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

Decided on: March 23, 2015

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ST.APPL. 78/2012

POWERLITE ELECTRICALS INDIA P LTD Petitioner

Through: Ms. Prem Lata Bansal, Sr. Advocate
with Mr. Ruchir Bhatia and Mr. Naman Nayak,
Advocates.

versus

COMMISSIONER TRADE AND TAXES DELHI..... Respondent

Through: Mrs. Avnish Ahlawat with Ms. Anchal
Chaudhry, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. R.K. GAUBA

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1. This appeal under Section 81 of Delhi Value Added Tax Act, 2004 (“DVAT Act” for short) seeks to assail the order passed on 27.08.2012 by Appellate Tribunal, Value Added Tax (hereinafter referred to as “the Tribunal”) dismissing appeal No.941/ATVAT/10-11 which, in turn, had been preferred by the appellant (assessee) impugning order dated 06.12.2010 passed by Additional Commissioner (Appeals).

2. The appellant presses the following as substantial question of law for consideration by this Court:-

“Whether the Tribunal and the authorities below failed to note and appreciate that the appellant having furnished valid and genuine declaration form ST-35 in terms of rule 11 (XXXIV) of the Delhi Sales Tax Rules, 1975 was legally and rightfully entitled to deduction under Section 4(2)(a)(v) of Delhi Sales Tax Act, 1975, on account of sales made to registered dealer?”

3. It may be mentioned at this stage that the dispute relates to Assessment Year (AY) 2000-01 when Delhi Sales Tax Act, 1975 was in vogue. Notwithstanding the repeal of said law, the remedy of appeal survives in terms of Section 106 of DVAT Act.
4. The background facts may be noted at the outset.
5. The assessee is a dealer in electrical goods, registered for purposes of sales tax with ward no. 99. The transactions of sale of certain items, which are subject matter of the controversy, occurred during the period 28.07.2000 to 09.10.2000 for total sale consideration of ₹1,53,50,908/-. It is the claim of the assessee that these sales were effected against purchase order dated 27.06.2000 by the purchasing dealer. The assessee relies on form ST-35 bearing No. 5AA-967198, for ₹1,53,50,908/- (hereinafter referred to as “the ST-35 form”), issued by the purchasing dealer.
6. There is no dispute that the purchasing dealer is registered with the Sales Tax Authorities for purposes of Section 4 of Delhi Sales Tax Act. It is not the case of the Revenue that the goods, thus sold against the ST-35 form, are specified in the registration certificate of the purchasing dealer. It was found by the assessing authority in the order dated 20.12.2005, and it is not disputed by the assessee, that in the original return submitted by the assessee and at the time of assessment proceedings arising therefrom, there was no reference made to the ST-35 form or to the purchase order dated 27.06.2000.

7. The assessing authority proceeded under Section 23(3) of Delhi Sales Tax Act and, by order dated 28.09.2002, disallowed exemption claim with regard to the transaction represented by the ST-35 form, raising a demand of sales tax along with interest on such account. The copy of the remanded assessment order dated 28.02.2005 further reflects, and again there is no contest in this regard on the side of the appellant, that the assessing authority had called for verification report from the concerned ward, the report dated 03.09.2002 submitted whereupon reflected that the purchasing dealer's activities were "doubtful".

8. On appeal, the first appellate authority remanded the matter by order dated 03.03.2003 with directions that the matter be re-considered after the assessee had been confronted with the reasons for which the claim founded on the ST-35 form was being rejected.

9. As indicated earlier, the assessing authority passed a fresh order on 28.02.2005 (remand order) reiterating the rejection of the ST-35 form and, thus, disallowing the exemption to the appellant noting, *inter alia*, the substance of the verification report dated 03.09.2002 regarding doubtful activities of the purchasing dealer and the fact that, in the original assessment proceedings, there is no reference to the purchase order or to the specific ST-35 form. Crucially, the ST-35 form was found to be inadmissible for the reason it had been issued to the purchasing dealer on 31.07.2000 for AY 1999-2000 and had been taken by the assessee without it being dated and with impermissible endorsement made in hand on the top converting into a form issued for AY 2000-01. The assessing authority also noted that the sale invoice issued by the assessee relating to the transaction in question also did not contain any information with regard to the purchase

order. It found it to be unusual that the purchase order was valid for a period of three and half months and on that basis treated it as a case of collusion. It also noted that the purchasing dealer had not submitted utilization certificate with regard to the goods thus sold to it by the appellant against the ST-35 form to its own assessing authority.

