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

% RESERVED ON: 07.08.2012
PRONOUNCED ON: 04.01.2013

\+ ST.APPL. 34-39/2012

SHANTI KIRAN INDIA PVT LTD ..... Petitioner
Through: Mr. Vinod Srivastava with
Mr. Ravi Chandhok, Advocates.

versus

COMMISSIONER TRADE & TAX DEPTT. ..... Respondent
Through: Mr. A.K. Babbar, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

1. The present judgment will dispose of six appeals preferred under Section 81 of the Delhi Value Added Tax Act, 2004 (hereafter called "VAT Act") challenging a common order of the Value Added Tax Appellate Tribunal ("VAT Tribunal") dated 05.01.2012. The question of law urged in the present case is:

> *"Whether in the facts and circumstances, the VAT authorities were justified in disallowing the input credit claimed by the appellant, a purchasing dealer."*

2. The brief facts necessary for deciding the case are that the appellant trades in electrical goods and is a registered dealer under the VAT Act. It purchases goods from dealers registered under the said Act on the basis of

tax invoices issued by them and on the payment of VAT at applicable rates. The appellant received notices for assessment of tax and interest under Section 32 of the VAT Act and for penalty assessment under Section 33. These were for various periods between 2007 and 2008 and apparently premised on the audit of its accounts by the VAT Department for the period 01.04.2007 to 31.03.2008. The VAT Officer (VATO) by assessment orders disallowed the input claimed on account of purchases from two dealers – M/s. Balaji Enterprises and M/s. R.S. International (hereafter referred to as the "selling dealers"). The VATO was of the opinion that the selling dealers operated for short periods and their turn-over was high in comparison to the tax deposited by them. Consequently by the orders, the VATO demanded tax, interest and penalty for the periods in question. Arguing that the VATO's orders were not justified in law, the appellant moved the Objection Hearing Authority (OHA) under Section 74. These appeals/objections were dismissed by order dated 29.01.2010. The OHA confirmed the VATO's order.

3. Appeals were consequently preferred the VAT Act to the Tribunal, which, by the impugned order, dismissed them, upholding the disallowance of the input credit and also upholding the penalties imposed. The Tribunal was of the view that Section 9(1) permits tax credit to a purchasing dealer to the extent the tax is actually deposited by the selling dealer. In doing so, the VAT Tribunal also took into consideration the amendment to Section 9(2) which was brought into force on 01.04.2010, i.e. after the appeals were preferred. That amendment inserted clause (g) to Section 9(2), clarifying that input tax credit is admissible to purchasing dealer only when tax is actually deposited by the selling dealer.

4. The appellant argued that the VAT authorities have misconstrued the relevant provisions and that the impugned order of the Tribunal upholding the objection hearing authority's order is based on an erroneous interpretation of the VAT Act. Learned counsel submitted that the VATO in this case was influenced by the fact that the two selling dealers had transacted business for a short duration and that their registrations had been cancelled. It was argued that the appellant as a purchasing dealer had no control over the affairs and functioning of the selling dealers and that in the absence of any statutory authority during the relevant period, could not be held liable for such parties' default. It was argued that as a purchaser, if any liability was imposed or ordained by the statute, the tax authority would be justified in fastening it in respect of particular transactions, to the extent that any sale or transaction had to fall within the turn-over for the relevant period, every dealer was obliged to include it. Learned counsel highlighted that the subsequent cancellation and the registration of the selling dealers in this case could not be the basis for tax liability of a purchaser.

5. Reliance was placed on behalf of the Appellant on decision reported as *State of Maharashtra v. Suresh Trading Company* 1998 (109) STC 439 (SC) where the Supreme Court had rejected the Revenue's contention in a similar factual setting. Learned counsel also relied upon the decision of the Madras High Court reported as *Althaf Shoes Pvt. Ltd. v. Assistant Commissioner (CT)* VSTI 2012 B-380. Lastly, it was urged that the necessary ingredients enabling the tax administrators in this case to impose penalty, i.e. where a tax deficiency arose in terms of Section 86(1), did not occur. Consequently there was no warrant for penalty. It was also submitted that the purchasing dealer could not ascertain the selling dealers'

registration certificates had been cancelled as they were not notified at the relevant time. In fact, the dates of the cancellation order were unknown. The appellant became aware of the cancellation only after the VATOs order, and could obtain information through applications made under the Right to Information Act. Counsel submitted that data confidentiality in such matters is mandated by virtue of Section 28 of the VAT Act, emphasizing that there was no mechanism for such information dissemination.

