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

Reserved on: August 5, 2015
Date of Decision: August 21, 2015

\+ **ST.APPL. 76/2014**

CHALLENGER COMPUTERS. LTD. ..... Petitioner
Through: Mr. Rajesh Mahna, Advocate and Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE & TAXES, DELHI ..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 98/2014

GOEL OIL COMPANY THROUGH:
ITS PROPRIETOR VIKAS GOEL ..... Petitioner
Through: Mr. Rajesh Mahna, Advocate and Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE & TAXES , DELHI ..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 80/2014

KUCHAL ENTERPRISES ..... Petitioner
Through: Mr.Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE & TAXES,DELHI ..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 83/2014

KUCHAL ENTERPRISES ..... Petitioner
Through: Mr.Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 86/2014

AMBA AIRCOOL PVT. LTD. ..... Petitioner
Through: Mr. Surendra Kumar, Advocate.

versus

COMMISSIONER VALUE ADDED TAX,DELHI..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 88/2014

SHAM LAL KRISHAN LAL ..... Petitioner
Through: Mr. Rajesh Jain,Mr. Kumar Jee Bhat, Mr. Virag Tiwari, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 99/2014

LAKSHMI BATTERIES ..... Petitioner
Through: Mr. Rajesh Jain,Mr. Kumar Jee Bhat, Mr. Virag Tiwari, Advocates.

versus

COMMISSIONER OF TRADE AND TAXES ..... Respondent
Through: Mr. Sanjay Ghose, Additional Standing Counsel with Mr. Yash S. Vijay, Advocate.

WITH

ST.APPL. 16/2015

G.D.ELECTRONICS ..... Petitioner
Through: Mr. D.M. Sinha, Advocate with Mr. Rajiv Deora, Advocate.

versus

COMMISSIONER OF TRADE & TAXES & ORS..... Respondents
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 19/2015

J.P. AGGARWAL PROP. ..... Petitioner
Through: Mr. D.M. Sinha, Advocate with Mr. Rajiv Deora, Advocate.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 20/2015

G.D.ELECTRONICS ..... Petitioner
Through: Mr. D.M. Sinha, Advocate with Mr. Rajiv Deora, Advocate.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

WITH

ST.APPL. 22/2015

G.D.ELECTRONICS ..... Petitioner
Through: Mr. D.M. Sinha, Advocate with Mr. Rajiv Deora, Advocate.

versus

COMMISSIONER OF TRADE & TAXES & ORS. ..... Respondents
Through: Mr. Sanjay Jain, Additional Solicitor General with Mr. Gautam Narayan, Ms.Rajul Jain, Ms. Astha Jain, Mr.R.Arunadhri Iyer, Advocates.

AND

ST.APPL. 26/2015

B. P. GUPTA & SONS ..... Petitioner
Through: Mr. M.P. Devnath, Mr. Abhishek Anand and Mr. Bhuvnesh Satija, Advocates.

Versus

COMMISSIONER OF TRADE AND TAXES ..... Respondent
Through: Mr. Sanjay Ghose, Additional Standing Counsel with Mr. Yash S. Vijay, Advocate.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

J U D G M E N T

% 21.08.2015

Dr. S. Muralidhar, J.

The issue

1. The common questions of law that arise for consideration in this batch of appeals, as framed by the Court by its order dated 9th February, 2015 read as under:

> "(i) Whether the Appellate Tribunal-VAT was right in holding that the appellants were required to reverse input tax credits claimed on purchases made by them, in the course of their activities as dealers, on account of credit notes issued by selling dealers, despite the selling dealers having confirmed that they have not reduced their output tax liability.
>
> (ii) Whether in the facts and circumstances of the case, it can be said that the returns filed by the appellants were false, misleading or deceptive, attracting penalty U/S 86(10) of the Act."

