

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

MAHARASHTRA VALUE ADDED TAX APPEAL NO.6 OF 2022

Oasis Realty
having its office at
Commerz, 3rd Floor,
International Business Park,
Oberoi Garden City, Off. W.E.Highway,
Goregaon (East), Mumbai – 400063
..... Appellant

Vs.

1. The Commissioner of Sales Tax
having his office at
GST Bhavan, Mazgaon,
Mumbai – 400 010
2. The State of Maharashtra
through the Government Pleader,
High Court, Mumbai
..... Respondents

Mr.Sahil Parghi i/b Mr.Sriram Sridharan for Appellant
Ms.Jyoti Chavan, A.G.P. for the State

**CORAM: K.R. SHRIRAM, J &
FIRDOSH P. POONIWALLA, J.**

DATE: JULY 26, 2023

JUDGMENT (PER FIRDOSH P. POONIWALLA, J):

1. The present Appeal challenges an Order dated 20th October 2021 passed by the Maharashtra Sales Tax Tribunal (“the Tribunal”) in VAT Second Appeal No.240 of 2020 filed by the Appellant for the period 1st April 2013 to 31st March 2014.

2. The Appellant is an association of persons. The Appellant is registered under the Maharashtra Value Added Tax Act, 2002 (“the MVAT Act”) and Central Sales Tax Act, 1956 (“the CST Act”). The Appellant is engaged in the business of construction, development and sale of immovable properties, i.e., flats and dwellings, in the State of Maharashtra. As part of its business, the Appellant has constructed various apartments / buildings / flats and transferred the same under written agreements to buyers along with the underlying land or the interest in such land.

3. For the purpose of payment of VAT towards the aforesaid construction activity, the Appellant opted for the Scheme of Composition notified by Respondent No.2 under Section 42(3A) of the MVAT Act vide Notification No.VAT 1510/CR-65/Taxation 1 dated 9th July 2010. The said Scheme was opted for by the Appellant for agreements in respect of sale of flats which were registered during the year 2013-14 and was to be the basis on which the Appellant was to pay VAT in respect of construction of such flats. The Scheme as notified by the said Notification dated 9th July 2010 reads as under:

In exercise of the powers conferred by sub-section (3A) of Section 42 of the Maharashtra Value added Tax Act, 2002 (Mah.IX of 2005), the Government of Maharashtra hereby, provide a scheme of Composition for the registered dealers specified in column (1) of the following schedule, who undertakes the construction of flats, dwellings or buildings or premises and transfer them in pursuance of an agreement along-with land or interest underlying the land and prescribes the rate of tax specified in column (2) of the said Schedule by way of composition, in lieu the amount of tax payable on the transfer of goods whether as goods or in some other form, in the execution of such works contract by such registered dealer under

the Act, subject to the conditions and restrictions specified in column (3) of the said schedule.

<i>Class of dealer (1)</i>	<i>Composition Amount (2)</i>	<i>Conditions (3)</i>
<i>A registered dealer who undertakes the construction of flats, dwellings or buildings or premises and transfer them in pursuance of an agreement along-with land or interest underlying the land</i>	<i>One percent of the agreement amount specified in the agreement of value specified for the purpose of Stamp Duty in respect of said agreement under Bombay Stamp Act, 1958, whichever is higher</i>	<i>1. All the agreements, which are registered on or after 1st April, 2010 shall be covered under this composition scheme.</i> <i>2. The claimant dealer shall make e-payment of the amount of composition for the return period in which the agreement is registered and include such agreement value as turnover of sales in the said return.</i> <i>3. The claimant dealer opting to pay composition under this scheme shall not be eligible to claim set-off of taxes paid in respect of the purchases.</i> <i>4. The claimant dealer shall not transfer the property in goods, procure from outside the State, using the declarations in Form C under the Central Sales Tax Act, 1956 in the contract for which the composition of tax payment is opted.</i> <i>5. The claimant dealer shall not issue declaration in Form 409 to his sub-contractor in respect of the works contract for which composition is opted.</i> <i>6. The claimant dealer shall not be entitled to change the method of computation of tax liability in respect of contract for which he has opted for this composition scheme.</i> <i>7. The claimant dealer shall not issue Tax invoice.</i>

4. The Appellant had, for Financial Year 2013-14, disclosed gross turnover of sales at Rs.28,67,538/- and paid VAT on the same at Rs.1,36,551/-. The Appellant claimed purchases at Rs.3,39,35,70,257/-, out of which it claimed local purchases from registered dealers eligible for set-off at Rs.2,28,74,305/- and

claimed set-off of Rs.24,92,113/-. The Appellant thus claimed refund of Rs.24,65,766/-. It was the case of the Appellant that it was purchasing three types of materials. One - material which is required in construction activity, second – purchases for office consumption and third - purchases at site.