6. It was argued on behalf of the Revenue that the records scrutinized by the Audit Department in this case revealed that both the selling dealers had deposited proportionately less tax in respect of the transactions which they reported. It was emphasized that the actual tax paid by M/s. Balaji Enterprises for the period May 2007 to December 2007 was just Rs.25,000/- as against a gross total turn-over of Rs.9.48 crores. The Registration Certificate of the said dealer, M/s. Balaji Enterprises was cancelled with effect from 12.02.2008. Consequently after that period since the concern was not a registered dealer it could not issue any tax invoices. Similarly in the case of M/s. R.S. Trading International, OHA's order reveal that for the period 01.07.2007 to 30.06.2008 as against gross turn-over of Rs. 9.6 crores, that concern had paid total tax of just about Rs.24,000/-. The Registration Certificate in respect of this concern (M/s. R.S. Trading International) was cancelled with effect from 01.07.2008. It was argued that the OHA was justified in concluding, on the basis of these materials that the transactions shown were sham and only paper transactions and that the appellant was in collusion with the said dealers.

7. Learned counsel for the Revenue also submitted that the Tribunal cannot be faulted for relying on Section 9(2)(g) which was brought into

force with effect from 01.04.2010. Learned counsel submitted that this provision was merely clarificatory and relied upon the decisions reported as *V.M. Salgaocar & Brothers P. Ltd. v. Commissioner of Income Tax* 2001 (119) STC 483; *Shyam Sunder v. Ram Kumar* 2001 (8) SCC 24. It was also submitted that the interpretation of Section 9(1), i.e. that input credit would be only to the extent the selling dealer deposits the tax, is appropriate and based upon a reasonable interpretation of the statute. Learned counsel relied upon the decision reported as *Bihar State Council of Ayurvedic and Unani Medicine v. State of Bihar* AIR 2008 SC 595; *R.S. Joshi, STO v. Ajit Mills* 1977 (40) STC 497 and *Shree Sajjan Mills Ltd. v. Commissioner of Income Tax* 1985 ITR 585 to say that the Court in its effort to give a purposeful interpretation has to strive and harmonize various provisions of statutes. It was also argued that fiscal statutes have to be construed in their own terms, having regard to the objections which they are expected to fulfill. Counsel relied on the decision of the Bombay High Court in *M/S.Mahalaxmi Cotton Ginning v The State Of Maharashtra & Ors* (decided on 11 May, 2012 in WP 33/2012) to say that there is nothing abhorrent in the interpretation placed by the VAT Tribunal, and a similar construction was approved by that High Court.

8. Under the scheme of the VAT Act, 2004, by virtue of Section 3(1) every dealer registered or required to be registered under the Act is liable to pay tax in the manner provided. Every dealer, under Section 3(2) is liable to pay tax *"at the rates specified in Section 4*" and in respect of *"every sale of goods effected by him"* as a registered dealer on any date from which he was required to be registered. Section 9 accrues tax credit to a registered dealer under the Act in respect of turn-over of purchases granted during the tax

period when the purchase earned in the course of his activities as a dealer of the goods are to be used by him directly or indirectly *"for making sales liable to tax under Section 3*" or "*for making sales or which are not liable to tax under Section 7."* Section 9(2) lists situations when input tax credit cannot be allowed. It reads as follows:

> *"(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;*
>
> *Explanation.- This sub-section does not prevent a tax credit arising for goods and building materials that are purchased either for the purpose of re-sale in an unmodified form, or for the performance of a works contract on a building owned or occupied by another;*
>
> *(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."*

Concededly, clause (g) to Section 9(2) was introduced by an amendment, made effective, in 2010. It was not in existence when the dispute which is the subject matter of these appeals, arose.

9. In *Suresh Trading Co,* the Supreme Court had to deal with a somewhat similar situation where the benefit claimed by the purchasing dealer was denied, or taken away, on the basis of the cancellation of the selling dealer's registration certificate. The Court held that denial of the benefit was not justified, observing that:

> *"The High Court noted that the effect of disallowing the deductions claimed by the respondents was, in substance, to tax transactions which were otherwise not taxable. The condition precedent for becoming entitled to make a tax free resale was the purchase of the goods which were resold from a registered dealer and the obtaining from that registered dealer of a certificate in this behalf. This condition having been fulfilled, the right of the purchasing dealer to make a tax free sale accrued to him. Thereafter to hold, by reason of something that had happened subsequent to the date of the purchase, namely, the cancellation of the selling dealers' registration with retrospective effect, that the tax free resales had become liable to tax, would be tantamount to levying tax on the resales with retrospective effect.*
>
> *5. In our view, the High Court was right. A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current. The argument on behalf of the department that it was the duty of persons dealing with registered dealers to find our whether a state of facts exists which would justify the cancellation of registration must be rejected. To accept it would be to notify the provisions of the statute which entitle persons dealing with registered dealers to act upon the strength of registration certificates."*

