

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: November 6, 2015

Decision on: November 24, 2015

+

ST.APPL. 1/2013

M/S CLASSIC ENGINEERING CO.

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

versus

THE COMMISSIONER OF SALES TAX

..... Respondent

Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 3/2013

M/S JAKSON & CO.

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

Versus

COMMISSIONER OF SALES TAX & ANR.

..... Respondents

Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 4/2013

NAND KISHORE & CO.

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

versus

COMMISSIONER OF SALES TAX & ANR. Respondents
Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 5/2013

PREM OILS

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

versus

COMMISSIONER OF SALES TAX & ANR. Respondents
Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 6/2013

PREM OILS

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

versus

COMMISSIONER OF SALES TAX & ANR. Respondents
Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 16/2013

D.D. SALES CORPORATION

..... Petitioner

Through: Mr. Surendra Kumar and Mr.A. Babbar
Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Satyakam, Additional Standing
counsel.

WITH

+

ST.APPL. 17/2013

MURLIDHAR VIJAY KUMAR

..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI

..... Respondent

Through: Mr. Amresh Mathur, Advocate.

WITH

+

ST.APPL. 18/2013

MURLIDHAR VIJAY KUMAR

..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER TRADE & TAXES DELHI

..... Respondent

Through: Mr. Amresh Mathur, Advocate.

AND

+

ST.APPL. 24/2013

ALMEX INDIA PVT LTD

..... Petitioner

Through: Mr. Rajesh Jain, Ms. Renu Sehgal,
Mr.N.K. Bhuraria, Mr. Virag Tiwari and
Mr.Kumarjee Bhatt, Advocates.

versus

THE COMMISSIONER OF SALES TAX & ANR Respondent

Through: Mr. Satyakam, Additional Standing
counsel.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

24.11.2015

%

Dr. S. Muralidhar, J.

1. These are nine appeals under Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') filed against a common majority order dated 19th September 2012 passed by the Appellate Tribunal, Value Added Tax, Delhi ('Tribunal') arising under similar facts and circumstances. In all these appeals the following substantial question of law arises for consideration and were framed by the order dated 21st August 2013:

“ (i) Whether the majority decision is right in holding that the appellant is not entitled to benefit of Form ST 35 for the sales made to buyers outside Delhi, which has resulted in enhancement of turnover?

2. In STA Nos. 1, 3, 17, 18 and 24 of 2013 the following further question was framed for consideration:

“(ii) Whether the majority opinion was right in holding that

the levy of penalty and/or interest under Section 56 of the Delhi Sales Act, 1975 was just and proper?”

3. In STA Nos. 1, 5, 6, 17 and 24 of 2013 the following additional question was framed for consideration:

“(iii) Whether the conditions for reopening, as stipulated under Section 24 of the Delhi Sales Act, 1975, are satisfied?”

4. The Appellants are all authorised purchasing dealers as well as extended first point sellers in terms of the Delhi Sales Act, 1975 (‘DST Act’). They are engaged in the business of purchase and resale of taxable goods as a dealer under the DST Act as well as the Central Sales Tax Act, 1956 (‘CST Act’).

Background facts

5. Illustratively, the facts concerning Classic Engineering Company (CEC), the Appellant in STA No. 1 of 2013, are narrated. CEC was granted an authorisation certificate with effect from 19th September 1992 in Form ST-37 for purchase of ‘first point goods’ without payment of tax by issuing a declaration in Form ST-35. In terms of Section 5 of the DST Act, goods which are notified by the Lieutenant Governor are liable to tax at the first point, i.e.,:

- (i) in the case of an importer when he sells such goods for the first time in Delhi;
- (ii) in the case of a manufacturer when he sells such goods for the first time in Delhi and when he is not liable to pay tax, the sale by earliest of the successive dealers liable to pay under the DST Act;

- (iii) in the case of a dealer who has not purchased the goods from any of the above two dealers, when such dealer sells such goods for the first time in Delhi;
- (iv) in the case of a registered dealer who purchased the first point goods on the declaration of Form ST-35, which has been referred to in Clause (xvii) of Rule 11 of the Delhi Sales Tax Rules, 1975 ('DST Rules') for any of the purposes mentioned in sub-clause 1 of Clause 17 but are not so utilised by him, when any such dealer sells any such goods for the first time in Delhi and
- (v) in the case of dealers who are stockists/sole selling agents, distributors of first point sellers, i.e., manufacturers or importers ('extended first point sellers') when they sell the goods for the first time in Delhi when purchased on the strength of ST-35/1 (Refer to sub-clause [XXXIVA] of Rule 11 of the DST Rules).

6. For grant of the authorisation in Form ST-37 an application in Form ST-36 has to be filed for purchasing first point goods against Form ST-35.

7. Till 30th September 1999, the legal position was that on the strength of the authorisation certificate in Form ST-37, the first point goods could be purchased by the authorised dealer when intended:

- (i) for use as a raw material in the manufacture in Delhi of goods (other than goods specified in the Third Schedule to the DST Act or newspaper) for sale in the manner specified in item (A) of Section 4(2)(a)(v);

(ii) for sale in the course of inter-state trade or commerce or in the course of exports outside India in the manner specified in sub-items (2) or (3) of item (A) of Section 4(2)(a)(v); and

(iii) for use as containers for the purpose of packing of goods (as inserted with effect from 3rd July 1990).

