

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 30, 2016

Decision on: April 7, 2016

+

W.P.(C) 2685/2014 & CM No. 5591/2014

**SAMSUNG INDIA ELECTRONICS PRIVATE
LIMITED**

..... Petitioner

Through: Mr. S.K. Bagaria, Senior Advocate with
Mr. Tarun Gulati, Mr. Shashi Mathews, Mr. Sparsh
Bhargava, Ms. Rachana Yadav, Mr. Ankit
Sachdeva and Mr. Kishore Kunal, Advocates.

versus

GOVERNMENT OF NCT OF DELHI & ORS.

..... Respondents

Through: Mr. Gautam Narayan, Additional
Standing Counsel for GNCTD with Mr. R.A. Iyer,
Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

07.04.2016

%

Dr. S. Muralidhar, J.

1. The challenge in this writ petition by Samsung India Electronics Private Limited is to the demand notices of default assessment of tax and interest dated 31st March 2014 under Section 32 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') and the penalty notice of the same date under Section 33 of the DVAT Act issued by the Value Added Tax Officer ('VATO').

Background facts

2. The facts leading to the filing of the present petition are that the Petitioner is engaged in the sale of electronic goods, home appliances, consumer durables and information technology products etc. It is a registered dealer under the DVAT Act and has been paying value added tax as well as filing return on monthly basis under the DVAT Act and corresponding Delhi Value Added Tax Rules, 2005 ('DVAT Rules').

3. *Inter alia* the Petitioner sells TFT/LCD/LED monitors. Under Section 4(1)(b) of the DVAT Act in respect of the goods specified in the III Schedule, 5% tax is leviable on the taxable turnover of a dealer. Entry 41 of the Third Schedule covers IT products including computers, telephones and parts thereof, cellular phones and accessories, etc. Entry 41A deals with the IT products and covers IT products as described in column 2 as covered under the headings or sub-headings mentioned in column 3 of the Central Excise Tariff Act, 1985 ('CET Act').

4. In the table given below Entry 41A there is an Item at Sl. No. 3 which covers a large range of automatic data processing machines. Specific to the case at hand, it includes "Graphic printer, Plotter, Laser jet printer, key board, Monitor, storage units, floppy disc drive etc." Column 3 gives the central excise tariff heading as 8471. Notes (2) and (3) read as under:

Note - (2). Where any commodities are described against any heading or, as the case may be, sub-heading, and the description in this entry and in entry number 84 is different in any manner from the corresponding description in the Central Excise Tariff Act, 1985, then, only those

commodities described in this entry and in the entry number 84 will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification.

Note-(3). Subject to Note (2), for the purpose of any entry contained in this notification, where the description against any heading or, as the case may be, sub-heading, matches fully with the corresponding description in the Central Excise Tariff, then all the commodities covered for the purposes of the said tariff under that heading or sub-heading will be covered by the scope of this notification.”

5. If an entry does not fall under any of the Schedules, then in terms of the Section 4(1)(d) of the DVAT Act, tax is payable at the rate of 12.5%.

Determination under Section 84 of the DVAT Act

6. Another company dealing with electronic products, i.e., NEC India Private Limited (‘NEC’) filed, on 8th July 2008, an application under Section 84 of the DVAT Act for determination of the following question:

“Whether LCD Monitors, LCD Displays/Plasma Displays are exempt from tax as being meant for educational purposes like books, periodicals and journals including maps, charts and globes which are covered by Entry No.5 of the First Schedule to the Delhi Value Added Tax Act, 2004 and are exempt from tax or the same are covered by Entry No. 41 of the Third Schedule to Delhi Value Added Tax Act, 2004 and are taxable @ 4%?”

7. The case of NEC India was that LCD displays/Plasma displays are an integral part of a computer and cannot work unless they are attached to a computer and, therefore, were classifiable under Entry 41 of the Third

Schedule. The case of the Department of Trade & Taxes ('DT&T') on the other hand was that even though there was Serial No. 18 which covered "LCD displays, LED panels and parts thereof", the LCD Monitors were distinct from LCD panels and, therefore, were not classifiable as such under any of the entries in the III Schedule to the DVAT Act.

