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

3.

\+ **ST.APPL. 74/2014**

BHARAT BIJLEE LIMITED ..... Petitioner

Through: Mr Anil K. Kher, Senior Advocate with Mr Kunal Kher, Advocate.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent

Through: Mr Naushad Ahemad Khan, ASC (Civil) GNCTD with Ms Neelam Kholiya, Advocate for Respondent Nos.1 & 2.

With

4.

\+ **W.P.(C) 3664/2015 & CM APPL 6523/2015 (stay)**

FRANKE FABER INDIA LTD. ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI & ANR. ..... Respondents

Through: None.

With

5.

\+ **W.P.(C) 3781/2015 & CM APPL 6757/2015 (stay)**

FRANKE FABER INDIA LTD. ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI

& ANR. ..... Respondents

Through: None.

With

6.

+ **W.P.(C) 3766/2015 & CM APPL 6760/2015 (stay)**

M/S BHUPINDER AUTO INTERNATIONAL ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI
& ANR. ..... Respondents

Through: None.

With

52.

+ **ST.APPL. 46/2014**

DCW LTD. ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

THE COMMISSIONER OF TRADE AND
TAXES, DELHI ..... Respondent

Through: Mr Satyakam, ASC, GNCTD.

With

53.

+ **ST.APPL. 63/2014**

H.G. INTERNATIONAL ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

THE COMMISSIONER OF TRADE AND TAXES,
DELHI ..... Respondent

Through: Mr Gautam Narayan, Additional Standing Counsel.

With

54.

\+ **ST.APPL. 75/2014 & CM No.18540/2014**

ESS ESS METAL ENTERPRISES ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES
& ORS. ..... Respondents

Through: Mr Satyakam, ASC, GNCTD.

With

55.

\+ **ST.APPL. 81/2014 & CM No.18856/2014**

ESS ESS METAL ENTERPRISES ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES
& ORS. ..... Respondents

Through: Mr Satyakam, ASC, GNCTD.

With

56.

\+ **ST.APPL. 82/2014 & CM No.18998/2014**

ESS ESS METAL ENTERPRISES ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents

Through: Mr Satyakam, ASC, GNCTD.

With

57.

\+ **ST.APPL. 84/2014**

TANYA ENTERPRISES ..... Petitioner

Through: Mr A. K. Babbar, Advocate.

versus

COMMISSIONER OF VALUE ADDED TAX ..... Respondent

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

58.

\+ **ST.APPL. 87/2014**

ELECTRONIC CORPORATION OF INDIA ..... Petitioner

Through: Mr Raj K. Batra and Mr H. L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents

Through: Mr Peeyoosh Kalra, Additional Standing Counsel, GNCTD with Ms Mahua Kalra, Advocates.

With

59.

\+ **W.P.(C) 4537/2014 & CM APPLS 9045/2014 (for stay) 9644/2014 (leave to amend), 9645/2014 (for stay)**

GRAVISS HOSPITALITY LTD. ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI & ANR. ..... Respondents

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

60.

\+ **W.P.(C) 6337/2014 & CM APPL 15274/2014 (stay)**

COUNTRYWIDE NETWORK PVT. LTD. ..... Petitioner

Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr K. G. Bhat and Mr S. K. Sarwal, Advocates.

versus

COMMISSIONER, TRADE & TAXES, DELHI & ANR. ..... Respondents

Through: None.

With

61.

\+ **W.P.(C) 5875/2014 & CM APPL 14408/2014**

DEV EXPORTS ..... Petitioner

Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr K. G. Bhat and Mr S. K. Sarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent

Through: None.

With

62.

\+ **W.P.(C) 6765/2014 & CM APPL 16005/2014 (stay)**

FOOD WORLD ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES, DELHI & ANR. ..... Respondents

Through: None.

With

63.

\+ **W.P.(C) 6768/2014 &CM 16011/2014 (stay)**

ALLIED IMPEX PVT. LTD. ..... Petitioner

Through: Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr K. G. Bhat and Mr S. K. Sarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

64.