8. It may be noted that through a foot note introduced on 5th August 1986, sales by an authorised registered dealer to another authorised registered dealer are allowed against form ST-35 inside Delhi. Where the extended first point sales were covered under Rule 11 (XXXIV A) an application was to be filed in Form-36A for grant of authorisation in Form ST-37A.

9. At this stage a brief explanation is called for as regards 'extended first point seller'. 'First point' means that the goods are taxed in the hands of the first seller in Delhi, i.e., in the hands of the importer who imports goods from outside Delhi and sells the same for the first time in Delhi or in the hands of the manufacturer who manufactures the goods and sells the same after manufacturing for the first time in Delhi. In case of first point taxable goods, registered dealers can issue an authorisation certificate to be authorised to buy first point taxable goods without payment of tax by issuing a declaration in ST-35 in spite of the fact that the goods are taxable at first point.

10. There was a representation to the Government by large companies that after import into Delhi they do not directly sell the goods to the consumers or retail dealers but appoint distributors/dealers who in turn affect the sales

and, therefore, should be treated as first sellers. Following this an amendment was made to the DST Act to provide for not treating a stage at which such companies sell to the distributors as first point. It is provided that it is only when the distributors would sell the goods, it would be treated as first sale. The dealers were then known as 'extended first point sellers' who could purchase first point goods from their principals without payment of tax by issuing a declaration in Form ST-35/1.

11. CEC was also granted a certificate of 'extended first point seller' with effect from 19th September 1992 in Form ST-37A for making purchases against the declaration in Form ST-35/1.

12. It requires to be noticed at this stage that Section 14 DST Act provides for registration of dealers. Section 14(1) states that no dealer can carry on business as such unless he is registered and possesses a certificate of registration. In terms of the second proviso, goods notified to be first point goods under Section 5(A)(1) are not to be specified in the registration certificate. A registration certificate itself is issued in Form ST-8.

13. The other fact to be noticed is that it is not as if a dealer can himself simply print the forms namely ST-37 or ST-37A (the authorisation forms) or the declarations in Form ST-35 or ST-35/1. There is a procedure specified under the DST Rules for this purpose. Rule 8 of the DST Rules provides for the authority from whom the declaration form will be obtained. It also provides for the use, custody, maintenance of such records and the matters incidental thereto. The forms have a serial number and can be issued only by an appropriate assessing authority for which a request has to be made by the

dealer in terms of Rule 8A. Rule 8 of the DST Rules reads as under:

“8. Every registered dealer shall maintain a register in Form ST-2, containing a true and complete account of every declaration form received from the appropriate assessing authority. If any such form is lost, destroyed or stolen, the dealer shall report the fact to the said authority immediately and make an entry thereof in the said register. He shall also furnish in respect of every such form lost, destroyed or stolen, an indemnity bond to the appropriate assessing authority for such sum as the said authority may, having regard to the circumstances of the case, fix.

14. Thus it is seen that Rule 8 provides that the declaration shall be printed under the authority of the Commissioner. It can be obtained by the purchasing dealer, who intends to purchase goods on the strength of the authorisation certificate, by submitting an application to the concerned assessing authority. After such assessing authority is satisfied with the genuineness of the request made by the dealer and if he is satisfied that the dealer has submitted a complete account of the forms earlier received and is not a defaulter in payment of tax or in filing the returns, the assessing authority may issue the necessary forms.

15. With effect from 30th September 1999, a change was brought out to Rule 11 (XXXIV) and (XXXIVA) of the DST Rules. The amendment was to restrict the extended first point selling to make sales only inside Delhi. In other words, an extended first point seller could make purchases without payment of tax by furnishing a declaration in the amended Form ST-35/1 that the purpose for which such goods were to be used was only for “resale inside Delhi”. Simultaneously, Form ST-5, Form ST-36 and Form ST-36A (applications for registration) were withdrawn and substituted by a new

consolidated and all inclusive Form ST-35. Similarly, Form ST-8 (in which registration was issued) and Forms ST-37 and ST-37A (forms of authorisation) were withdrawn and were substituted by a consolidated all inclusive Form ST-8 (registration certificate). Form ST-35/1 was also substituted by another Form ST-35/1 restricting the use of first point goods purchased against such substituted forms for resale in Delhi only. The net result was that with effect from 30th September 1999, as a result of the amendment to Rule 11 (XXXIVA) and Form ST-35/1, purchases against the amended Form ST-35/1 could not be made for affecting:

- (a) inter-state sales
- (b) exports out of India or
- (c) for use in manufacture of goods for sale outside Delhi.

16. In the case goods sold for a purpose other than for sale in Delhi then the purchase price of such goods was liable to be included in the taxable turnover of the purchasing dealer.