8. In the determination dated 8th July 2008, the Commissioner DT&T held that since the products in question were not classifiable under Clause (18) of Entry 41-A to the Third Schedule of the DVAT Act and since LCD displays/plasma displays do not find any reference in any of the Schedules, they were unclassified items taxable at the rate of 12.5%.

Audit proceedings

9. On the basis of the said determination under Section 84 of the DVAT Act, the Petitioner was subjected to audit proceedings for the period 1st April 2009 to 31st March 2011. In terms of the VAT Audit Team report dated 12th July 2008 for the period of the audit, the Petitioner was engaged in export, import, trading and stock transfer of various electronic goods, refrigerating goods, mobile phones and accessories. The audit report also did not find any discrepancy in the Petitioner's business as well as its books of accounts.

10. On 25th May 2014, the Petitioner received a letter dated 8th March 2014 from the VATO, Ward-202 (KCS-II) seeking certain documents/information. Reference was made to an earlier letter dated 11th February 2014 which according to the Petitioner it did not receive. That letter sought additional information from the Petitioner under Section 59 of

the DVAT Act in respect of sales of LCD/LED/TFT monitors made during the financial year ('FY') 2009-10 and 2010-11. The letter sought information regarding sales made in respect of multipurpose/functional printers during 2009-10 and 2010-11. The letter, however, stated that in the event of non-compliance with the said directions, the sales of LCD/LED/TFT Monitors would be charged tax at the rate of 12.5%. Along with its reply dated 28th March 2014, the Petitioner enclosed details of its sales turnover of Monitors for 2009-10 and 2010-11.

Default Assessments

11. The Petitioner states that on 17th April 2014 it received 12 notices of default assessment of tax and interest under Section 32 of the DVAT Act for the period April 2009 to March 2010 raising a demand of more than Rs.15 crores.

12. In the impugned notice it was stated that the Petitioner had sold IT related TFT/LCD/LED Monitors by charging VAT at 4% or 5% although the said item is not covered under the Third Schedule to the DVAT Act. Asserting that it has to be classified only under the residuary entry, the demand notice also made a reference to the determination order passed at the instance of NEC. The Petitioner was asked to make payment of the tax and arrears before 30th April 2014. On the same day, the VATO also issued the impugned penalty notices under Section 33 of the DVAT Act for the period April 2009 to March 2010. Pursuant to the receipt of the impugned notices, the Petitioner sent a letter dated 24th April 2014 to the VATO stating, *inter alia*, that no show cause notice was issued to them asking why

LCD/LED/TFT Monitors should not be treated as unclassified and charged VAT at 12.5%, that they were not confronted with the determination dated 8th July 2008 in the case of M/s. NEC India Pvt. Ltd. and therefore, the notice of default assessment and demand of tax, interest and penalty were in violation of the principles of natural justice. When no response was forthcoming, the Petitioner filed the present writ petition seeking the reliefs referred to hereinbefore.

13. At the first hearing of this writ petition on 29th April 2014, the Court, while directing notice to be issued to the Respondents, restrained the Respondents from passing final orders in respect of the impugned notices and stayed all further proceedings pursuant thereto.

Stand in the counter affidavit

14. The stand of the GNCTD in its counter affidavit, in the first place, is that the Petitioner has an efficacious alternative remedy by filing objections under Section 74 of the DVAT Act before the Objection Hearing Authority (OHA). If not satisfied with the said determination, the Petitioner could file an appeal before the Appellate Tribunal, Value Added Tax ('AT'). It is pointed out that initially the Petitioner was issued notice under Section 59(2) of the DVAT Act on 11th February 2014 and again on 8th March 2014 seeking additional information about the sales details of LCD/LED/TFT Monitors. The said notice also stated that if the Petitioner failed to comply with the said notice, the sales shown in the returns filed would be treated that of LCD/LED/TFT Monitors on the sale of which tax of 12.5% has to be levied.