\+ **W.P.(C) 6770/2014 & CM APPL 16019/2014 (stay)**

BERCO'S MELODY HOUSE ..... Petitioner

Through: Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr K. G. Bhat and Mr S. K. Sarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent

Through: None.

With

65.

\+ **W.P.(C) 7615/2014 & CM APPL 17944/2014 (stay)**

ALLIANCE PETROLEUM PVT. LTD. ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

GOVT. OF N.C.T. OF DELHI & ORS. ..... Respondents

Through: None.

With

66.

\+ **W.P.(C) 7632/2014 & CM APPL 17976/2014 (stay)**

VIKAS PLASTICS ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

THE GOVT. OF DELHI & ORS. ..... Respondents

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

67.

\+ **W.P.(C) 7689/2014 and CM APPL. 18101/2014 (stay)**

S. L. ENTERPRISES ..... Petitioner

Through: Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr K. G. Bhat and Mr S. K. Sarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent

Through: Mr Satyakam, ASC, GNCTD.

With

68.

\+ **W.P.(C) 8156/2014 & CM APPL 18996/2014 (stay)**

LAKRA OIL TRADING CO. ..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE & TAXES, DELHI & ANR. ..... Respondents

Through: None.

With

69.

\+ **W.P.(C) 8718/2014 & CM APPL 20047/2014 (stay)**

KHERA SALES CORPORATION ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF VAT & ORS ..... Respondents

Through: None.

With

70.

\+ **W.P.(C) 8719/2014 & CM APPL 20049/2014 (stay)**

RICHI RICH RESTAURANT PVT. LTD. ..... Petitioner
Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF VAT & ORS. ..... Respondents
Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

71.

\+ **W.P.(C) 387/2015 & CM APPL 638/2015 (stay)**

RICHI RICH RESTAURANT PVT. LTD. ..... Petitioner
Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE AND TAXES,
NEW DELHI & ORS. ..... Respondents
Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

72.

\+ **W.P.(C) 403/2015 & CM APPL 678/2015 (stay)**

KROSS DIAMONDS PVT. LTD. ..... Petitioner
Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER, VAT & ORS. ..... Respondents
Through: None.

With

73.
\+ **W.P.(C) 2535/2015 & CM APPL 4528/2015 (stay)**

KAPUR GEMS PVT. LTD. ..... Petitioner
Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES
& ORS. ..... Respondents
Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

74.
\+ **W.P.(C) 2537/2015**

KAPUR GEMS PVT. LTD. ..... Petitioner
Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES
& ORS. ..... Respondents
Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

75.

+ **W.P.(C) 2694/2015 & CM APPL 4815/2015 (stay)**

KAPUR GEMS PVT LTD. ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

76.

+ **W.P.(C) 2698/2015 & CM APPL 4820/2015 (stay)**

KAPUR GEMS PVT. LTD. ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES, & ORS. ..... Respondents

Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

With

77.

+ **W.P.(C) 2815/2015 & CM APPL 5049/2015 (stay)**

KAPUR GEMS PVT. LTD. ..... Petitioner

Through: Mr. Raj K. Batra with Mr. H.L. Taneja, Advocates.

versus

COMMISSIONER OF TRADE & TAXES
& ORS. ..... Respondents
Through: Mr Peeyoosh Kalra, ASC (Civil), GNCTD with Ms Mahua Kalra and Ms Sona Babbar, Advocates.

And

78.
\+ **W.P.(C) 3663/2015 & CM APPL 6521/2015 (stay)**

FRANKE FABER INDIA LTD. ..... Petitioner
Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER,TRADE &TAXES, DELHI
& ANR. ..... Respondents
Through: Mr. Naushad Ahmed Khan, ASC with Ms. Neelam, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% **18.02.2016**
Dr. S. Muralidhar, J.:

1. The common question that arises in these appeals and writ petitions is whether a single Member of the Appellate Tribunal, Value Added Tax ('AT') can legitimately function as the AT in terms of Section 73(1) of the Delhi Value Added Tax Act, 2004 ('DVAT Act').