17. However, this gave rise to an anomaly inasmuch as although the amended rule including the new Form ST-35/1 was notified by publication in the gazette, the earlier registration certificate in ST-8 or the authorisation certificate in ST-37 and ST-37A which were issued to registered dealers, authorised purchasing dealers and extended first point sellers were neither withdrawn nor rendered inoperative either by the said notification dated 30th September 1999 or any other notification. The fact of the matter was that the sales tax department continued to treat the said registration as valid and continued to issue Forms ST-1, ST-35 and ST-35/1 on the basis of Forms ST-8, ST-37 and ST-37A in the unamended versions even after 30th

September 1999.

18. At this stage it requires to be noticed that Rule 2(g) of the DST Rules defines form to mean “a form appended to these Rules which includes Rule 8.” The fact of the matter was that no new forms were printed by the sales tax authorities after the amendment to the DST Rules with effect from 30th September 1999. This was confirmed by the authorities by way of a reply to a query posed to them by the registered dealer under the Right to Information Act, 2005 (‘RTI Act’).

19. The resultant position was that notwithstanding the amendment to Rule 30 (11) with effect from 30th September 1999 restricting the extended first point selling to make sales only inside Delhi, the sales tax authorities continued to issue the old and unamended form ST-35/1, i.e., the form which existed prior to 30th September 1999 and which permitted a dealer to make purchases for making sales in the course of inter-state sales as well as inside Delhi. Therefore it could not be said that the declarations given by the dealer in such unamended forms were false declarations so as to attract the first proviso to Rule 11(XXXIVA).

Reassessment proceedings

20. In the case of CEC, its sales tax assessment for the Assessment Year (‘AY’) 2001-02 was framed both under the DST Act as well as the CST Act by orders dated 22nd March 2003. This was done after the assessing authority verified the complete books of accounts, the purchases made against declarations and the declarations received and issued.

21. Somewhere down the line, the assessing authorities appear to have realised the error and instructions were given for reopening all cases in which declarations in Form ST-35/1 were issued. The instructions were that if the declarations were for the purposes of making inter-state sales they should be taxed by making a reassessment.

22. On the strength of the above instructions, notices were issued under Section 24 of the DST Act to examine whether goods purchased against Form ST-35/1 were sold locally or by way of inter-state sales. These notices were issued on 28th April 2005 under Section 24 of the DST Act. Notices were also issued on 31st March 2007 under Section 56 of the DVAT Act calling upon the dealer to show cause why penalty should not be imposed.

23. In the case of CEC, the assessing authority negated the objections regarding non-recording of satisfaction for reopening the assessment and by reassessment order dated 19th March 2007 levied tax amounting to Rs.5,55,425 on account of alleged misuse of declaration in amended Form ST-35/1 on purchases amounting to Rs.69,42,753 thus attracting the second proviso to Rule 11(XXXIVA) since it was found that the goods were sold in course of inter-state trade and commerce. The assessing authority further levied interests in the sum of Rs.4,99,878 and penalty of Rs.5,55,420. The total demand created was Rs.16,10,723.

Orders in Appeal

24. Aggrieved by the above order of reassessment, CEC filed an appeal before the Additional Commissioner who by an order dated 2nd June 2009 confirmed the reassessment order dated 19th March 2007.

25. Thereafter an appeal being ST Appeal No. 104/ATVAT/09-10 was filed before the Tribunal. There were three Members of the Tribunal i.e. Mr. S.K. Kaushik, Chairman, Mr. D.C. Anand, Member (Judicial) and Ms. Nita Bali, Member (Accounts). While the majority, comprising of Mr. Anand and Ms. Bali by order dated 19th September 2012, confirmed the order of the Additional Commissioner both in respect of the legality of the reassessment as well as in respect of the merits of the case, the dissenting Member Mr. S.K. Kaushik (Chairman) relied on the decision of the Supreme Court in *Polestar Electronics (P) Ltd. v. Additional Commissioner of Sales Tax (1978) 41 STC 409 (SC)* and allowed the appeal.

26. The facts of the other appeals are more or less similar to the case of CEC except as regards the dates of the respective orders of assessment, reassessment and the respective orders of the Additional Commissioner dismissing their appeals. The figures of tax, interest and penalty would also differ.

27. While the first question of law as noted hereinbefore is common to all the appeals, Question 2 concerning levy of penalty and interest is relevant for STA Nos. 1, 3, 17, 18 and 24 of 2013. Question No.3 pertaining to reopening of assessment under Section 24 of the DST Act arises in STA Nos. 1, 5, 6, 17, and 24.

Question 1: Effect of non-issuance of amended Form ST- 35

28. The Court first proposes to deal with the common question raised in all the appeals viz., whether the majority of the Tribunal is right in holding that

the Assesseees were not entitled to the benefit in Form ST-35 for inter-state sales made outside Delhi resulting in the enhancement of their respective turnovers.