5. The Appellant contended that the said Notification dated 9th July 2010 was issued in respect of discharge of liability on goods getting transferred in the construction contract and therefore the scope of the said Notification was restricted in relation to goods which were liable to tax. It further contended that since the aforesaid second and third category purchases were of goods that were not transferred, the said Notification was not applicable for such category of purchases and therefore the Appellant would be entitled to claim set-off of tax paid in respect of said purchases.

6. By an Assessment Order dated 28th March 2018, the Deputy Commissioner of Sales Tax (LTU-3), E-628, Mumbai, who was the Assessing Officer (AO) rejected the said claim of set-off of the Appellant. The AO took the view that the condition disallowing set-off in respect of purchases does not restrict itself to purchases in respect of which property is passed on to the buyer and that same was applicable to all purchases, regardless of whether the property in respect of them passes on to the buyer or not. In other words, all input purchases in respect of flat construction were not eligible for set-off. Aggrieved by the said Assessment Order dated 28th March 2018, the Appellant preferred an Appeal before the Joint Commissioner of Sales Tax, Appeal-V, Bandra, Mumbai. By an

Order dated 28th February 2020, the Joint Commissioner of Sales Tax confirmed the said Assessment Order and dismissed the Appeal of the Appellant. Being aggrieved by the said Order dated 28th February 2020, the Appellant filed the said VAT Second Appeal No.240 of 2020 before the Tribunal. By an Order dated 20th October 2021, the Tribunal dismissed the said Appeal. Aggrieved by the said Order of the Tribunal, the Appellant has filed the present Appeal.

7. In the present Appeal, the Appellant has proposed the following substantial questions of law :

“I. Whether Condition No.3 of Notification No.VAT 1510/CR-65/Taxation-1 dated 09.07.2010 restricts set-off only in respect of purchases of those goods involved in the execution of a works contract the property in respect of which (goods) are transferred in the execution of such works contract?

II. Whether Condition No.3 of Notification No.VAT 1510/CR-65/Taxation-1 dated 09.07.2010 does not restrict set-off in respect of purchases of goods involved in the execution of a works contract the property in respect of which (goods) are not transferred in the execution of such works contract?”

8. Mr.Sahil Parghi, the learned Counsel for the Appellant, submitted that the Scheme of Composition dealt with payment of taxes solely in lieu of amount of tax payable on transfer of goods in execution of work contracts and therefore the prohibition on claiming set-off had to be limited to those purchases, property in which is transferred to the buyer. He submitted that as payment of tax under Scheme of Composition is in lieu of tax to be paid on transfer of goods in works contract, set-off cannot be claimed only in respect of those input items which go directly into the works contract and property in which is then transferred to buyers after the execution of the contract.

9. Mr.Parghi submitted that, in the present case, items such as cement, steel etc., which were transferred to the buyers at the time of transfer of property in the flat, were not eligible for set-off. However, those items which were not transferred to buyers such as cranes, IT equipment etc. can be the subject of set-off. He further submitted that Condition No.3 of the Notification dated 9th July 2010, which prohibited claiming set off of taxes paid in respect of purchases, did not state that it applied to “all” purchases but only stated that set-off would not be claimed in respect of “the” purchases. He submitted that the expression “the purchases” in Condition No.3 had to be read harmoniously with the enabling powers in Section 42(3A) of the MVAT Act whereunder the Scheme of Composition was introduced as well as the purpose of the Scheme of Composition, which is to levy tax at a reduced rate in lieu of tax on transfer of goods in a works contract.

10. Mr.Parghi submitted that when the composition tax itself is in lieu of the tax on transfer of goods in a works contract, the prohibition of claiming set-off should be applicable only to those purchases which are transferred to the buyer at the time of passing of the property in the works contract. The use of the word “the” as against the word “all” is telling and Respondent no.2 had intentionally decided to make the prohibition on set-off applicable only to those purchases, the property in which passes on to the buyer.

11. On the other hand, Ms.Jyoti Chavan, the learned counsel for the Respondents, supported the Order of the Tribunal. Ms.Chavan submitted that

Condition no.3 prohibited claiming of set-off of taxes paid in respect of purchases and the same could not be restricted to only certain purchases as contended by the Appellant.