15. On merits it is submitted by the Respondents that the notice of default assessment/order dated 31st March 2014 passed by the assessing authority was a reasoned one which analysed the information provided by the Petitioner. The determination of Section 84 of the DVAT Act in the case of NEC was in the public domain and well known to all concerned dealers. They were well aware that the rate of tax applicable on the goods in question was 12.5%. It is submitted that the term 'year' as defined Section 2(1)(zp) of the DVAT Act means the financial year from the first day of April to the last date of March. The notices had to be issued before the completion of four years after the concerned year, i.e., March 2010. Therefore, the assessments could be made under Section 32 of the DVAT Act up to 31st March 2014 and, therefore, were within time.

Submissions of counsel for the Petitioner

16. Mr. S.K. Bagaria, learned Senior counsel for the Petitioner, first pointed out that the re-opening of the assessments was time-barred on a collective reading of Section 31 (1) read with Sections 32 and 34 of the DVAT Act. He pointed out that the returns, when originally filed, were accepted by the DT&T and therefore were deemed to be assessments in terms of Section 31 (1). So construed, the notices of default assessments for most of the months of the AY 2009-2010, barring the months of February and March 2010, were barred by limitation.

17. Mr Bagaria next pointed out that when a thorough audit was conducted by the DT&T of the Petitioner's business in 2012, no discrepancy was found.

The notice dated 8th March 2014 issued by the VATO only sought information under Section 59(2) of the DVAT Act. This notice was received on 25th March 2014. The earlier letter dated 11th February 2014 was not received by the Petitioner. There is no indication in the said notice of the VATO having invoked powers under Section 32 of the DVAT Act for reopening an assessment. There was no show cause notice issued to the Petitioner seeking reasons why the LCD/LED/TFT Monitors should not be treated as an unclassified item and rate of 12.5% VAT applied to them. Likewise, the Petitioner was not provided with the copy of the determination order dated 8th July 2008 passed by the Commissioner at the instance of NEC. The Petitioner was, in any event, not party to the said determination. Under Section 84 of the DVAT Act, the said determination was *in personam* and not *in rem*. Reliance was placed on the decisions in ***Vistar Construction (P) Ltd. v. Union of India 2013 (31) STR 129 (Del)*** and ***Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay 26 ITR 736***.

18. Mr. Bagaria submitted that what was covered by Item 3 below Entry 41-A to the Third Schedule was 'Monitor' and the LCD/LED/TFT Monitors sold by the Petitioner did fall within the purview of the said Entry and, therefore, were chargeable to tax only at 5%. There was no ambiguity in the Entry for it to have any other meaning. Relying on the decision in ***Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat (1990) 1 SCC 532***, Mr. Bagaria submitted that LCD/LED/TFT Monitors did not cease to be Monitors and that unless the DT&T could establish that the Monitors in question can no longer be brought under the existing tariff entries 'resort cannot be headed to the said

statutory items'. Reliance was also placed on the decisions in ***Dunlop India Ltd. v. Union of India* 1983 (13) ELT 1566; *HPL Chemicals Ltd. v. Commissioner of Central Excise* 2006 (197) ELT 324 (SC)** and ***Jain Exports Private Limited v. Union of India* 1992 (61) ELT 173 (SC)**. Relying on the decision in ***Sun Export Corporation v. Collector of Customs, Bombay* 1997 (93) ELT 641 (SC)**, it was submitted that the interpretation that favours the Assessee must be preferred.

19. It was submitted by Mr Bagaria that the Respondents' plea of the existence of an alternative remedy should not be entertained as the proceedings were not only time-barred but were without jurisdiction. Reliance is placed on the decisions in ***Filterco v. Commissioner of Sales Tax, Madhya Pradesh* (1986) 2 SCC 103** and ***Raza Textiles Ltd. v. Income Tax Officer, Rampur* (1973) 1 SCC 633**.