29. To recapitulate, the dealers in these cases do not deny that an amendment took place to Rule 11 (XXXIV) and (XXXIVA) with effect from 30th September 1999. Their case, however, is that with the amended forms not actually being issued to them, they continued filing declarations using the unamended Form ST-35 and ST-35/1. Their position is that for no fault of the Appellants, and on account of the failure of the sales tax authorities to print the amended forms, the dealers cannot be made to bear the burden of additional tax, interest or penalty. The majority decision of the Tribunal proceeded on the basis that once the amendment along with the amended form were notified, the dealers could not have continued filing declarations in the old forms. The majority also placed reliance on the decision of the Supreme Court in *Modi Spinning Mills v. CST 16 STC 310*.

30. Mr. Rajesh Jain, learned counsel for the Appellant in STA Nos. 1, 3, 5, 6 and 13 and Mr. Ruchir Bhatia and Ms. Renu Sehgal, learned counsel for the Appellants in the other appeals submitted as under:

(i) The decision of the Supreme Court in *Polestar Electronics (P) Ltd.* (*supra*) applies clearly to the facts of the present case. The Forms in terms of the amendments with effect from 30th September 1999 were never printed by the Department. In such event the dealers had to necessarily use the unamended form that was issued by the department and could not have added or subtracted anything in the said Form. The declarations given by

them in the old Forms could not therefore be said to be false declarations. Reliance was also placed on the decision in ***Ramesh Chawla v. Commissioner of Sales Tax, Delhi 132 STC 1 (SC)***.

(ii) Even assuming that by reason of the amendment to Rule 11 (XXXIV) and (XXXIVA) the corresponding Form ST-35 and ST-35/1 should be deemed to have been amended, the consequence was only that the selling dealers would be disentitled to the exemption since the declaration was not in the prescribed form. The consequence could not be that the price of the goods purchased would be included in their taxable turnover. The fact that the substituted forms were never printed was confirmed by the letter dated 22nd December 2009 issued by the Additional Commissioner of Sales Tax under the RTI Act.

(iii) Even the newly printed registration certificates under ST-8 were issued to the assessing authority only with effect from 25th June 2009 i.e. after nine months from when the amendment was carried out to Rule 11 (XXXIVA). Further the department never issued any notification, press note, circular etc. informing them of the availability of the new Form ST-8 *in lieu* of Form ST-37A.

(iv) The majority was in error in holding that the violation of Rule 11 (XXXIVA) took place at the time of purchase of the goods by the Appellants and not at the time of issue of Form ST-35/1. The violation did not take place either at the time of purchase or at the time of making inter-state sales since the Appellant could not have visualised at the time of purchase whether the goods were going to be sold in Delhi or outside Delhi.

Further even at the time of inter-state sales violation could not be said to have taken place since till that point in time the amended Form ST-35/1 was not even printed much less issued. A purchasing dealer can be said to have violated the declarations only when he acts contrary to the condition expressly stated in the declaration. In the present case dealers acted in consonance with the declarations.

31. In reply it is submitted by Mr. Satyakam, learned counsel appearing for the Respondent, that at no point in time did any of the dealers submit any requisition under Rule 8(3)(i) of the DST Rules for issuance of the amended Forms. He stated, on instructions, that the new forms were in fact printed. Thirdly, Mr. Satyakam sought to distinguish the decision of the Supreme Court in *Polestar Electronics (P) Ltd. (supra)* by contending that in that case the amended Forms were in fact not issued whereas in the present case the amended Forms were also notified in the official gazette and, therefore, it is not as if the dealers were unaware that the forms also stood amended. Reliance was placed on the decision in *Modi Spinning Mills (supra)*.

The decision in Polestar Electronics (P) Ltd.

31.1 Since the majority and minority judgments of the Tribunal have referred to the decision in *Polestar Electronics (P) Ltd. (supra)* that decision requires to be discussed at some length.

31.2 The facts of that case were that the Appellants/Assessees were registered dealers under the Bengal Finance (Sales Tax) Act, 1941 which applied to the Union Territory of Delhi during the assessment period 1971-72 and 1972-73. The Assessees held registration certificates which specified

the classes of goods intended for resale or for use both as raw materials and in the manufacture of goods for sale. The registration certificate was in the form which was prior to 29th September 1973. There was no requirement in terms of the said registration form that the resale of goods or use of such goods as raw materials should be within Delhi. That requirement was brought in by an amendment with effect from 29th March 1973.

31.3 One part of the decision in *Polestar Electronics (P) Ltd. (supra)* concerned the interpretation of the word 'resale' under the second proviso to Section 5(2)(a)(ii) of the Bengal Act as amended by Finance Act, 1972. It was held that the plain meaning of the word 'resale' cannot mean resale that is restricted to the territory of Delhi. It was held that "there was no geographical limitation confining resale, manufacture or sale to the territory of Delhi." Further, it was held that the burden of proof that the goods purchased were utilised by the purchasing dealer for a different purpose would be on the Revenue and that if the Revenue wanted to add the price of the goods purchased in the taxable turnover of the purchasing dealer it would be for the Revenue to show that, in a given case, the goods were utilised by the purchasing dealer for a different purpose, i.e., after having purchased the goods for resale or for use as raw material, they were neither resold nor used as raw material.