10. The appellant appealed against the order dated 28.02.2005 but unsuccessfully. The order dated 06.02.2010 of the first appellate authority was carried in appeal to the Tribunal which rejected the contentions of the appellant and upheld the assessment.

11. By virtue of Section 3 of Delhi Sales Tax Act, 1975, every dealer whose turnover during the assessment year exceeds the prescribed taxable quantum is liable to pay sales tax under the said law on all sales effected by him. Section 4 prescribes the rate at which the sales tax payable by a dealer under this law would be levied. The expression “turnover” was defined in Section 2(o) to mean the aggregate of the amounts of sales price receivable, or, if so elected, actually received by the dealer, in respect of sale of goods, made during the prescribed period, after deducting the amount of sale price, if any, refunded.

12. The “taxable turnover”, by virtue of Section 4(2), however, would be computed after allowing certain deductions from the aggregate turnover. The amounts deductible for calculating the “taxable turnover” include those mentioned in sub-clause (v) of clause (a) of Section 4(2) as follows:-

“(v) sale to a registered dealer—

(A) of goods of the class specified in the certificate of registration of such dealer, as being intended for use by him as raw materials in the manufacture in Delhi of any goods, other than specified in the Third Schedule or newspapers,--

(1) for sale by him inside Delhi; or

(2) for sale by him in the course of inter-State trade or commerce, being a sale occasioning, or effected by transfer of documents of title to such goods during the movement of such goods from Delhi; or

(3) for sale by him in the course of export outside India being a sale occasioning the movement of such goods from India Delhi, or a sale effected by transfer of documents of title to such goods effected during the movement of such goods from Delhi, to a place outside India and after the goods have crossed the customs frontiers of India; or

(B) of goods of the class or classes specified in the certificate of registration of such dealer as being intended for resale by him in Delhi, or for sale by him in the course of inter-State trade or commerce or in the course of export outside India in the manner specified in sub-item (2) or sub-item (3) of item (A), as the case may be; and

(C) of containers or other materials, used for the packing of goods, of the class or classes specified in the certificate of registration of such dealer, other than goods specified in the Third Schedule, intended for sale or resale.”

13. The above are subject to second and third provisos to Section 4(2)(a) which need to be quoted *in extenso* as under:-

“Provided further that no deduction in respect of any sale referred to in sub-clause (v) shall be allowed unless a true declaration duly filled and signed by the registered dealer to whom the goods are sold and containing the prescribed particulars in the prescribed form obtainable from the prescribed authority is furnished in the prescribed manner and within the prescribed time, by the dealer who sells the goods;

Provided also that where any goods are purchased by a registered dealer for any of the purposes mentioned in sub-clause (v), but are not so utilised by him, the price of the goods so purchased shall be allowed to be deducted from the turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer.”

(emphasis supplied)

14. In exercise of the powers conferred by Section 71 of the Delhi Sales Tax Act, the administrator had framed Delhi Sales Tax Rules, 1975. For present purposes, rule 11 is relevant. It, *inter alia*, prescribed that in calculating the taxable turnover, the registered dealer is permitted to deduct from his turnover the value of the sale consideration in which regard there is a declaration obtained by him in form ST-35 issued to a registered dealer. The form ST-35 prescribed under the said rule 11 is in the nature of a declaration by a registered dealer holding valid licence with regard to purchases of specified goods. Noticeably, the declaration by the purchasing dealer would certify the bill/cash memo against which the purchase is made of such goods (properly described with value also indicated) as may attract the exemption under any of the categories of sub-clause (v) of Section 4(2)(a) quoted above.

15. Clause (XXXIV) of rule 11 would correspondingly permit such purchases to be treated by the purchasing dealer as exempt from levy of sales tax in terms of the registration certificate issued to him subject, however, to the condition of he “furnishing to the selling dealer a declaration in form ST-35” concerning goods in respect of which a notification under Section 8 has been issued.

16. Section 8 of Delhi Sales Tax Act clarified that the authorities under the law were not authorized to impose a tax on any sale or purchase of goods when such sale or purchase takes place (i) in the course of inter-State trade or commerce; or (ii) outside Delhi; or (iii) in the course of import of the goods into or export of the goods out of, the territory of India.