Submissions of counsel for the Respondents

20. Countering the above submissions, Mr. Gautam Narayan, learned Additional Standing counsel for the Respondents, submitted that the correct way to interpret Section 34 in light of Section 32 of the DVAT Act was to compute the expiry of the period of four years from the end of the year. The word 'assessment' in Section 34 (1) DVAT Act related only to an assessment under Section 32 of the DVAT Act and not a self-assessment under Section 31(1) of the Act.

21. Referring to the decision in ***L.G. Electronics India Pvt. Ltd. v. Commissioner, Value Added Tax*** (decision dated 21st January 2014 in W.P.

(C) 213/2014), Mr Narayan submitted that the Petitioner had an alternative efficacious remedy of filing the objections before the OHA and if still aggrieved to file an appeal before the AT. He submitted that there is no particular reason why the Petitioner should be permitted to directly approach this Court in a writ petition under Article 226 of the Constitution. He submitted that the points regarding limitation and classification could well be urged before the OHA.

22. Turning to the merits of the case Mr Narayan submitted that the action to reopen the assessment was taken only after notice was issued under Section 59(2) of the Act and only after the authorised representative of the Petitioner appeared and submitted the sales details. He submitted that while Item 3 of Entry 41A of Third Schedule did mention 'Monitor', it did not mention LCD/LED/TFT Monitors and the same was, therefore, treated as an unclassified item. Admittedly, the dealer had sold the said Monitors by collecting tax of 4% instead of 12% and, therefore, was liable to pay the differential amount of tax and the corresponding interest.

Limitation

23. The first question to be considered is whether the demands raised against the Petitioner by means of the impugned notices of default assessments are barred by limitation.

24. To begin with, the scheme of the DVAT Act requires to be understood. Under Section 30 of the DVAT Act, no claim can be made by the Commissioner for the payment by a person of an amount of tax, interest or

penalty or other amount in the nature of tax, interest or penalty “except by the making of an assessment for the amount.”

25. Sections 31, 32 and 34 of the DVAT Act read thus:

“31. Self assessment.- (1) Where a return is furnished by a person as required under section 26 or section 27 of this Act which contains the prescribed information and complies with the requirements of this Act and the rules

(a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;

(b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and

(c) the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.

(2) No assessment shall arise under sub-section (1) of this section, if the Commissioner has already made an assessment of tax in respect of the same tax period under another section of this Act.

32. Default assessment of tax payable.-

(1) If any person

(a) has not furnished returns required under this Act by the prescribed date; or

(b) has furnished incomplete or incorrect returns; or

(c) has furnished a return which does not comply with the requirements of this Act; or

(d) for any other reason the Commissioner is not satisfied with the return furnished by a person; the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by

a single order so long as all such tax periods are comprised in one year.

(1A) If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.

(2) Where the Commissioner has made an assessment under this section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.

(3) Where the Commissioner has made an assessment under this section and further tax is assessed as owed, the amount of further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due.

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

34. Limitation on assessment and re-assessment.-

(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from

(a) the date on which the person furnished a return under section 26 or sub-section (1) of section 28 of this Act; or

(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

Provided that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person.

26. Under Section 31(1) of the DVAT Act, once a return is furnished by the registered dealer under Section 26 and 27 of the Act, which is compliant with all the requirements of the DVAT Act and DVAT Rules, then three consequences follow:

- (a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;
- (b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and
- (c) the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.

27. The word ‘assessment’, although not defined under the DVAT Act, includes self-assessment. Section 31(1)(a) of the DVAT Act makes this explicit and deems that an assessment is taken to have been made by the Commissioner “on the day on which the return is furnished”.