31.4 The decision in *Polestar Electronics (P) Ltd. (supra)* also discussed the effect of the declarations given by the Assesseees in the unamended Forms. As in the present case, in the facts of that case, despite the amendment to Section 5(2)(a)(ii) of the Bengal Act, the Department failed to issue the

amended Forms and the dealers kept using the unamended Forms by making purchases. In that context, the Supreme Court observed as under:

“If you have amended the Act or the Rules, but you have not amended the declaration form as per the Act or the Rule, and the dealer uses the goods as per the purposes declared in declaration, you cannot say that there is violation of the declaration and you cannot tax the purchasing dealer.”

31.5. It was noted in ***Polestar Electronics (P) Ltd.*** (*supra*) that although the amendment took effect from 28th May 1972, the amended Forms were not issued till 29th March 1973. As a result, from 28th May 1972 to 29th March 1973 the Form with declaration continued to be the same as before and carried the statement that “goods were purchased by the purchasing dealer for use by him as a raw material in the manufacture of goods for sale” without any restriction as to the place of manufacture or sale and this was the Form in which the declarations were given by the Assesseees to the selling dealers when they purchased the goods. The Supreme Court in those circumstances observed as under:

“Now, if the declarations given by the assesseees stated the purpose of purchase of goods to be used as raw materials in the manufacture of goods for sale and did not specify that the manufacture and sale will be inside the territory of Delhi, it is difficult to see how the assesseees could be said to have utilized the goods for “any other purpose” if they used the goods as raw materials in manufacture outside Delhi or sold the goods manufactured outside Delhi. Even if they manufactured goods outside Delhi and sold the goods so manufactured outside Delhi, the use by them of the goods purchased would be for the purpose stated in the declarations and it would not be right to say that they utilized the goods for any other purpose. The problem can also be looked at from another point of view and that too

yields the same conclusion. We may assume for the purpose of argument that since the words “in the Union Territory of Delhi” and “inside Delhi” were added after “manufacture” and “sale” respectively in section 5(2)(a)(ii), a similar amendment may also be taken to have been effected in the second proviso and we may read there the words “in the Union Territory of Delhi” after the word “manufacture” and the words “inside Delhi” after the word “sale”. What the second proviso, on this construction postulates is that the goods must be purchased by the purchasing dealer as being intended for use by him as raw materials in the manufacture “in the territory of Delhi” of goods for sale “inside Delhi”. But the declarations given by the assesses being in the unamended form, it would not be possible to say that the goods were purchased by the assesses as being intended for use as raw materials in the manufacture “in the territory of Delhi” of goods for sale “inside Delhi. The condition for the applicability of the second proviso was, therefore, clearly not satisfied and the second proviso could not be invoked for including the price of the goods purchased in the taxable turnover of the assesses....”

31.6. In *Polestar Electronics (P) Ltd.* (*supra*) the Supreme Court also observed that even if the declarations given by the purchasing dealers were held to be invalidated since they were given in the old Form and not in the amended Form, the result could not be that the purchasing dealers would be saddled with the tax that had escaped assessment. It was observed by the Supreme Court as under:

“It is indeed difficult to see how the assesses could be saddled with liability to tax under the second proviso when they have literally complied with the statement of intention expressed in the declarations given by them to the selling dealers.”

31.7. The Supreme Court in *Polestar Electronics (P) Ltd.* (*supra*) itself distinguished the earlier decision in *Modi Spinning Mills* (*supra*). In *Modi Spinning Mills* (*supra*), the declaration form had been amended to provide that the declaration must set out the intention of the purchasing dealer to use the goods purchased in the manufacture 'in the State of Punjab' of goods for sale. The Appellant there had issued a declaration in the amended ST-22 to the selling dealer from whom cotton had been purchased for the purposes of manufacture. Despite having furnished such declaration, the Appellant claimed deduction in its return on the basis of the registration certificate ST-3 which did not contain the words "in the State of Punjab of goods for sale." In those circumstances it was held that the Appellant had violated the declaration given in the amended form because the cotton was sent for the manufacture of goods out of Punjab. Therefore, on the one hand the Assessee violated the declaration given in the amended ST-22 and on the other claimed deduction on the basis of the unamended certificate.

Effect of non-availability of the amended forms

32. The Court fails to appreciate, in the present case, the submission of the learned counsel for the Revenue that the decision in *Polestar Electronics (P) Ltd.* (*supra*) is distinguishable on facts. While it is true that in the facts noted in the *Polestar Electronics (P) Ltd.* (*supra*) there was no indication that the amended Form also stood notified in the gazette, what is similar to both cases is that the Department failed to print the amended forms for issuance to the dealers. As has been discussed hereinbefore, a very detailed procedure has been prescribed under Rule 8 of the DST Rules for issuance of the Forms. It is not as if a dealer can simply print out a form and begin using it.

The assessing authority has to be satisfied that the purchasing dealer is entitled to such a Form. The Forms are maintained in serial numbers and the assessing authority has to keep a complete record of all the Forms being issued to various dealers.