17. The department of Trade and Taxes of the Govt. of NCT of Delhi had issued instructions by circular No. 7 of 1995-96 dated 23.06.1995 (hereafter referred to as “the circular”) in terms of Section 4 of Delhi Sales Tax Act read with rule 11 (XXXIV-A)(i) of Delhi Sales Tax Rules. The Tribunal, in its order, noted clauses (iv) and (vii) of the said circular as under:-

“(iv) the dealer shall file along with his application a list of his complete requirement of the type of statutory forms for full 1 year, based on the bills/invoices (to be produced in original before the assessing authority for checking) and he would be entitled to have his full quota of forms in one go, unless the AA has specific reasons to deny the full quota for reasons to be recorded in writing.

(vii) All the statutory forms issued would be stamped for the particular year for which the transactions pertain. While issuing the forms it has to be ensured that the dealers’ name, address & RC No. are reflected thereon through a stamp and it is also stamped and signed by the assessing authority.

The process of issue of statutory forms on year to year basis would continue on furnishing of the complete account of the used Forms in St-2 statements. The dealer would be entitled for the issue of statutory form for the subsequent year only after rendering the full accounts of the preceding year. However, in respect of the year 1994-95, the dealer can submit utilization account of the 75% of forms issued for the preceding year for procuring the advance forms for the year 1995-96.”

18. The argument of the appellant is that the Tribunal, and the authorities below, have wrongly placed the burden of proving the genuineness of the transaction and the ST form on the selling dealer. It is submitted that the claim of the selling dealer for exemption under Section 4(2)(v) on the basis of the ST-35 form could not have been rejected for any defect in the said ST-35 form or for doubtful activities of the purchasing dealer or default on the part of the purchasing dealer in submitting proper utilization certificate. It is argued that the purchasing dealer here was indisputably a registered dealer and that the ST-35 form was officially issued to it and there was no reason for the selling dealer to doubt its validity or admissibility for purposes of the transaction in question. It is the contention of the appellant that the doubts entertained for the reason that the purchase order was valid for a period of three and half months are unfair and unjust since such factor could not lead to inference of the transaction being suspect or collusive. It was submitted that the Tribunal has wrongly referred to the circular of the department to uphold the impugned assessment order and that material gathered behind the back of the assessee, with which it was not properly confronted, has been used to impose tax liability which is improper.

19. The argument of insufficient opportunity to explain does not survive in the case at hand inasmuch as the initial order rendered on 28.09.2002 was upturned by the first appellate authority by its order dated 03.03.2003 remanding the case to the assessing authority. The present appeal arises out of the fresh assessment order passed after the remand.

20. We do not find any substance in the reasoning that the purchase order was suspect because it was intended to be valid for three and half months. There is no hard and fast rule or norm as to the validity of purchase orders.

It is a matter of commercial expediency and mutual understanding between the two dealers.

21. In the case of *State of Madras v. M/s. Radio and Electricals Ltd. & Anr.* (1996) 18 STC 222, questions as to the onus to explain had arisen, *albeit* in the context of similar provisions of Central Sales Tax Act, 1956, observations whereupon of the Supreme Court are germane to the issue at hand and, thus, may be quoted as under:-

“The Act seeks to impose tax on transactions, amongst others, of sale and purchase in inter-State trade and commerce. Though the tax under the Act is levied primarily from the seller, the burden is ultimately passed on the consumers of goods because it enters into the price paid by them. Parliament with a view to reduce the burden on the consumer arising out of multiple taxation has, in respect of sales of declared goods which have special importance in inter-State trade or commerce, and other classes of goods which are purchased at an intermediate stage in the stream of trade or commerce, prescribed low rates of taxation, when transactions take place in the course of inter-State trade or commerce. Indisputably the seller can have in these transactions no control over the purchaser. He has to rely upon the representations made to him. He must satisfy himself that the purchaser is a registered dealer, and the goods purchased are specified in his certificates: but his duty extends no further. If he is satisfied on these two matters, on a representation made to him in the manner prescribed by the Rules and the representation is recorded in the certificate in Form ‘C’ the selling dealer is under no further obligation to see to the application of the goods for the purpose for which it was represented that the goods were intended to be issued. If the purchasing dealer misapplies the goods he incurs a penalty under section 10. That penalty is incurred by the purchasing dealer and cannot be visited upon the selling dealer. The selling dealer is under the Act authorized to collect from the purchasing dealer the amount payable by him as tax on the transaction, and he can

collect that amount only in the light of the declaration mentioned in the certificate in Form 'C'. He cannot hold an enquiry whether the notified authority who issued the certificate of registration acted properly, or ascertain whether the purchaser, notwithstanding the declaration, was likely to use the goods for a purpose other than the purpose mentioned in the certificate in Form 'C'. There is nothing in the Act or the Rules that for infraction of the law committed by the purchasing dealer by misapplication of the goods after he purchased them, or for any fraudulent misrepresentation by him, penalty may be visited upon the selling dealer.