2. Section 73(1) of the DVAT Act reads as under:

> "(1) The Government shall, as soon as may be after the commencement of this Act, constitute an Appellate Tribunal consisting of one or more members, as it thinks fit, to exercise the powers and discharge the functions conferred on the Appellate Tribunal by or under this Act:
>
> Provided that where the Appellate Tribunal consists of one member, that member shall be a person who has held a civil judicial post for at least ten years or who has been a member of the Indian Legal Service (not below Grade III) for at least three years or who has been in practice as an advocate for at least ten years, and where the Appellate Tribunal consists of more than one member, one such member shall be a person qualified as aforesaid."

3. In terms of Section 73(1) of the DVAT Act, a notification was issued by the Lieutenant Governor ('LG'), Government of National Capital Territory of Delhi ('GNCTD') on 27th June 2005 which reads as under:

> "In exercise of the powers conferred by sub-section (1) of Section 73 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), and subject to the stipulations contained in the proviso to the said sub-section, the Lieutenant Governor of the National Capital Territory of Delhi hereby constitutes an Appellate Tribunal consisting of two members to exercise the powers and discharge the functions conferred on the Appellate Tribunal by or under the said Act. The Appellate Tribunal shall also dispose of the appeals already filed or yet to be filed under Section 43(2) of the Delhi Sales Tax Act, 1975 (since repealed with effect from the 1st April, 2005)."

4. Initially the AT consisted of Mr. S. K. Kaushik (Chairman), Mr. D.C. Anand (Judicial Member) and Ms. Nita Bali (Administrative Member). On 18th June 2012, Section 73 of the DVAT Act was amended to insert sub-

section (9), which empowered the GNCTD to constitute benches comprising of one or more members through a notification. Admittedly, as far as the AT was concerned, no notification under Section 73(9) of the DVAT Act has been issued till date.

5. On 31st July 2013, the Lieutenant Governor ('LG'), GNCTD removed Mr. Kaushik and Ms. Bali from the AT with immediate effect. As a result only Mr. D.C. Anand remained as the Member (Judicial) of the AT.

6. Thereafter the GNCTD invited applications for appointment of Members of AT on 7th September 2013. On 11th July 2014, by two separate notifications issued under Section 73(1) of the DVAT Act, the GNCTD appointed a Member (Judicial) and a Member (Administrative) respectively.

7. During the period between 1st August 2013 and 28th July 2014 (the date from which the two new members joined), only Mr. Anand continued as Member (Judicial). He continued to exercise the powers and functions of the AT. He *inter alia* heard the appeals of the Appellants and Petitioners herein.

Preliminary issue

8. In response to a specific query from the Court, whether in any of these matters the Appellants or Petitioners (hereafter 'Assessees') had raised an objection before Mr. Anand, who heard their appeals, that he did not have jurisdiction to do so, the reply was in the negative. It appears that while at the time of filing of some of the appeals, and even at the time of passing an order of pre-deposit, the AT may have comprised of two or more members,

by the time the appeal was taken up for final hearing only Mr. Anand continued as Member (Judicial) of the AT.

9. On the issue whether the failure by the Assessees to raise an objection before Mr. Anand about his lack of jurisdiction to hear the appeal would preclude them from later urging such a ground in a higher forum, learned counsel for the Assessees placed reliance on the decision of the Constitution Bench of the Supreme Court in ***The United Commercial Bank Ltd. v. Workmen AIR 1951 SC 230*** and the Full Bench of the Andhra Pradesh High Court in ***M/s. Sheik Hussain v. State of Andhra Pradesh AIR 1964 AP 36 (FB)***.

10. In light of the legal position explained in the aforementioned decisions, the Court proposes to examine the question that arises in these matters notwithstanding that none of the Assessees may have raised it in the first instance before Mr. Anand when he functioned as AT and heard and disposed of their respective appeals.