33. There is no denial by the Department at any stage that they had in fact not printed the amended Forms. The Assessee has placed on record a copy of the reply given by the Additional Commissioner of Sales Tax on 22nd December 2005 to the following effect:

“With reference to your application I.D. No. 5486/ACTT-111 dated 24-11-05 on the above cited subject, it is to inform you that the Form ST-35/1 as amended vide Notification dated 30-09-99 were not got printed by this Department as per record. A copy of the said notification, which is self explanatory, is enclosed.”

34. In light of the above letter, the Court fails to understand that how it can be contended before this Court by learned counsel for the Revenue that the amended Form ST-35/1 was available. Further the contention that at no stage did any of the dealers actually seek the issuance of the Form in terms of Rule 8(3) of the DST Rules was not a contention raised by the Revenue at any stage of the proceedings i.e. before the Assessing Officer, the Appellate Authority or the Tribunal. When asked to point out if such contention had been raised earlier, the answer given by learned counsel for the Revenue was that in a communication to him by the Department such a contention was raised. In other words, he was not able to point out that the contention had been raised at any of the stages of the proceedings prior to the present appeals. This being a pure question of fact and not having been noticed by

any of the authorities including the Tribunal, the submission to this effect by the Revenue for the first time at this stage cannot be accepted.

35. In any event, the fact remains that with the Forms not having been printed and in case of the some of the Appellants the unamended Forms being continued to be issued, the Assesseees could not be held to have made any false declaration. The observation of the majority judgment that “non-printing of Forms due to administrative reasons was a mere technicality which cannot make the statutory rule redundant” overlooks the detailed procedure under the DST Rules itself for the printing and issuance of Forms by the assessing authority.

Analysis of the forms

36. In the present case, the unamended Form ST-35 reads as under:

“Form ST-35
(see rule 11)

**FORM OF DECLARATION FOR PURCHASES BY
REGISTERED DEALERS HOLDING AUTHORISATION**

Issued to holder of
Authorisation No.

Serial No.....
Seal of issuing
authority

To

.....(Seller)
.....(Address)

Certified that the goods purchased from you as per
*bill(s)/cash memo(s) stated below are covered by *my/our
authorisation No.....dated.....which is valid with
effect fromand are for:

*(1) sale by me/us in the course of inter-state trade or

commerce in the manner specified in sub-item (2) of item (A) of section 4(2)(a)(v).

*(2) sale by me/us in the course of export outside India in the manner specified in sub-item (3) of item (a) of section 4(2)(a)(v).

*(3) use by me/us as raw materials in the manner and for the purposes specified in item (A) of section 4(2)(a)(v).

*[(4) use by me/us as container or for the purpose of packing of goods in the manner specified in clause (c) of section 4(2)(a)(v).]

in terms of sub-clause (1) of clause (xxxiv) of rule 11 of the Delhi Sales Tax Rules, 1975.

Bill/Cash memo No. & date	Description of goods	Value of goods
------------------------------	-------------------------	----------------

Total

The above statements are true to the best of my knowledge and belief.

.....
Name of the person signing

Declaration and his status in

Relation to the purchasing dealer

.....
Signature

.....
Name and address of the purchasing dealer.

*Strike out the words/expressions not applicable.”

37. It has been contended by the Revenue that it is incumbent on the purchasing dealers to strike out those portions of the above Forms which are ‘not applicable’ in terms of the asterisk marks given in the Form while giving the declaration in the above Form after 30th September 1999. This submission, in fact, appears to have been accepted by the majority judgment. The contention of the Assessee that they could not have struck out anything in view of the instruction by way of the stamp affixed on the Form stating ‘cutting not allowed’ was held by the majority to be ‘not tenable’ by

interpreting the words 'cutting not allowed' to mean that cutting out of the various heads is not allowed while entering the particulars in a Form manually. The instruction 'Strike out the words/expressions not applicable' appearing at in relation to asterisks alongside certain options/phrases was held to imply that striking out options within the heads was required to be done.

38. However, as rightly pointed out in the minority judgment, it is only by Circular dated 13th April 2004 issued by the Deputy Commissioner (Forms) that all the STOs, ASTOs were directed to strike out the terms mentioned at Serial Nos. 1, 2 and 3 from Form ST-35 before issuing them to the dealers. This clearly means that the Department intended to strike out the terms mentioned at Serial Nos. 1, 2 and 3 from Form ST-35 issued to the dealers and that there was no implied obligation on the Assesseees to do the same. More importantly, as noted in the dissenting opinion of the Chairman of the Tribunal, in the case of one of the Appellants i.e. M/s Murlidhar Vijay Kumar the dealer had applied for grant of authorisation in Form 37-A on 7th October 1999 i.e. after the amendment on 30th September 1999, by filing an application in Form ST-36A. He was issued an authorisation in Form ST-37A on 13th October 1999. After the authorities intended to implement the amended provision, rather than issuing a Form in ST-37A (which had in fact been deleted by the amendment), they could have amended the registration certificate of the Assessee.

39. As rightly pointed out by the Assesseees in the present case, on the strength of the registration certificate that was still unamended, it was open

to the Assesseees to make the purchases by using the authorisation under Form ST-37A as it turned out that the amended Forms were issued only with effect from 27th June 2000. Therefore, even if the Assesseees had approached their ward authorities to get the Form ST-8 in its amended version (which had replaced Form ST-37A) such amended Forms would in fact have not been available. There was not even any press note, circular or notification issued to the dealers about the availability of such amended ST-8 Forms.