Background

2. The Appellants are all registered dealers under the Delhi Value Added Tax Act, 2004 (DVAT Act). All of them faced demands issued by the Value Added Tax Officer (VATO) for failure to reverse the input tax credit (ITC) availed of by them as purchasing dealers on the ground that they had received discounts/incentives from their corresponding selling dealers subsequent to the sales. Each of the Appellants were unsuccessful in getting their objections accepted by the Objection Hearing Authority (OHA) and thereafter in their appeals before the Value Added Tax Appellate Tribunal ('Tribunal'). By a common order dated 6th August 2014 the Tribunal dismissed their appeals and therefore the present appeals are before this Court. Although the essential facts concerning the failure by the selling dealers to reverse the ITC is common to all the appeals, for the sake of convenience, the facts in ST Appl. Nos.76 of 2014 and 26 of 2015 are being adverted to illustratively.

Facts in ST Appeal No. 76 of 2014

3. The Appellants are engaged in trading of computer hardware and

software. The VATO issued a notice to the Appellants for the audit of its business affairs for the period 1st April, 2008 to 31st March, 2009. The Appellant states that it furnished necessary details to the VATO. Nevertheless, the VATO issued notices of default assessment of tax and interest under Section 32 of the DVAT Act and notices of assessment of penalty under Section 33 of the DVAT Act both dated 28th July, 2010, creating various demands for each of the months from April, 2008 till March, 2009. The contention of the Department was that in terms of Section 10(1) read with Section 51(a) of the DVAT Act it was incumbent on the purchasing dealer to claim ITC only to the proportionate extent after accounting for the discount received from the selling dealer. Consequently it was insisted by the Department that the purchasing dealer has to adjust the input tax and reverse the ITC claimed by him against the discount/incentives received from the selling dealer. The contention of the purchasing dealers, i.e. the Appellants, on the other hand, was that such reversal would be lawful only if the selling dealer has adjusted his output tax in terms of Section 8 and has issued a credit note disclosing the amount of tax separately in terms of Rule 45 of the Delhi Value Added Tax Rules, 2005 (DVAT Rules). It was pointed out that the selling dealer had not adjusted his output tax as a result of offering the discount/incentive and also had not claimed any refund from the Department. The selling dealer also issued a certificate to that effect to the purchasing dealer and this was produced before the VATO. Nevertheless, the VATO reduced the purchase value and the corresponding ITC on the ground that the discounts and incentives offered by the selling dealer to the purchasing dealer after the conclusion of the sale would go to reduce the actual selling price and

consequently the incidence of tax.

Facts in ST Appeal No. 26 of 2015

4. In STA No. 26 of 2015, the Appellant B.P. Gupta and Sons, is a registered dealer, which trades in the products of Hindustan Unilever Limited ('HUL') which includes soaps, shampoos, toothbrushes and is one of its distributors in Delhi. It is stated that the Appellant is a re-distribution stockist under a principal to principal buyer-seller agreement. It is stated that the Appellant then sells the products to other retailers and wholesalers. In order to promote the sale of its products, HUL comes out with several 'price drop schemes' where discounts are offered to wholesalers, retailers through the re-distribution stockists like the Appellant.

Objections before the OHA

5. Objections were filed by the Appellant against the aforementioned default assessments before the OHA i.e. Additional Commissioner – Special Zone and the Joint Commissioner (KCS).

6. By orders dated 7th July, 2011 and 30th January, 2012, the OHA rejected the objections in STA No. 76 of 2015. Similarly, by orders dated 31st August 2009 and 15th February 2010, the OHA rejected the objections in STA No. 26 of 2015.The appeal filed by the Appellant, along with the appeals of other similarly placed dealers, was dismissed by the Tribunal by the impugned orders dated 6th August, 2014 (in STA No. 76 of 2014) and 28th July 2014 (in STA No, 26 of 2015).