28. Turning next to Section 32 of the DVAT Act, this talks of default assessment of the tax. There are four contingencies under which Section 32(1) of the DVAT Act gets attracted. These are:

- (a) where returns as required under this Act have not been furnished by the prescribed date; or
- (b) incomplete or incorrect returns have been furnished; or
- (c) the return furnished does not comply with the requirements of the DVAT Act; or
- (d) for any other reason the Commissioner is not satisfied with the return furnished.

29. Where the a dealer has not furnished returns as envisaged under Section 32 (1) (a) of the DVAT Act, then the Commissioner, for reasons to be recorded in writing, can 'assess' the taxable turnover using his 'best judgment' . Where in terms of Section 32 (1)(b), (c) or (d) of the DVAT Act, the dealer has furnished incomplete returns that do not satisfy the requirements of the Act or for any reason the return filed is not satisfactory then the Commissioner will 'reassess' to the best of his judgment the amount of net tax due for the tax period.

30. Section 34 of the DVAT Act spells out the maximum period within either an assessment or, where the circumstances so warrant, a reassessment under Section 32 of the DVAT Act can be made. The outer limit for either is four years from “the end of the year comprising of one or more tax period for which the person furnished a return under Section 26 or 28 of the Act or the date on which the Commissioner made an assessment of the tax for the tax period **whichever is earlier**” (emphasis supplied).

31. Although Mr. Narayan urged that Section 34(1)(b) of the DVAT Act talks only of a Commissioner making an assessment under Section 32 of the DVAT Act, the Court is unable to agree to such a narrow interpretation of the word 'assessment'. Given the context in which it occurs, and the scheme and structure of Section 31 (1) of the DVAT Act, a self-assessment would also be another form of assessment. As already noted, under Section 31(1)(a) of the DVAT Act, such self-assessment is deemed to be an assessment made by the Commissioner on the date on which the return is furnished. This can be a date different from the end of the year comprising a tax period.

32. In the present case, the Assessee was filing monthly returns and, therefore, the limitation for the purposes of Section 34 of the DVAT Act would have to be reckoned from the date of the filing of the return by way of self assessment. The Petitioner has calculated the limitation on the above basis in a tabular form as under:

Month & Year	Original Return Filed on	Four years completed on
April 2009	23 rd May 2009	22 nd May 2013
May 2009	23 rd June 2009	22 nd June 2013
June 2009	24 th July 2009	23 rd July 2013
July 2009	21 st August 2009	20 th August 2013
August 2009	24 th September 2009	23 rd September 2013
September 2009	23 rd October 2009	22 nd October 2013

October 2009	25 th November 2009	24 th November 2013
November 2009	23 rd December 2009	22 nd December 2013
December 2009	23 rd January 2010	22 nd January 2014
January 2010	26 th February 2010	25 th February 2014
February 2010	27 th March 2010	26 th March 2014
March 2010	24 th April 2010	23 rd April 2014

33. The DT&T, however, contends that for all of the aforementioned months, the four year period would come to an end only on 31st March 2013 and, therefore, it has time till then to complete the assessment in terms of Section 34(1)(b) of the DVAT Act.

34. The Court is unable to accept with the above submission of the DT&T. Given the overall scheme of the DVAT Act and Section 31, 32 and 34 in particular, the Court accepts the manner of computation of the four year period as depicted by the Petitioner. The notices for reopening of the assessment for the months comprising the Assessment Year 2009-10 ought to have been issued before the expiry of the respective dates as shown in the above table. Barring the reopening of the assessments for February and March 2010, where the dates of the notices of default assessment were prior to the completion of four years, i.e., 26th March and 23rd April 2014, in respect of all other returns by way of self-assessment made by the Petitioner from April 2009 to January 2010, the re-opening of the assessment was sought to be done on a date after the expiry of the four-year period.