40. In this context the following observations of the Supreme Court in the decision in ***Ramesh Chawla v. Commissioner of Sales Tax, Delhi*** (*supra*) are relevant:

“Since the relevant forms prescribed under Section 64 of the Delhi Sales Tax Act, 1975, and meant to be carried by the owner or person in-charge of a goods vehicle were not printed by the department and made available, the owners or person in-charge of the goods vehicle could not have the obligation to carry the declaration forms nor could the vehicle be detained for not carrying the forms, so long as the forms were not printed and made available by the department.”

41. The Court, therefore, accepts the view expressed in the minority opinion of the Chairman of the Tribunal as being consistent with the law explained in the aforementioned decisions in ***Polestar Electronics (P) Ltd.*** (*supra*) and ***Ramesh Chawla v. Commissioner of Sales Tax, Delhi*** (*supra*).

No false declaration

42. The Court also accepts the plea of the Appellants that this was not a case of making a false declaration. The Appellants were issued Form ST-35 and

ST-35/1 and declarations were given in both forms, which at the time of making of these declarations, could not be held to be false declarations. Another decision which is relevant in this context is *MMTC v. State of Orissa 1987 65 STC 129 (Ori)* where again it was observed that when the Form is not amended by the time of furnishing the declaration it was impossible on the part of the Assessee to furnish a declaration in the amended Form.

43. The Court further notices that after the amendment to Rule 11 (XXXIVA) with effect from 30th September 1999, the amended Form ST-35/1 provides for a declaration as under:

“Form ST-35/1

(See rule 11)

FORM OF DECLARATION FOR PURCHASES BY
REGISTERED DEALERS HOLDING AUTHORISATION
IN FORM ST-37A

Issued to holder of
Authorisation No.

Serial No.....
Seal of issuing
authority

To

.....(Seller)
.....(Address)

[Certified that the goods purchased from you as per
*bill(s)/cash memo(s) stated below are covered by *my/our
registration certificate issued under rule 16 with No.....
dated.....which is valid with effect fromand
are for resale in Delhi or part thereof in terms of sub-clause
XXXIVA of rule 11 of Delhi Sales Tax Rules, 1975.]

Bill/Cash Memo No. and Date	Description of goods	Value of goods
Total		

The above statements are true to best of my knowledge and belief.

Signature.....

(Name of the person signing the declaration and his status in relation to the purchasing dealer)

.....

(Name and address of the purchasing dealer)

.....

*Strike out the words/expressions not applicable.”

44. The two factors that are striking on a perusal of the amended Form is that its title continues to mention a registered dealer ‘holding authorisation in Form ST-37A’ which obviously is a mistake since Form ST-37A was no longer in vogue after that date. The second factor that requires to be noticed is that the Form specifically refers authorisation to the under Rule 16 and striking out is only permissible when the payment is either by bill or by cash memo or the word ‘me/our’ has to be used. This declaration clearly states that the goods are intended for resale in Delhi and for no other purpose.

45. With the Department in the present case having continued to issue, even after 30th September 1999 to purchasing dealers, the unamended Forms as they existed prior to 30th September 1999 and with those purchasing dealers continuing to hold valid authorisation in Form ST-37A which had neither

been withdrawn nor rendered inoperative, the declarations given by the dealers in the unamended Form ST-35 or ST-35/1 could not be stated to be false declarations. In other words, there was no violation of the declaration by the dealers. In any event, at the time of giving such declarations the dealers could not have known whether the goods were going to be resold within Delhi or sold by way of inter-state sales. Even if the declarations were held to be invalid, it is the seller who would lose the benefit of the exemption. The consequence could not be that the price of the goods purchased would be included in the taxable turnover of the Assesseees who are purchasing dealers as well as extended first point sellers under the DST Act.

46. One more submission that was made was that in terms of Clause 7A of the Return Forms which had been amended with effect from 30th September 1999, the Assesseees were required to include in the taxable turnover the purchase price of the goods purchased against Form ST-35/1 and sold in the course of inter-state trade and commerce. It was contended that by non-complying with that requirement, the Assesseees had violated the first proviso to Rule 11 (XXXIVA).

47. As pointed out in the dissenting opinion of the Chairman of the Tribunal, Clause 7A refers to Rule 23A(2) which provides that where a dealer purchases goods on the strength of the registration certificate issued under Rule 16 and against Form ST-35(1) but utilises such goods not by way of sale but for a purpose other than that mentioned in Rule 11(XXXIVA) then the purchase price would be included in his taxable turnover. However, Rule

23A(2) itself is not applicable because the condition laid down for its applicability did not exist. In other words, with Form ST-37A not being formally withdrawn and in fact the authorisation being continued to be issued, it was impossible for the dealers to comply with the requirement of the amended provisions and on the one hand with the department issuing the old unamended Forms, the dealers could not be faulted for making declarations in the unamended Forms.