Submissions of the Assessees

11. The main plank of the submission on behalf of the Assessees was that the AT, for the purposes of Section 73(1) of the DVAT Act, is that which is constituted by the GNCTD. In the absence of any separate notification under Section 73(9) of the DVAT Act constituting benches of the AT of one or more of its members, the AT for all practical purposes was that comprised of two members in terms of the notification dated 27^{th} June 2005. It was submitted that in the absence of the vacancy created with effect from 1^{st} August 2013 being filled up to complete the quorum of the AT, any order

passed by Mr. Anand sitting singly as Member (Judicial) of the AT would be null and void. It is pointed out that unlike provisions in the value added tax legislations of some other states, for e.g., Assam, Manipur, West Bengal etc. which contain a specific provision to the effect that "no decision or action of the Tribunal shall be called in question merely on the ground of any vacancy in the Tribunal", there is no provision in Section 73 or any other provision of the DVAT Act to that effect. It is accordingly contended that all decisions taken by Mr. Anand sitting singly as Member (Judicial) of the AT should be declared to be invalid by this Court.

12. Apart from the reliance being placed by the Assessees on the decision of the Constitution Bench of the Supreme Court in ***The United Commercial Bank Ltd. v. Workmen*** (*supra*), reliance was also placed on the decisions in ***Subhash G. Narvekar v. State of Goa (2005) 6 Bom CR 341***, ***C.K. Doraiswamy Naidu v. State of Andhra Pradesh 1966 (12) FLR 248 (Hyd)*** and ***Kama Umi Isa Ammal v. Rama Kudumban AIR 1953 Madras 129.***

Submissions of the GNCTD

13. Countering the above submissions, it was contended by Mr. Peeyoosh Kalra and Mr. Satyakam, Additional Standing Counsel for GNCTD that under Section 73(1) of the DVAT Act, the GNCTD could constitute an AT consisting of one or more members. It was pointed out that the proviso to Section 73(1) of the Act envisages a single member of the AT, qualified to hold the post of Member (Judicial) functioning as the AT. A reference was also made to Section 73(4) of the DVAT Act which contemplates a vacancy being caused in the AT which is required to be filled up by the GNCTD "as

soon as practicable". Attention was also drawn to Regulation 35 of the Delhi Value Added Tax Appellate Tribunal Regulations, 2005 ('AT Regulations') which provides that the proceedings of the AT will not be invalid merely because the Chairman or a Member of the AT withdraws from hearing a matter. Considerable reliance was placed by the Respondents on the decision of this Court in ***Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT (2012) 54 VST 387 (Del)***.

14. It was submitted that considering that only one member of the AT was available in the period between 1st August 2013 and 28th July 2014, such member could validly function as AT notwithstanding the absence of a notification under Section 73(9) of the DVAT Act. Alternatively, it was submitted that the *de facto* doctrine would apply and even if it were to be held that Mr. Anand as Member (Judicial) could not have functioned as AT, his decisions in the appeals of the Assessees herein would not be invalid on that score.

Analysis and reasons

15. To begin with, the Court notices that Section 73(1) of the DVAT Act does not contemplate the GNCTD having to issue a notification to constitute the AT. Even if it appoints one or more members of an AT, such AT could validly function as such. In other words, the AT does not cease to function only because there is no notification specifically issued by the GNCTD constituting such an AT.

16. An AT under Section 73(1) of the DVAT Act can have one or more

members. In the present context, while there was a notification of 27th June 2005 constituting an AT consisting of two members, no separate notification as such was issued under Section 73(1) of the DVAT Act when the third Member (Technical) was appointed. That did not mean that the AT could not function as a three-member Tribunal. As long as the requirement of Section 73(1) of the DVAT Act stood satisfied, inasmuch as there was one or more members of the AT functioning as such, the absence of notification being issued by the GNCTD under Section 73(1) of the DVAT Act would not impinge on the valid constitution of such AT.