35. In *H.M. Industries v. Commissioner of Value Added Tax* (decision dated 26th September 2014 in ST.Appl. 32/2013), this Court held that unless the conditions of Section 32(1) of the DVAT Act are satisfied, default assessment cannot be made and if made will be liable to be struck down. In a recent decision dated 14th May 2015 in Writ Petition (C) No. 5231/2014 (*ITD-ITD Chem JV v. Commissioner of Trade and Taxes*) it was emphasised by this Court that for invoking the powers under Section 34 read with Section 32 of the DVAT Act, the jurisdictional pre-conditions must be satisfied.

36. The reasons for re-opening have to be recorded in writing by the Commissioner. In particular the reasons must indicate which of the four contingencies in Section 32(1) of the DVAT Act stand attracted in the facts and circumstances of the case. In the present case, since the first proviso to Section 34 of the DVAT Act has not even been invoked, there was no possibility of invoking the extended period of limitation, i.e., beyond the expiry of four years. The phrase 'whichever is earlier' occurring in Section 34 (1) of the DVAT Act is an indication that the date on which the Petitioner makes an assessment in terms of Section 31(1)(a) of the DVAT Act is crucial for determining the expiry of the limitation of four years for completion of the reassessment.

37. In that view of the matter, the Court is satisfied that barring the default notices of assessment pertaining to the months of February and March 2010, all the other notices of default assessment issued for the remaining months

of AY 2009-10 by the impugned notices dated 31st March 2014 are barred by limitation and deserve to be set aside on that ground.

Classification of 'Monitors'

38. The Court next proceeds to examine the central issue of whether the monitors sold by the Petitioner fall within the entry 'Monitors' in terms of Item 3 below Entry 41A of the Third Schedule. As already noticed, that Entry does not specify LCD/LED/TFT Monitors. The question that then arises is whether the Entry 'Monitors' is broad enough to cover particular types of monitors or whether such special varieties of monitors should be treated as unclassified and brought under the residuary entry to be taxed at 12.5%.

39. As was cautioned by the Supreme Court in ***Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat*** (*supra*), the residuary entry ought not to be lightly resorted to. In that case the Court was concerned with Item 26-AA(iv) of the Central Excise Tariff which talks of 'pipes and tubes (including blanks therefor) all sorts whether rolled, forged etc.' The Appellants there were manufacturing pipe fittings such as elbows, bends and reducers. The question was whether such articles would fall under Item 26-AA(iv) or under the residuary Tariff Item 68. In that context, it was observed by the Supreme Court in para 4 of the said order that "only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry". It was held that Tariff Item 26-AA(iv) encompasses all sorts of pipes and tubes. Therefore, there was no reason why a similar item cannot be

prescribed as pipes and tubes. Likewise, in the present case, it is not shown by the DT&T that LCD/LED/TFT Monitors cannot be brought under the broad classification of 'Monitors'.

40. In ***Jain Exports Private Limited v. Union of India*** (*supra*), it is held that 'coconut oil' without qualifying words would cover both edible as well as non-edible (commercial or industrial) varieties. It is found in that case that in Appendix 9 to the Import Policy of 1980-81 there was no classification of coconut oil. In the circumstances, it was held that all varieties of coconut oil should be taken as covered by the term. There was no occasion to assume that Appendix 9 para 5(1) covered only the edible variety of coconut oil.

41. In ***Commissioner of Sales Tax v. Agarwal & Co. 1983 (12) ELT 116 (Bom)***, the question was whether 'milk' occurring in Entry 36 of Schedule A of the Bombay Sales Tax Act, 1959 includes 'milk powder' as well. It was held that milk would not only include milk in liquid form but all types of milk. It was held that while looking at the words of an Entry in the Sales Tax legislation, it was permissible to examine the legislative history of the said Entry. It was pointed out that "while interpreting a general term used for describing any commodity in any fiscal legislation, the general term so used covers that commodity or item or article in all its forms and varieties". It was accordingly observed that "milk in powder form can be looked upon as a result of this continually evolving technology. There is no reason why it should be excluded from the generic term 'milk'."

42. In ***Dunlop India Ltd. v. Union of India*** (*supra*), it was reiterated that

“when an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause”.