(emphasis supplied)

22. In the case of *Prince Plastics & Chemical Industries and Ors. v. Commissioner of Sales Tax and Ors.* (2003) 131 STC 372 (Del.), this court examined the consequences of default on the part of the purchasing dealer in terms of Section 4(2)(a) of the Delhi Sales Tax Act and ruled thus:-

“There are three provisos to section 4(2)(a) of the Act, the penultimate declares that no deduction in respect of any sale referred to in sub-clause (v) shall be allowed unless a true declaration in the prescribed form duly filled and signed by a dealer is furnished to the selling dealer. The last proviso is also of immense import as it specifies that where goods are not utilized by the purchasing dealer for the purposes mentioned in Sub-clause (v), the price of such goods shall none the less be deductible from the turnover of the selling dealer and instead, shall be included in the taxable turnover of the purchasing dealer. It indicates that the selling dealer is not responsible for ensuring that goods are used for the purpose for which they are sold. Such an investigation would be carried out by the Department and if misutilisation is detected, the value of the transaction will be added to the account of the purchasing dealer. Section 6 of the Act explicitly places the burden of proof on the selling dealer if its case is that any sale is not liable to the payment of tax; this provision rubs against the grain of the petitioners’ contentions.”

(emphasis supplied)

23. Relying, *inter alia*, upon the aforementioned cases, a Division Bench of this Court, of which one of us (S. Ravindra Bhat, J.) was a member, concluded in the case of *Milk Food Ltd. v. Commissioner, VAT & Ors.* S.T. Appeals 14-15/2011 decided on 04.02.2013 that “*it is not the burden of the selling dealer to show that the declaration in form No. ST-1 submitted by the purchasing dealer were not spurious or were genuine or that the conditions subject to which the forms were issued to the purchasing dealer by the Sales tax department were complied with.*”

24. Whilst we do not find any impropriety in the approach of the Tribunal in relying upon the circular issued by the GNCTD for regulating the issuance of the statutory forms (which include form ST-35), we do not approve use of the verification report concerning the purchasing dealer, may be reflecting “doubtful activities” on his part, in the manner done. Unless there is some material available to show complicity between the purchasing dealer and the selling dealer vis-à-vis the alleged “doubtful” activities of the former, inferences adverse to the interest of the latter are impermissible. The default on the part of the purchasing dealer in submitting a proper utilization certificate respecting the goods purchased under the cover of the ST-35 form may lead to consequences for him but not for the selling dealer. In this context, the third proviso to Section 4(2)(a) of the Sales Tax Act quoted earlier only needs to be applied. It makes it clear that the benefit of deduction continues to inure for the benefit of selling dealer even if the purchasing dealer is found to have indulged in misutilisation.

25. The assessee explained in the proceedings under Section 23(3) of Delhi Sales Tax Act that the sale transactions herein were relatable to

purchase order dated 27.06.2000. It is not the case of the Revenue that the ST-35 form is a fabricated document. Concededly, it was issued by the sales tax department of GNCTD to the purchasing dealer who is registered for such purposes with the concerned authorities. There is nothing to show that the selling dealer (the assessee) could have known as to for which assessment year the specific form had been issued by the department. For his purposes, the endorsement on the top showing it to be a form pertaining to AY 2000-01 was sufficient. The mere fact that the form when handed over did not bear a specific date is inconsequential and from this complicity of the assessee cannot be inferred.

26. We follow the law laid down in cases cited above and conclude that deduction of the value of the transaction represented by the ST-35 form has been wrongly disallowed by the Tribunal and the authorities below. The question of law is, thus, answered in the affirmative in favour of the assessee (appellant).

27. The impugned order is set aside and the appeal is consequently allowed.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MARCH 23, 2015
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