48. For all the aforementioned reasons, the Court answers Question 1 in the negative by holding that the majority decision was in error in holding that the Appellant Assesseees were not entitled to the benefit of the unamended Form ST-35 for the sales made by way of inter-state sales. In other words, the question is answered in favour of the Assessee and against the Department.

Question 2: Validity of the penalty

49. In view of the above answer, Question No.2 is also answered in the negative. In other words, it is held that the majority opinion was in error in upholding the levy of interest and penalty under Section 56 of the DST Act. In this context, reference made to the decision of the Supreme Court in ***J.K. Synthetics Ltd and Birla Cement Works v. Commercial Taxes Officer and State of Rajasthan (1994) 4 SCC 276*** which holds that if the original assessment is accepted and the dealer has paid tax in terms of that return, the levy of interest will not be justified. The levy of penalty was in any event not justified. The imposition of penalty is not automatic even assuming that the reassessment was justified. The fact that there was a dissenting opinion

by one of the Members of the Tribunal, does indicate that it is not a case of concealment of particulars but a case where there is a possible interpretation in favour of the Assessee.

Question 3: Validity of the reassessment proceedings

50. The Court has been shown the order passed by the assessing authority. The Court notices that there is nothing in the order sheet which indicates if there is any formation of an opinion in terms of Section 24 of the DST Act that any taxable turnover had escaped assessment. The order sheets do not themselves record any reasons for reopening of the assessment. It was not even disputed by learned counsel for the Revenue that there is no separate noting in the files of the concerned Assessee of any satisfaction by the Assessing Officer of no assessment or escapement of turnover.

51. This was particularly relevant since in the original assessment framed by the assessing authority, which was after the amendment came into force, it was noted that “Dealer has claimed exemption against first point taxable sales which is allowed after verification from the books of accounts...”. The assessing authority thus examined the records, the declarations and the books of accounts produced by the Assessee. There was no new information on the basis of which the assessing authority could have reopened the assessment.

52. In other words, what the assessing authority was seeking to do by invoking Section 24 of the DST Act was to review the earlier order passed by him earlier after having realised that the Assessee ought not to have

furnished the declarations under the unamended Forms in ST-35 in respect of the inter-state sales. There is a distinction between the reopening of an assessment under Section 24 of the DST Act and the exercise of revisionary powers by a superior officer under Section 46 of the Act. Thus a Commissioner could form the opinion that the order of an assessing authority is prejudicial to the interests of the Department. In other words, Section 24 cannot substitute for the power exercisable under Section 46 of the Act. This legal position has been made explicit in the decisions of this Court in *CST v. Janata Wire Works 1999 81 STC 250 (Del)*, *Hoshyar Singh Suresh Chandra v. CST 136STC 173 (Del)* and *Krishna Enterprises v. CST 140 STC 148 (Del)*.

53. After the decision of this Court in *Samagya Consultants (P) Ltd. v. CST 2001 (122) STC 512 (Del)* and *Jagdish Cold Storage & Ice Factory v. The Commissioner of Sales Tax, Delhi 2007-08 (46) DSTC J-1 (Del)*, the legal position was made clear that the recording of the reasons by the assessing authority officer before issuing a notice of re-assessment under Section 24 of the DST Act is mandatory and the violation of this requirement would result in invalidating the entire reassessment proceedings. The Commissioner has issued the following directions by way of Circular No.7 of 2001-02 (reported in DSTC N-38 at page 39) in light of the aforementioned decision:

“It is emphasised upon all Assessing Authorities that the aforementioned observations of the Hon’ble Delhi High Court be strictly adhered to and before issuing the notice in Form ST 15 under the aforesaid provision of Section 24, the reasons therefore invariably recorded on the order sheet. Non compliance will be viewed

seriously.”

54. The majority of the Tribunal has brushed aside the above contention by simply stating that the inclusion of the purchase price in respect of goods purchased by the Assessee against Form ST-35/1 had not been considered by the assessing authority in the original assessment and that “this means that this aspect had escaped assessment while framing the original assessment.” A mistake in the original assessment will not by itself constitute a justification for reopening of the assessment particularly where all the material facts were already known to the assessing authority. Secondly, the statutory requirement of recording the formation of an opinion about turnover escaping assessment by the tax by the assessing authority is mandatory. Thirdly, the question whether there was ground for reopening the assessment is not a matter for inference reference. There is a mandatory requirement that there must be a written note on the file by the assessing authority recording satisfaction that there existed grounds for reopening the assessment within the meaning of Section 24 of the DST Act. This again cannot be a mechanical reproduction of the provision. If there is no such recording of satisfaction by the assessing authority, the inevitable result is invalidation of the entire reassessment proceedings. The above legal position has been completely overlooked by the majority opinion in the present cases.

55. Consequently, Question No. 3 is also answered in favour of the Assessee and against the Department. In other words, it is held that the conditions for reopening of the assessment under Section 24 of the DST Act were not satisfied in the present cases.

Conclusion

56. For all of the aforementioned reasons, the appeals are allowed and the majority opinion of the Tribunal dated 19th September 2012 is hereby set aside but in the circumstances with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 24, 2015

dn