17. Turning to Section 73 (4) of the DVAT Act, it is seen that the legislative intent is to ensure continuity of the functioning of the AT even if a vacancy is caused in the membership of the AT. The wording of Section 73(4) of the Act makes this position explicit. It states that the Government will endeavour to fill up the vacancy "as soon as practicable". It does not say that till such time the vacancy is not filled up, the AT cannot function as such. In the absence of any prohibition in the AT functioning as such with the remaining members when a vacancy is caused, it cannot be presumed that an AT with a lesser number of members than those appointed initially cannot function as an AT.

18. This position has been explained by the Division Bench of this Court in ***Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT*** (*supra*). A perusal of the said decision shows that the Assessee therein had its appeal heard by a two-member AT at a time when the AT comprised of three members. The hearing of the appeal was more or less concluded and it was

at the stage of final arguments when the third member of the AT joined the proceedings. An objection was immediately raised by the Assessee therein to the expansion of the quorum of the AT to include the Member (Technical) who had till then been away on account of leave or absence and had not participated in the hearing. With the AT negativing the objection, the Assessee filed a writ petition in this Court questioning the correctness of the said order of the AT.

19. It is significant that the respective stands of the Assessee and the Department of Trade and Taxes (DTT) in the aforesaid case is converse of their respective stands in the present case. In ***Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT*** (*supra*) the contention of the Assessee was that it would be unfair to the Assessee if a third member of the AT is permitted to participate in hearing of the appeal at the fag-end of the hearing when most of the hearing had taken place before the AT comprising only two members. The stand of the DTT, on the other hand in the said case, was that the AT could not be said to have been fully constituted till all the members of the AT participating in the hearing.

20. In ***Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT*** (*supra*), this Court took note of the fact that under Regulation 35(3) of the AT Regulations, there can be a situation where the full quorum of the AT is not available since one or more members could withdraw on the ground of conflict of interest *vis-a-vis* the subject matter of the proceedings before the AT. It was observed by the Court as under:

"8. Facially, the provisions of the Act and Regulations suggest that the Tribunal, whenever it consists of a plurality of members has to hold sittings en bloc. However, at the same time, Section 73(4) contemplates a situation where a vacancy might arise in the membership of the Tribunal. This is not perceived to be an impediment in its functioning or cause such a hiatus as to require a separate provision, to enable the existing members to continue with their functioning. Nor does the statue ordain a minimum quorum for the hearing of appeals. It, therefore, appears that the statute is neutral about the consequences which follow in the event of a member's absence from the Tribunal for a temporary period, as in this case. This aspect is important, because the absence of any prohibition either in the negative form, enjoining members from functioning and hearing appeals during the absence of one of them, or absence of a provision mandating a minimum quorum, implies that the Legislature did not contemplate a logjam, in the Tribunal's functioning. The argument of the Revenue about a restrictive class of cases which deals with absence of a member, i.e., in terms of regulation 35, is insubstantial. For one, that regulation is not part of the statute; secondly, it states an obvious rule, which all members of judicial and quasi-judicial bodies have to follow. Its absence would in no whit undermine the principle it gives shape to. It would be useful to recollect that every Tribunal is clothed with incidental and ancillary powers to effectuate its orders, and carry out its functions effectively (***Union of India v. Paras Laminates (P) Ltd. [1991] 90 STC 263 (SC); [1990] 186 ITR 722*** one of the members of the VAT Tribunal can, by no stretch of the imagination, result in its becoming dysfunctional, or being unable to function."

21. The Court further proceeded to observe that the conspectus of the DVAT Act and the AT Regulations reveal that an AT discharges judicial functions. Even if there were anomalies in the provisions, anything which tends to undermine the public confidence in the AT has to be "shunned and wherever necessary, cured". In the facts and circumstances, the Court passed an order forbearing the third Member (Technical) from participating in the

proceedings in the appeal in question any further and also directed the appeal to be disposed of by the AT comprising two members who heard it at the first place. The decision in ***Kwality Restaurant & Ice Cream Co. v. Commissioner, VAT*** (*supra*) underscores that the legislative intent was that of continuity of the AT and not its cessation because of a vacancy in its membership.