The Tribunal's findings

7. The summary of the findings of the Tribunal is as under:

i. The object and purpose of the DVAT Scheme requires every addition of value on a subsequent sale to be subject to tax. The Department would be adversely affected in case credit notes are issued after conclusion of the sale transaction without complying with the requirements of Section 51 (a) read with Section 10 (1) of the DVAT Act. The issuance of credit notes subsequent to the sale does go to reduce the sale price. It has an impact of increasing the purchase price shown in the invoice and the ITC claimed on that basis thereon and violates the DVAT scheme.

ii. The decision of the Madras High Court in ***Jayam & Co. v. Assistant Commissioner (2013) 65 DST 260 (Madras)*** would squarely apply to the facts and circumstances of the case. The Madras High Court had in the said decision upheld the validity of Section 19 (20) of the Tamil Nadu Value Added Tax, 2006 (TNVAT Act) which was *impari materia* Section 10 (5) of the DVAT Act.

iii. The Madras High Court further upheld the retrospective operation of Section 19(20) of the TNVAT Act. The relevancy of Section 10(5) of the DVAT Act could not be allowed to be diluted only because it had not been made retrospective. In any event, since the provision was only clarificatory, it was not necessary to make

Section 10(5) of the DVAT Act retrospective.

iv. The arrangement whereby the selling dealer issues a credit note "is nothing but a plan or understanding in collusion with the partner in transaction which could easily be termed as tax advantage in terms of clause (b) of Section 40A, clause (2), which has in effect reduced the tax liability of the purchasing dealer to pay tax and also reduction in liability of the Appellant to collect more tax for adjustment with the Input Tax Claim."

v. The penalty was remitted by 50 per cent.

8. The Court has heard at length the submissions of Mr. Rajesh Mahna, Mr. Ruchir Bhatia, Mr. Surendra Kumar & Mr. D.M. Sinha, counsel for the Appellants. On behalf of the Department, arguments were addressed by Mr. Sanjay Jain, learned Additional Solicitor General, Mr. Gautam Narayan and Mr. Sanjay Ghose, Standing Counsel.

Relevant provisions of the DVAT Act

9. The Court would first like to discuss the provisions under the DVAT Act relevant to the issues at hand:

> "2(1)(r) **"input tax"** in relation to the purchase of goods, means the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under this Act"
>
> ....
>
> **"**2(zd) **"sale price"** means the amount paid or payable as

valuable consideration for any sale, including-

(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;

(ii) in relation to the delivery of goods on hire purchase or any system of payment by instalments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;

(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;

(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;

(v) [amount of duties levied or leviable on the goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962), or the Delhi Excise Act, 2009 (Delhi Act 10 of 2010) whether such duties are payable by the seller or any other person; and]

(vi) amount received or receivable by the seller by way of deposit (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental to or ancillary to the sale of goods;

(vii) in relation to works contract means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract;
less –

(a) any sum allowed as discount which goes to reduce the sale price according to the practice, normally, prevailing in trade;

(b) the cost of freight or delivery or the cost of installation in cases where such cost is separately charged;

and the words "purchase price" with all their grammatical variations and cognate expressions, shall be construed accordingly;

[PROVIDED that where the dealer makes sale of goods imported into the territory of India, the sale price shall be greater of the following:

(a) the valuable consideration received or receivable by the dealer;

(b) value determined by the Custom authorities for payment of custom duty at the time of the import of such goods.]"

....

"3 **Imposition of tax**

(1) Subject to other provisions of this Act, every dealer who is –

(a) registered under this Act; or

(b) required to be registered under this Act;

shall be liable to pay tax calculated in accordance with this Act, at the time and in the manner provided in this Act.

[(2) Every dealer shall be liable to pay tax at the rates specified in section 4 of this Act on every sale of goods effected by him –

(a) while he is a registered dealer under this Act; or

(b) on and from the day on which he was required to be registered under this Act.]

[(3) The amount of tax payable under this Act by a dealer, is the dealer's net tax for the tax period calculated under section 11 of this Act.]

[(4) The net tax of a dealer shall be paid within twenty one days of the conclusion of each calendar month.

Explanation.- The obligation to pay the tax arises by virtue of this provision and is not dependent on furnishing a return, nor on the issue of a notice of assessment to the dealer.]