12. Ms.Chavan also referred to a Judgment of this Court in the case of ***Maharashtra Chamber of Housing Industry and Others vs. State of Maharashtra and Others***¹ and in particular paragraph no.64 thereof which reads as under:

“64. As regards the challenge to the Notification dated 9 July 2010, it may be noted that the Notification which has been issued in exercise of power conferred by Section 42(3A) provides for a composition scheme. A composition scheme is made available at the option of the registered dealer. There is no compulsion or obligation upon a registered dealer to settle. The Court may in an extreme instance interfere in the exercise of its powers of judicial review only where the terms of a composition scheme are ex facie arbitrary and extraneous so as to be violative of Article 14. That has not been established before the Court in this case. There is no merit in the challenge to the Constitutional validity of the composition scheme.”

13. Section 42(3A) of the MVAT Act provides that the State Government may provide a Scheme of Composition for the registered dealers who undertake construction of flats etc and reads as under:

“(3A) The State Government may, by notification published in the Official Gazette,-

(a) provide a scheme of composition for the registered dealers who undertake the construction of flats, dwellings or buildings or premises and transfer them in pursuance of an agreement along with the land or interest underlying the land;

(b) prescribe the rate of tax by way of composition, in lieu of the amount of tax payable on the transfer of goods (whether as goods or in some other form), in the execution of such works contracts by such registered dealer under this Act.”

1 (2012) SCC Online Bom 546

14. As stated hereinabove, pursuant to the powers vested in it by virtue of the provisions of Section 42(3A) of the MVAT Act, the State Government has notified the Composition Scheme vide the said Notification dated 9th July 2010. As held by this Court in the case of *Maharashtra Chamber of Housing Industry and Others* (Supra), a dealer has the option as to whether to opt for such a Composition Scheme or not and there is no compulsion or obligation upon a dealer to opt for such a scheme.

15. As per the Composition Scheme notified by the said Notification dated 9th July 2010, the composition amount is one percent of the agreement amount specified in the agreement or the value specified for the purpose of stamp duty in respect of the said agreement under Bombay Stamp Act, 1958, whichever is higher.

16. Thus the Scheme provides for tax at a flat rate of one percent on the aforesaid amount. However, Condition No.3 provides that a dealer who opts to pay composition under the said Scheme shall not be eligible to claim set-off of taxes paid in respect of the purchases.

17. In the present case, the Appellant's claim of set-off pertains to administrative expenses as well as expenses towards the lease of construction equipment which were used for the purpose of undertaking construction activity. The Appellant could not have executed the contract without the said expenses.

18. On a plain reading of Condition No.3 of the said Scheme, it is clear that

the said condition prohibits a dealer opting for the Scheme from claiming set-off of taxes paid in respect of purchases. In our view, there is no merit in the argument of the Appellant that, just because Condition No.3 refers to “the purchases”, it applies only in respect of certain kind of purchases and does not apply in respect of certain other purchases. In our view, if Condition No.3 wanted to make an exception in respect of certain kind of purchases, then it would have expressly stated so. In the absence of any such exception made by Condition No.3, in our view, on the plain language of Condition No.3, it applies to all purchases.

19. Further, the whole purpose of such a Composition Scheme is to provide for a convenient, hassle-free and simple method of assessment. By opting for the Composition Scheme, the contractor saves himself the bother of book keeping, assessment, appeals and other such things. If the contractor opts for the Composition Scheme, it is not necessary to enquire and determine the extent or the value of the goods which have been transferred in the course of the execution of the works contract, the rate applicable to them and so on.

20. In our view, this being the purpose and object of such a Composition Scheme, this very purpose and object would be totally and completely defeated if the argument of the Appellant is accepted and the AO has to make an enquiry as to what goods have been transferred and in respect of what purchases set-off can be claimed.

21. For this reason also, we are unable to accept the interpretation sought to

be placed by the Appellant on Condition no.3.

22. In these circumstances, in our view, by its Order dated 20th October 2021, the Tribunal has correctly rejected the Appellant's claim of set-off.

23. For all the aforesaid reasons, in our view, no substantial question of law arises in the present Appeal. The Appeal is dismissed.

24. In the facts and circumstances of the case, there shall be no order as to costs.

(FIRDOSH P.POONIWALLA, J.)

(K.R. SHRIRAM, J.)