22. As far as the present case is concerned, the Court finds that it is only on account of the vacancies created by the removal of the two of the three members comprising the AT, that the remaining single Member (Judicial) had to function as AT with effect from 1st August 2013. Since he was the only member, there was no question of constituting benches by issuing a notification under Section 73 (9) of the DVAT Act. Also in terms of Section 73(1) of the DVAT Act, since one or more members could function as an AT, there was no illegality attached to the single Member functioning as an AT. This is also in consonance with the legislative intent behind Section 73 (4) of the DVAT Act which contemplates continuity of the proceedings before the AT notwithstanding the vacancies created in its membership.

Decision in UCO Bank

23. Since considerable reliance has been placed by learned counsel for the Petitioner on the decision in ***The United Commercial Bank Ltd. v. Workmen*** (*supra*) it becomes necessary to discuss the said decision in some detail. The facts there were that the Central Government constituted an Industrial Tribunal (IT) by a notification dated 13th June 1949 comprising a Chairman and two other members under Section 8 of the Industrial Disputes

Act, 1947 ('ID Act'). The second notification dated 24th August 1949 was issued under Section 8(1) of the ID Act appointing Mr. N. Chandrasekhara Aiyer as a member of the IT in place of one of the members, whose services ceased to be available. The re-constituted IT commenced its regular sitting first in Bombay and thereafter at Delhi and Patna. At some of the sittings, one or other of the three members comprising the IT were absent.

24. Between 23rd November 1949 and 20th February 1950 the services of Mr. Aiyer were placed at the disposal of the Ministry of External Affairs. The remaining two members, Mr. Sen and Mr. Mazumdar, together sat at several places as the IT and made certain Awards. Under Section 15 of the ID Act the said Awards were accepted by the Government and published in the gazette. Between 16th January and 20th February 1950 several issues concerning the jurisdiction of the IT were dealt with. These arose also in the context of Mr. Aiyer resuming as member of the IT after 20th February 1950 and thereafter sitting with both Mr. Sen and Mr. Mazumdar.

25. It was in this background that the question arose whether in the absence of Mr. Aiyer, the two other members had no jurisdiction to hear anything at all without an appropriate notification being issued. Since Mr. Aiyer's services had ceased to be available on 27th October 1949 he could not resume sitting as a Member of the IT with the other two members in the absence of a notification under Section 7 of the ID Act.

26. In ***The United Commercial Bank Ltd. v. Workmen*** (*supra*) the Constitution Bench of the Supreme Court analysed the relevant provisions

and noticed a distinction between Section 7 of the ID Act which talked of appointments of two or more members of the IT and Section 8(1) of the ID Act which talked of vacancy in the membership of the Board or IT. It was held that under Section 5(4) of the ID Act when a member of the Board is absent or there is a vacancy, "the Board is permitted to act, notwithstanding such absence, provided there is the prescribed quorum. Such quorum is fixed by the rules of framed" by the appropriate Government. It was observed that in terms of the proviso to Section 5(4) of the ID Act, where the services of a Chairman or Member of the Board had ceased to be available, the Board would not act "until a new Chairman or a member, as the case may be, has been appointed".

27. The very wording of the relevant provisions of the ID Act is different when compared to the provisions of the DVAT Act. For instance, Section 7(1) of the ID Act states that the appropriate government may constitute one or more Tribunals for adjudication of the industrial disputes and Section 7(2) of the ID Act states that such Tribunal shall consist of such number of members as the appropriate government may think fit. Where the Tribunal comprises two or more members, one of them shall be appointed as its Chairman. In contrast, Section 8(3) of the ID Act specifically states that where the services of any member of a Board other than the Chairman has ceased to be available, the appropriate government shall appoint, in the manner specified in Section 5(3) of the ID Act, another person to take his place and the proceedings shall be continued before the Board as reconstituted. The above provisions of the ID Act also, therefore, make it clear that unless the vacancy is filled up and the IT reconstituted, it cannot

continue the proceedings pending before the Board.