(5) Tax shall be paid in the manner specified in section 36 of this Act."

....

"8. **Adjustments to tax**
(1) [Subject to such conditions as may be prescribed, this section shall apply where, in relation to the sale of goods by any dealer –]
(a) that sale has been cancelled;
(b) the nature of that sale has been fundamentally varied or altered;
(c) the previously agreed consideration for that sale has been altered by agreement with the recipient, whether due to the offer of a discount or for any other reason;

[(d) the goods or part of the goods sold have been returned to the dealer within six months of the date of sale; or]

(e) the whole or part of the price owed by the buyer for the purchase of the goods has been written-off by the dealer as a bad debt; and the dealer has –

(i) provided a tax invoice in relation to that sale and the amount shown therein as tax charged on that sale is not the tax properly chargeable on that sale; or

(ii) furnished a return in relation to a tax period in respect of which tax on that sale is attributable, and has accounted for an amount of tax on that sale that is not the amount properly chargeable on that sale."

....

"9 **Tax credit**

[(1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period [where the purchase arises] in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making –

(a) sales which are liable to tax under section 3 of this Act; or
(b) sales which are not liable to tax under section 7 of this Act.

(2) No tax credit shall be allowed –
(a) in the case of the purchase of goods for goods purchased from a person who is not a registered dealer;
(b) for the purchase of non-creditable goods;
(c) for the purchase of goods which are to be incorporated into the structure of a building owned or occupied by the person;

(d) for goods purchased from a dealer who has elected to pay tax under section 16 of this Act;

[(e) for goods purchased from a casual trader;]

{(f)} to the dealers or class of dealers specified in the Fifth Schedule except the entry no.1 of the said Schedule.]

[(g) to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period.]"

....

"10 **Adjustment to tax credit**

(1) Where any purchaser has been issued with a credit note or debit note in terms of section 51 of this Act or if he returns or rejects goods purchased, as a consequence of which the tax credit claimed by him in any tax period in respect of which the purchase of goods relates, becomes short or excess, he shall compensate such short or excess by adjusting the amount of the tax credit allowed to him in respect of the tax period in which the credit note or debit note has been issued or goods are returned.

....

10 [(5) Where the goods which have been purchased by a dealer are sold at a price lower than the price at which it was purchased by the dealer, the tax credit on such purchases shall be reduced proportionately in the tax period during which the goods are sold.
Explanation. – The tax credit claimed on a particular purchase shall not
exceed the amount of tax payable on its sale.]"

....

"11 **Net tax**
(1) The net tax payable by a dealer for a tax period shall be determined by the formula:
Net Tax = O – I – C
where
O = the amount of tax payable by the person at the rates stipulated in section 4 of this Act in respect of the taxable turnover arising in the tax period, adjusted to take into account any adjustments to the tax payable required by section 8 of this Act.

I = the amount of the tax credit arising in the tax period to which the person is entitled under section 9 of this Act, adjusted to take into account any adjustments to the tax credit required by section 10 of this Act.

C = the amount, if any, brought forward from the previous tax period under sub-section (2) of this section."

....

38 (10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

....

"**40A Agreement to defeat the intention and application of this Act to be void**

(1) If the Commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of this Act or any provision of this Act, then, the Commissioner may, by order, declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for the increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not, such dealer or person is a party to the arrangement, in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that dealer from or under the arrangement.

(2) For the purposes of this section -
(a) "arrangement" includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect;

(b) "tax advantage" includes, -
(i) any reduction in the liability of any dealer to pay tax,
(ii) any increase in the entitlement of any dealer to claim input tax credit or refund,

(iii) any reduction in the sale price or purchase price receivable or payable by any dealer.]"

....

"**51 Credit and debit notes**

Where a tax invoice has been issued in respect of a sale and –

(a) the amount shown as tax in that tax invoice exceeds the tax payable in respect of the sale, the dealer shall provide the purchaser with a credit note, containing such particulars as may be prescribed; or

(b) the tax payable in respect of the sale exceeds the amount shown as tax on the tax invoice, the dealer shall provide the purchaser with a debit note, containing such particulars as may be prescribed."

