of trade or manufacturing or for execution of works contract in Delhi."

19. Section 6 (3) of the DVAT Act states that there will be an exemption from payment of VAT on the following transaction:

"Where a dealer sells capital goods which he has used since the time of purchase exclusively for purposes other than making non-taxed sale of goods, and has not claimed a tax credit in respect of such capital goods under section 9, the sale of such capital goods shall be exempt from tax."

20. Section 9 (9) of the DVAT Act lists out the instances where tax credit is allowable in respect of capital goods. Section 9 which talks of 'input tax credit', has already been summarized by this Court earlier.

21. It makes no distinction whether the main business of the Assessee is dealing in cars or some other business in order for goods purchased in the Assessee's own name and used for the purposes of the Assessee's business to be treated as capital goods. The Assessee being a dealer selling new cars, it is but natural that the Assessee purchases some cars in its own name for use as demo cars. Prospective customers might like to 'test drive' or 'inspect' the demo car before making an informed choice of purchasing the new car. The fact that these cars are purchased by the Assessee in its own name clearly indicates that the Assessee intends to use these cars as 'demo cars' and therefore, would be entitled to treat them as Assessee's capital goods. Such demo cars are used for the purchase of Assessee's business.

22. Although in *Anand Decor* (*supra*), this Court explained the difference between 'capital goods' and 'capital assets', that distinction is not of much significance for the purpose of availability of the benefit under Section 6 (3) of the DVAT Act. As long as the four conditions spelt out in *Anand Decor* (*supra*) are satisfied, the Assessee would be entitled to the benefit under Section 6 (3) of the DVAT Act. In the considered view of this Court, the Appellant satisfies each of those four conditions. The Department has not been able to show that any of those conditions have not been met. The Appellant deals in the business of selling new cars. For that purpose it uses the cars purchased in its own name as demo cars. This is perfectly plausible.

Such cars are the capital goods of the Appellant and are treated as such. The capital goods have not been exclusively used for making sale of non-taxable goods. Lastly, no ITC is claimed by the Appellant in respect of the VAT paid by it at the time of purchase of the cars.

23. The fact that in 2010-11, 9 cars were sold whereas one demo car purchased on 22nd March 2010 was sold subsequently on 31st October 2010 after using it for about seven months again will not *per se* disentitle the Appellant for the benefit under Section 6 (3) of the DVAT Act.

24. The Court also does not see any significance being attached to the fact that in the return filed by the Appellant in columns R6.1 and R11.9 the value of capital goods purchased has been specified as 'Nil'. The disclosure of information in the capital goods in the returns would not make any difference whatsoever to the Appellant's taxable turnover under the DVAT Act.

25. It must be noticed at this stage that VATO gave no reasons whatsoever for denying the benefit of exemption except saying that the case of the Appellant cannot be accepted. It is only a conclusion without any reasons. The Department has expressed an apprehension that the Appellant may be dressing up regular sales transactions as sale of capital goods for availing the benefit under Section 6 (3) of the DVAT Act. The denial of benefit of that provision cannot be based on mere apprehensions and suspicions. The fact remains that the Department has been unable to produce any credible material to show that in selling any of the demo cars in either 2009-10 or 2010-11, the Appellant was seeking to camouflage regular sale transactions

as sale of capital goods in order to claim the benefit under Section 6 (3) of the DVAT Act.

26. For all the aforementioned reasons, the Court finds that the order of the OHA as well as the order dated 21st August 2014 of the AT and its subsequent order dated 29th July 2015 are unsustainable in law and therefore, they are hereby set aside. Accordingly, the question framed by the Court is answered in the affirmative, i.e., in favour of the Assessee and against the Department.

27. The appeal is accordingly allowed in the above terms but, in the circumstances of the case, with no orders as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

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