43. In *HPL Chemicals Ltd. v. Commissioner of Central Excise* (*supra*), the question was of classification of ‘denatured salt’. The Court disagreed with the Department of Excise in that case that the said product was classifiable under the residuary Heading No. 38.23 and not Heading 25.01 of the Central Excise Tariff Act, 1985 which was a specific heading. The Court observed as under:

“This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as “Denatured Salt” falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department’s own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride.”

44. In *Sun Export Corporation v. Collector of Customs, Bombay* (*supra*),

the Supreme Court reiterated the well settled principle that if in a matter of classification of goods two views were possible, the one favouring the Assessee has to be preferred.

45. In this context, the Court would like to observe that the determination by the Commissioner in the case of NEC under Section 84 of the DVAT Act was not binding on the present Petitioner as it was not a party to those proceedings.

46. In the present case the DT&T has not been able to persuade the Court that LCD/LED/TFT monitors sold by the Petitioner during the period under consideration is not classifiable as 'Monitors' under Item 3 below Entry 41A of the Third Schedule to the DVAT Act.

Non-compliance with the requirements of Section 32

47. Turning to the impugned notices in the present case, it is seen that although the VATO was required to be satisfied, for the purposes of Section 32(1) of the DVAT Act as to which of the grounds attracted, the VATO chose to use a standard format order where the first paragraph of the order reads as under:

“Whereas I am satisfied that the dealer has not furnished returns/furnished incomplete returns or incorrect returns/furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004/any other reason”.

48. The photocopy of the original signed order issued by the VATO was

perused by the Court. It showed that none of the above alternatives were specifically tick marked by the VATO. It is, therefore, unclear as to the precise ground on which the VATO was proceeding to exercise its powers under Section 32(1) of the DVAT Act. In this context, the observation of the Supreme Court in *Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay* (*supra*) is significant. There it is observed that

“It is well established that when a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises”.

49. This is yet another ground on which the default notices of assessment require to be quashed.

Violation of principles of natural justice

50. There is merit in the contention of the Petitioner that the impugned default notices of assessment were also in violation of the principle of natural justice.

51. The notices under Section 59(2) of the DVAT Act issued to the Petitioner asked for additional information in respect of the LCD/LED/TFT Monitors. There was no indication in the said notices regarding any erroneous classification of the monitors as forming the basis for reopening the assessments. There was also no whisper of the determination under Section 84 of the DVAT Act in the case of NEC which, as it transpired, was one of the reasons for reopening the assessments. In other words, the

Assessee was not put on notice as to the grounds on which the assessments were sought to be reopened.

52. In similar circumstances, in the context of Section 142 (2A) of the income Tax Act 1961, the Supreme Court in ***Rajesh Kumar v. Deputy Commissioner of Income Tax (2007) 2 SCC 181*** observed in para 26 as under:

“[W]hen by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf, compliance with principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution”.

Existence of Alternative Remedy

53. Lastly, on the issue of the existence of an alternative remedy, the Court notes that in the present case the entire proceedings for the months of AY 2009-10 (barring February and March 2010) are barred by limitation. There has also been an obvious violation of the principles of natural justice.

54. In ***Filterco v. Commissioner of Sales Tax, Madhya Pradesh (supra)***, a Constitution Bench of the Supreme Court in similar circumstances disapproved of the *in limine* dismissal of the writ petition by the High Court. Likewise, the Court made similar observations in ***Durga Enterprises (P) Limited v. Principal Secretary, Government of Uttar Pradesh (2004) 13 SCC 665*** and in ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1***, the Court held as under:

“15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

Conclusion

55. For all of the aforementioned reasons, the impugned notices of assessment dated 31st March 2014 issued to the Petitioner as well as notices of default assessment of penalty of the same date are hereby quashed.

56. The writ petition is allowed with costs of Rs. 20,000 which will be paid by the Respondents to the Petitioner within four weeks. The pending application is disposed of.

S. MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 7, 2016

dn