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

\+ VAT APPEAL 1/2018

INDO BURMA PETROLEUM CORPORATION LIMITED ..... Appellant

Through: Mr. Ashok K. Bhardwaj & Mr. Manish Kr. Hirani, Advocate

versus

COMMISSIONER, VAT, DELHI ..... Respondent

Through: Mr. Satyakam, ASC with Mr. Akshay Alagh, Advocate

CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

<u>O R D E R</u>

% **05.01.2018**

<u>CM No.282/2018</u>

Allowed, subject to all just exceptions. The application is disposed of.

<u>VAT Appeal No.1/2018</u>

1. Indo Burma Petroleum Corporation Limited (a Government of India Undertaking), which is now merged with the Indian Oil Corporation Ltd. (another Government of India Undertaking), has filed the present appeal under Section 81 of the DVAT Act, 2004 ('Act' for short), impugning the order dated 8.12.2017 passed by the Appellate Tribunal (Tribunal) in VAT No.222/ATVAT/17-18. The impugned order disposes off application for waiver of pre-deposit of penalty of Rs.2,15,32,268/- imposed under Section 86(12) of the Act, with a direction that the Appellant would deposit 15% of the penalty amount within a period of 30 days.

2. Having heard learned counsel for the parties, we frame the following substantial question of law:-

(i) Whether the Tribunal, VAT, Delhi was justified and correct in law in directing the appellant to deposit 15% of the penalty amount of Rs.2,15,32,268/- as a pre-condition for hearing of the appeal against the order imposing penalty under Section 86(12) of the Act.?

3. With the consent of learned counsel for the parties, who state that a short issue arises for consideration, we take up the appeal for hearing and disposal on the first date itself.

4. The appellant is engaged in the business of marketing of petroleum products and registered under the Act and under the Central Sales Tax Act, 1961.

5. Controversy with regard to VAT payable, in terms of the proviso to Section 2(1)(zd) of the Act, had arisen for consideration, resulting in the order of the Tribunal dated 1.12.2011, adverse to the appellant. The finding was affirmed by the Delhi High Court and by the Supreme Court, *inter alia*, recording that benefit of the said proviso would not be applicable after reduction in price of petroleum products by the Central Government w.e.f. 13.11.2006 and 16.2.2007.

6. Tribunal, in the first round of litigation, vide order dated 1.12.2011, while dismissing the appeal filed by the appellant on interpretation of the proviso to Section 2(1)(d), had set aside the penalty imposed under Section 86(10) of the Act of Rs.43,67,689/-, i.e., equal to the deficient amount of VAT paid by the appellant. It was observed that the VATO would consider the question of assessment of penalty as per law, if deemed necessary.

7. Thereafter, there was a second round of litigation resulting in

another order by the Tribunal, dated 27.06.2016. This order rejected the appellant's contention on bonafides and mistaken interpretation, observing that the returns filed by the appellant were rightly rejected by the VATO as false, misleading and deceptive. The High Court in VAT Appeal No.14/2016, however allowed the appeal of the appellant, observing that the Tribunal has failed to notice the earlier order dated 1.12.2011 on the question of penalty under Section 86(10) of the Act. An order of remand to the Tribunal was passed.

8. Thereafter, the Tribunal, vide the order dated 27.06.2016, allowed the appeal and quashed the penalty, again leaving it open to the VATO to consider the question of assessment of penalty as per law and as deemed necessary. Contention of the appellant that there was no remand on the aspect of tax and penalty was rejected observing that it would not come in the way of the penalty, which was distinct and separate from assessment of tax.

9. By an order dated 25.11.2016, the VATO imposed penalty under Section 86(12) of the Act of Rs.2,15,32,268/-. This order of penalty has been upheld by the Objection Hearing Authority vide order dated 23.8.2017. This order is now the subject-matter of appeal before the Tribunal.

10. It would be noticed from the facts above, that at the initial round, penalty imposed was Rs.43,67,689/-. The said penalty was imposed under Section 86(10) of the Act. However, the penalty now imposed has increased exponentially to Rs.2,15,32,268/-, which is almost five times the total amount of VAT, which was short paid. We also record that the issue raised in the assessment related to

interpretation of the proviso which became the subject-matter of litigation before the Tribunal, then the High Court and the Supreme Court. Several rounds of litigation have taken place.

11. Keeping in view the aforesaid facts, we do not think that the direction of the Tribunal to deposit 15% of the penalty amount of Rs.2,15,32,268/- (amounting to Rs.32,29,840/-) would be justified and proper. The Tribunal would examine question of conduct and bonafide claim of the Assessee, its relevance as well as the effect of the earlier orders passed.

12. On the suggestion being given, the learned counsel for the appellant states that they would deposit 50% of the differential amount of VAT of Rs.43,67,689/-, which amounts to Rs.21,83,844.50/-.

13. We feel that the offer made by the learned counsel for the appellant is just and fair.

14. Accordingly, we partly modify the order of the Tribunal and direct the appellant to deposit Rs.21,83,844.50/- within a period of 30 days from today. On the said deposit being made, the appeal preferred by the appellant would be heard on merits, without being influenced by the observations made in this order. The substantial question of law is answered partly in favour of the appellant. The appeal is disposed of, with no order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JANUARY 05, 2018/tp