28. By its very wording, Section 73(4) of the DVAT Act is different. It does not state that there can be no continuation of the hearing of the appeals by a single Member (Judicial) of the AT unless the second member is also appointed. On the contrary, it appears to indicate that whoever is remaining in the AT shall act as such, till such time the government fills up the vacancy. Consequently, the Court is of the view that the decision in ***The United Commercial Bank Ltd. v. Workmen*** (*supra*) is not of any assistance to the Assessees.

29. The Court is of the view that on a collective reading of Section 73(1), (4) and (9) of the Act together with the AT Regulations, the position that emerges is that as long as there is only one remaining member of the AT by virtue of the others being either removed or the vacancies not being filled up, such member can, subject to being otherwise qualified, validly function as an AT.

30. Alternatively, if the situation was that there were two members of the AT and only one of them sat as an AT to decide an appeal, it could be argued that the AT was not properly constituted particularly in the absence of a notification under Section 73(9) of the DVAT Act constituting benches of the AT. However as far as the present cases are concerned that would be a hypothetical question because there was no other member of the AT remaining between 1st August 2013 and 20th July 2014. It was only Mr. Anand, Member (Judicial) who remained in the AT. There was no question

of a notification being issued under Section 73(9) of the DVAT Act to constitute a bench of the AT. There was no bar to Mr. Anand continuing to function as an AT.

The de facto doctrine

31. Even assuming that Mr. Anand lacked jurisdiction to hear the appeals and petitions as the AT, by applying the *de facto* doctrine it could be held that the decision taken by him as a single Member of the AT would nevertheless get validated on this score. Here the rational appears to be that no litigant should suffer on account of the delays and uncertainties only because a vacancy is created in the AT. The law in this regard has been succinctly explained in the decision in ***Gokaraju Rangaraju v. State of AP (1981) 3 SCC 132*** where the Supreme Court observed as under:

> "17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public a policy, to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into

> jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against the judgment is, of course, such a collateral attack."

32. The result of the above discussion is that the Court negatives the plea of the Assessees and holds that the single Member (Judicial) could validly function as the AT between 1st August 2013 and 20th July 2014. Further, even assuming that during the aforementioned period he lacked jurisdiction, the *de* facto doctrine would apply and the decisions taken by him during the said period shall not be invalidated.

Writ petitions that are dismissed

33. Accordingly, as far as Writ Petition Nos. 3664/2015, 3781/2015, 3766/2015, 4537/2014, 6337/2014, 5875/2014, 6765/2014, 6768/2014, 6770/2014, 7615/2014, 7632/2014, 8156/2014, 8718/2014, 8719/2014, 387/2015, 403/2015, 2535/2015, 2537/2015, 2694/2015, 2698/2015, 2815/2015 and 3663/2015 are concerned, since the only issue is the challenge to the jurisdiction of a single Member of the AT, these writ petitions are dismissed. The pending applications in these writ petitions are also disposed of in the above terms.

34. The challenge raised in these writ petitions to the decision of the AT on merits cannot be addressed in these writ petitions. Although learned counsel for the Petitioners urged that the writ petitions may themselves be treated as appeals, the Court is not inclined to do so. It would be open to the Petitioners to file the respective statutory appeals, in accordance with law, to

challenge the orders of the AT on merits accompanied by application for condonation of delay, wherever applicable. In considering the question of condonation of delay, the Court concerned will take into account the fact of pendency of the above writ petitions.

35. As far as the Writ Petition (C) No. 7689 of 2014 is concerned, it raises an additional issue of the constitutional validity of Section 5 of the DVAT Act. To consider that issue, Writ Petition (C) No. 7689 of 2014 is set down for hearing on 16th August 2016.

36. As far as the Sales Tax Appeals being ST. Appl. Nos.74/2014, 46/2014, 63/2014, 75/2014, 81/2014, 82/2014 and 87/2014 are concerned, to the extent that the question of the validity of the decision of the single Member AT, that question is answered against the Assessees and in favour of the Department.

37. To consider the remaining questions raised in the aforementioned appeals, each of the appeals is directed to be listed on separate dates as will be indicated in the separate order passed in the concerned Sales Tax Appeals.

S. MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 18, 2016
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