10. The above provisions have to be read along with Rule 45 of the DVAT Rules, which reads as under:

"**45 Credit and Debit Notes**

For the purposes of section 51, a credit note and a debit note shall be signed by a person authorised to sign the return to be filed under the Act and shall contain the following particulars, namely:-

(a) the name, address and registration certificate number of the selling registered dealer;

(b) the name and address of the purchaser and his registration number where the purchaser is a registered dealer;

(c) a description of the reason for issuing the credit note or debit note, as the case may be;

(d) the serial number of the relevant tax invoice affected by the credit note or debit note, as the case may be; and

(e) the amount of the variation to the tax amount shown on the tax invoice."

Analysis of the provisions

11. In terms of Section 2(r) of the DVAT Act 'input tax' means 'the proportion of the price' paid by the buyer which 'represents tax' which is liable to be paid by the selling dealer. On a sale transaction of Rs.100/- with rate of VAT @ 10 per cent the Input Tax would be Rs.10/-. In terms of Section 3(3) of the DVAT Act the amount of tax payable by a dealer is the dealer's net tax for the period calculated under Section 11 of the Act. Section 9 permits a dealer to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer including sales which are liable to tax under Section 3 of the Act. While Section 8 talks of 'Adjustment to tax'; Section 10 talks of 'Adjustment to Tax Credit'.

12. In the example given it is stated that if HUL sells goods worth Rs.100 to the Appellant it collects on the invoice VAT at 12.5% which means the Appellant pays Rs.112.50. In case any discount scheme has been announced then in the invoice raised by the Appellant on its customers, apart from adding its margin of 5% (which makes the taxable value in the invoice as 105) it adds VAT at 12.5% and then gives the post-tax discount at Rs.5. The net ITC works out to Rs.12.50 whereas the output tax works out to Rs.12.98. The net liability of the Appellant is 0.48.

13. In another scenario where the Appellant avails of a pre-tax discount at 10%, the taxable value itself comes down to Rs.95 (after adding the

Appellant's margin of Rs.5). VAT on 12.5% works out to Rs.11.74 and the bill value comes to 95+11.74=106.74. After a post-tax discount is given at Rs.5 in the bill raised on the Appellant's customer then the final bill value comes to 101.74. The output tax liability works out in the above example to Rs.11.74. The next tax liability is negative at 0.76. In either case, HUL does not adjust the discount amount against its tax value. It does collect upfront the tax at 12.5% and remits it to the Department.

14. In all these cases, the Appellants have been able to produce certificates from the selling dealers who have clarified that they are not claiming any output tax credit or seeking any refund. In other words, the entire amount of VAT collected by the selling dealer from the buying dealer is remitted to the Department. Therefore, there is no question of the selling dealer resorting to the procedure under Section 51(a) of the DVAT Act to raise a credit note in accordance with Rule 45 of the DVAT Rules, or to notify that on account of an arrangement with the buying dealer the selling price has been altered. Consequently, there is no corresponding obligation on either of them to resort to the procedure under Section 8 (1) of the DVAT Act. There is also, therefore, no obligation on the buying dealer to resort to the procedure under Section 10 (1) of the Act. This, of course, is the scenario prior to the introduction of Section 10 (5) to the Act which, as will be discussed hereafter, is only prospective and not as, contended by the learned ASG, merely clarificatory.