10. Dealing with the *rationale* behind State tax legislation such as Sales tax law (a forerunner for tax on sale of goods), The Supreme Court had held

in *George Oakes (Private) Ltd. v. State of Madras*, AIR 1962 SC 1037 that the law does not:

> *"mean that in law the tax as imposed by government is a tax on the buyer making the dealer a mere collecting agency so that the tax must always remain outside the sale price"*

11. There is authority for the rule that the actual words used in a statute should be seen, and the courts must not add to or subtract from the phraseology used by the legislature. In *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal* 2011 (1) SCC 236, while construing the correct approach in examining an exemption or concessional provision in a tax statute, the Supreme Court held that:

> *"The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."*

This was brought home emphatically in *State of Jharkhand v. Govind Singh* (2005) 10 SCC 437, where it was held that:

> *"When the words of a Statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. The intention of the Legislature is primarily to be gathered from the*

language used, which means that attention should be paid to what has been said as also to what has not been said. [See J.P. Bansal v. State of Rajasthan (2003 (5) SCC 134]

As a consequence, as construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As was noted by the Privy Council in Crawford v. Spooner (1846) 6 Moore PC1:"We cannot aid the Legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there".

12. In the present case, Section 9(1) grants input credit to purchasing dealers. Section 9(2), on the other hand, lists out specific situations where the benefit is denied. The negative list, as it were, is restrictive and is in the nature of a proviso. As a result, this Court is of the opinion that the interpretation placed by the Tribunal that there is statutory authority for granting input credit, only to the extent tax is deposited by the selling dealer, is unsound and contrary to the statute. It is also iniquitous because an onerous burden is placed on the purchasing dealer – in the absence of clear words to that effect in the statute- to keep a vigil over the amounts deposited by the selling dealer. The Court does not see any provision or methodology by which the purchasing dealer can monitor the selling dealer's behavior, vis-à-vis the latter's VAT returns. Indeed, Section 28 stipulates confidentiality in such matters. Nor is this Court in agreement with the Tribunal's opinion that insertion of clause (g) to Section 9(2) is clarificatory. As observed earlier, Section 9(2) is an exception to the general rule granting input tax credit to dealers who qualify for the benefit. The conditions for operation of the exception are well defined. The absence of any condition such as the one spelt out in clause (g) and its addition in 2010 rules out legislative intention of its being a mere clarification of the law which always

existed. This Court is further of the opinion that the Bombay High Court judgment in *M/S.Mahalaxmi Cotton Ginning* is of no assistance to the revenue, because there, the Court had to deal with the Constitutionality of Section 48(5) of the local VAT law. The Court applied the well-established principle of greater deference to policy makers and legislatures in economic and fiscal matters, and upheld the statute, which had said that set off (a provision similar to input credit under Section 9(1) of the Delhi VAT Act) would be permissible only to the extent of the amounts actually paid. The High Court held that:

> *"The words "actually paid" into the government treasury signify that a claim for set off cannot be in excess of the tax in respect of which the set off is claimed that has been deposited into the treasury. The plain and natural meaning of the expression "actually paid" into the treasury is that the tax on purchases of which a set off is claimed must actually and physically have been deposited into the treasury. A constructive or notional deposit would not fulfill the mandate of the provision. The State Legislature has used language of a mandatory nature that leaves its intent beyond any doubt. The exception which is carved out in the substantive part of sub-section (5) is where a claimant dealer is liable to pay purchase tax on the purchase of the said goods effected by him. The proviso creates an exception where tax is deferred or deferrable under any Package Scheme of Incentives implemented by the State Government. In that event a deeming fiction is created by the proviso under which the tax is deemed to have been received in the Government treasury for the purposes of the sub-section. In all other cases, an actual deposit of taxes is mandated before a set off is allowed."*

In the present case, as noticed previously, the VAT Act is silent; Section 9(2) (g) was introduced only with effect from 1-4-2010. Therefore, the Bombay High Court decision is not of any assistance to the revenue.

13. This Court is of the opinion that in the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled (as has happened in this case) the benefit of input credit, under Section 9(1) cannot be denied. Furthermore, this Court notices that the cancellation of both selling dealers' registration occurred after the transactions with the appellant. The VAT authorities observed that the scanty amounts deposited by the selling dealers was incommensurate with the transactions recorded, and straightaway proceeded to hold that they colluded with the appellant. Such *a priori* conclusions are based on no material, or without inquiry, and accordingly unworthy of acceptance.

14. In view of the above discussion and findings, this Court answers the substantial question framed in favour of the assessee, and against the revenue. It is held that the appellant is entitled to the credit claimed, which shall be worked out and given, after due verification, in accordance with law, within two months from today. The appeals are allowed in the above terms, with no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 4, 2013
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