15. One of the submissions made by Mr. Sanjay Jain, learned ASG, was that Section 10 (5) was clarificatory of the existing legal position flowing

from an interpretation of Section 51 (a) read with Section 10(1) of the Act, which according to him cast a legal obligation on the buying dealer to reverse the input tax credit. He contended that any discount being received after completion of the sale transaction would have the effect of altering the sale price, whether directly or indirectly. He sought to place reliance on the decision in ***Central Bank of India v. Their Workmen AIR 1960 SC 12.***

16. The legal position as regards the circumstance under which an amendment can be said to be clarificatory has been explained by the Supreme Court in ***Union of India v. Martin Lottery Agency Ltd.2009 (7) SCALE 34.*** The Court in that case was considering the question whether the sales promotion and marketing of lottery tickets would be eligible to service tax within the meaning of the provisions of Section 65 (105) of the Finance Act, 1994. One of the incidental questions the Court was considering was whether the explanation appended to the provision which widened the tax net was merely clarificatory. The Court was of the view that by inserting the explanation to Clause (19) of Section 65 of the Finance Act, a new concept of imposition of tax had been brought in. It was not merely clarificatory. It was held:

> "the question as to whether a Subordinate Legislation or a Parliamentary Statute would be held to be clarificatory or declaratory or not would indisputably depend upon the nature thereof as also the object it seeks to achieve…….if two views are not possible, resort to clarification and/or declaration may not be permissible".

17. The fact that Section 10(5) inserted in the DVAT Act with effect from

1st April 2010 brings a substantive change is evident from a collective reading of Section 51 (a), Section 10 (1) and Section 8 (1) of the Act. The scheme, prior to the insertion of Section 10 (5) appears to be this. Where a selling dealer intends to claim a refund or reduce his output tax *qua* a transaction for whatever reason including offering a discount, he will have to resort to the procedure set out in Section 51 (a) of the DAVT Act. He will have to raise a credit note and issue a tax invoice in respect of that sale. Rule 45 of the DVAT Rules is consistent to the above legal position. The obligation thereunder is again of the selling dealer. A reading of Section 10 (1) also reveals that it is the selling dealer that has to take steps to adjust the tax credit and issue to the purchasing dealer the credit note or debit note as the case may be. If the purchasing dealer is not given the credit note by the selling dealer under Section 51 (a) read with Section 10 (1), the question of the purchasing dealer adjusting the input tax in terms of Section 8 (1) does not arise.

18. Section 10(5) of the DVAT Act introduced for the first time an obligation on the buying dealer to reduce the ITC in proportion to the difference in the price at which the buying dealer had purchased the goods and the price at which the dealer sold the goods if the price at which the goods sold by the buying dealer was lower than the price at which he had purchased the goods. In other words, the ITC claimed by the buying dealer would not exceed the tax payable on sale made by the buying dealer. Section 10(5) of the DVAT Act obliges the buying dealer having to reverse the ITC in the above circumstances, imposes for the first time an obligation on the buying dealer to reverse, and thereby, forgo ITC. This cannot be

viewed as merely clarificatory of the existing legal position. The decisions cited by learned ASG on the issue as to when a legislative change can be stated to be merely clarificatory of an existing legal position cannot have any application in the above facts and circumstances.

Section 10 (5) is not retrospective

19. Further, Section 10 (5) brings about a change which is substantive and not procedural. It is a change that adversely affects the substantive rights of the buying dealer. There cannot, therefore, be a presumption of retrospectivity as far as the said provision is concerned. The settled legal position which was reiterated in ***Martin Lottery*** (*supra*) was that if by virtue of an insertion of an explanation in a taxing statute "a substantive law is introduced, it will have no retrospective effect".

20. Since considerable reliance has been placed by the Department on the decision of the Madras High Court in ***Jayam & Co. v. Assistant Commissioner*** (*supra*) it becomes necessary to discuss the said case in some detail. By the Tamil Nadu Value Added Tax (Second Amendment) Act 2010, an amendment was inserted by way of Section 19 (20) in the TNVAT Act to provide for reversal of the amount of ITC for the goods over and above the output tax in those cases where a registered dealer has sold the goods at a price less than the price of the goods purchased by him. By notification dated 19th August 2010, the date from which the amendment would take effect was altered to 1st January 2007.

21. In ***Jayam & Co***, a specific challenge was raised to the constitutional

validity of Section 19 (20) of the TNVAT Act and in particular to its retrospectivity. The High Court held that a law cannot be held to be unreasonable merely because it operates retrospectively. The unreasonableness must result from some other factors like unforeseeable financial burden or the measure being unduly oppressive or confiscatory. Answering those questions in the negative, it was held that there was no invalidity in the said provision having retrospective effect from 1st January 2007. It was further held that there was no ambiguity in Section 19 (20) of the TNVAT Act and it was not beyond the legislative power of the State Legislature under Entry 54 of List II of the Seventh Schedule to the Constitution.

22. The Court finds the decision in ***Jayam & Co.*** distinguishable. Although the wording and purport of Section 10 (5) of the DVAT Act and Section 19(20) of the TNVAT Act are similar, viz., reversal of the ITC by the purchasing dealer where he sells the goods at a price less than for which he purchased them, Section 10 (5) of the DVAT Act has not been made expressly retrospective.

23. On the other hand, it has been made explicit by the Department of Trade and Taxes, GNCTD by Circular No.3 of 2011-12 dated 10th June 2011 that the said provision is prospective. The operative portion of the said Circular reads as under:

> "In continuation to Circular No.1 of 2011-12 dated 02.05.2011 and in order to further clarify applicability of amendments made in Section 9(2) (g), 10(5) of the DVAT Act, 2004 and Annexure 2A & 2B to be attached with Return Form DVAT-16, the following clarifications are hereby issued:

1. It is clarified that the filing of Annexure 2A & 2B with Return Form i.e, DVAT-16 is effective since the date of notification i.e. 07.05.2010.

2. The other amendments i.e. in Section 9 (2) (g) and Section 10(5) of DVAT Act, 2004 stands implemented from the date of notification i.e. 01.04.2010.

This issues with the prior approval of Commissioner (VAT)."

24. As already noticed the introduction of Section 10(5) does affect the substantive rights of the purchasing dealers. This is not a mere procedural change. The provision cannot be presumed to be retrospective.

Obligation of the selling dealer under Section 51

25. The learned ASG contended that Section 51 of the DVAT Act was mandatory and it was not open for the selling dealer to avoid issuing credit or debit notes, as the case may be, in the event there was any variation in the sale price. He further argued that failure to issue credit note under Section 51(a) of the Act would not enable the buying dealer to claim a higher tax and it was not be open for the dealers to choose the instance of tax on their own volition by not following the mandate of Section 51 of the DVAT Act.

26. Section 51 of the DVAT Act must be read in the context of the scheme of the Act. A purchasing dealer cannot claim any ITC without issuance of a tax invoice under Section 50 of the Act by the selling dealer. Section 50 of the Act also specifies that the tax invoice can only be issued by a registered dealer in cases other than the instances specified under the said

section (which are also instances where ITC is not available to the buying dealer). A tax invoice is required to be issued in accordance with Rule 44 of the DVAT Rules. As far as the selling and buying dealer is concerned, the tax invoice reflects the tax payable by the selling dealer and the same is liable to be deposited with the tax authority. Any alteration in the tax invoice cannot be made except in accordance with the DVAT Act and no refund or adjustment of tax can be claimed except under Section 38 of the Act.

27. Section 38(9) of the Act provides for the refund or adjustment of tax in cases where the goods are sold by the registered dealer and the price charged expressly includes the amount of tax. Section 38(9) of the Act reads as under:

> **"38 Refunds**
> (9) Where – (a) a registered dealer has sold goods to another registered dealer; and (b) the price charged for the goods expressly includes an amount of tax payable under this Act, the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer."

28. It is apparent from the aforesaid provision that any reduction in the tax payable by the selling dealer on account of reduction in the sale price would correspondingly result in reassessment of the tax credit claimed by the buyer in cases where the goods have been sold by one registered dealer to another. It is also clear from the scheme that the same would necessarily involve issuance of credit notes under Section 51(a) of the DVAT Act as

without issuance of such credit notes, it would not be open for the buying dealer to adjust the tax credit in terms of Section 10 of the Act. The scheme of the DVAT Act insofar as it relates to reduction in the tax liability of the selling dealer subsequent to the sale which results in corresponding reduction in the input credit available to a buying dealer is triggered by the credit notes issued under Section 51(a) of the Act. Unless credit and debit notes are issued under Section 51 of the Act, the tax reflected in the tax invoice would continue to stand. Consequences of non issuance of credit/debit note under Section 51(a) of the Act would effectively disentitle the selling dealer from claiming any refund.

29. It is also relevant to refer to Section 38(8) of the Act which expressly provides that where a sale has been made to a non-registered dealer and the selling price includes the amount of tax payable, the selling dealer would not be entitled to any refund unless the Commissioner is satisfied that the selling dealer has refunded the amount to the purchaser. This also, clearly, indicates that a selling dealer would not be entitled to any refund of tax collected from the purchaser unless (a) the amount is refunded to the purchaser if the purchaser is an unregistered dealer and (b) a credit note is issued to the purchasing dealer where the purchasing dealer is a registered dealer and is consequently reassessed on its liability.

30. Section 51(a) of the DVAT Act is, thus, a provision for the benefit of the selling dealer, inasmuch as the selling dealer cannot claim any refund of tax paid unless a credit note under Section 51(a) is issued. In case where the tax payable exceeds the amount paid, the selling dealer cannot claim

any tax from the purchaser unless a debit note under Section 51(b) of the DVAT Act is issued. In the circumstances, it would be difficult to accept that the selling dealer is obliged to issue a credit or a debit note under Section 51 of the DVAT Act as it would always be open for the selling dealer not to avail its benefit, which is the only consequence of not following Section 51.

31. In fact many of the selling dealers in these cases have issued certificates stating that they have not claimed any refund of tax from the Department or sought any adjustment in their respective output tax liability. One such certificate is issued by the LG Electronics to the Appellant in ST Appeal No. 86 of 2014 (Amba Aircool) reads as under:

> To whomsoever it may concern
>
> "This is to certify that we have issued credit notes towards incentives earned by the dealer from time to time on account of their achieving the sales targets. during the financial year 2008-09, we have issued credit notes to M/s Amba Aircool Pvt Ltd, New Delhi, which were not to make good any losses. while issuing these credit notes we have not returned back the tax paid by the dealer, reason being that neither we have claimed refund of tax from the department nor have sought any adjustment in our output tax liability."

32. The introduction of Section 10(5) of the DVAT Act does not alter the aforesaid scheme in any manner. The only effect of Section 10(5) of the DVAT Act is that the tax credit available to a purchasing dealer would not exceed the amount of tax payable on its sale.

Section 40-A not attracted

33. Although in the assessment order of the VATO in STA No. 26 of 2015, a reference is made to Section 40 A of the DVAT Act, nothing has been brought on record by the Department in any of these appeals to show that the arrangement by which discounts/incentives were offered to the purchasing dealers by the selling dealers was with a view to "defeat the application or purposes of" any provision of the DVAT Act. In other words, no foundational facts have been brought out by the Department to sustain the demand with reference to Section 40 A of the DVAT Act. Understandably therefore none of the impugned orders confirming the demand have based their conclusions on Section 40 A of the DVAT Act.

34. Question (i) is accordingly answered in the negative by holding that the Tribunal erred in holding that the Appellants were required to reverse the ITC claimed on purchases made by them.

35. Question (ii) is also answered in the negative by holding that the returns filed by the Appellants could not be held to be false, misleading or deceptive thus attracting penalty under Section 86 (10) of the DVAT Act.

Conclusion

36. In view of the above discussion, the impugned judgment of the Tribunal confirming the demand created on the Appellants in each of these appeals is held unsustainable in law and is hereby set aside. The corresponding orders of the VATO and the OHA in each of the appeals which were upheld by the Tribunal are also set aside.

37. The appeals are allowed in the above terms with costs of Rs. 10,000 in each of the appeals.

S. MURALIDHAR, J.

AUGUST 21, 2015 **VIBHU BAKHRU, J.**

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