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

% *Decision delivered on: 14.07.2022*

\+ **W.P.(C) 120/2019**

APPLE INDIA PVT. LTD. ..... Petitioner
Through: Mr Rohan Shah, Mr Alok Yadav and Mr Sri Sabari Rajan, Advs.

versus

COMMISSIONER OF DELHI VAT ..... Respondent
Through: Mr Satyakam, ASC.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

Preface:

1. This writ petition is directed against the show-cause notice dated 15.11.2018, issued by the Commissioner, Value Added Tax, issued under Section 74A (2) of the Delhi Value Added Tax Act 2004 [hereafter referred to as "Act".]

1.1. The said notice required the petitioner's authorized representative to make an appearance on the date stipulated i.e., 20.11.2018.

2. Besides this, the petitioner has also sought a direction for a refund of Rs.2 crores which was made over as a pre-deposit for the purposes of having its objection heard by the Special Commissioner-I, Department of Trade and Taxes, GNCTD.

2.1. In addition, thereto, *mandamus* is also sought for grant of interest on

the delayed release of above-mentioned pre-deposit i.e., Rs.2 crores.

3. We may indicate at the very outset that insofar as prayer clauses (b) and (c) of the writ petition are concerned, they concededly stand satisfied during the pendency of the proceedings. Rs. 2 crores was refunded to the petitioner, pursuant to the order dated 08.01.2020 passed by this Court.

3.1. We are informed that the said sum was refunded to the petitioner, along with interest.

4. It is important to note that the impugned notice dated 15.11.2018 seeks to revise the order dated 22.03.2017 passed by the Special Commissioner – II i.e., the Objection Hearing Authority [hereafter referred to as "OHA"] and the consequent order dated 26.02.2018 passed by the Assessing Officer [hereafter referred to as "AO"].

5. The respondent seeks to revise the aforementioned orders passed by the OHA and the assessment order, by taking recourse to the powers conferred on the said authority under 74A of the Act.

6. Before we proceed further, it is relevant to have a brief overview of the facts obtaining in the instant case, which have led to the institution of the present petition.

6.1. The petitioner, which is in the business of importing and trading laptops, mobile phones and streaming devices, while paying tax, had classified one of the devices, which is known as 'Apple Watch', under the residual entry.

6.2. Consequently, the tax, which was offered by the petitioner, with respect to the abovementioned device, was calculated at rate of 12.5%.

7. Insofar as the A.O. was concerned, he was of view that the said product i.e., Apple Watch, ought to have been classified as 'Watch' under

Entry No. 12 of the Fourth Schedule of the Act, and therefore, the petitioner ought to have paid tax at the rate of 20%.

7.1. The A.O., thus, repelled the contention of the petitioner that Apple Watch could be classified under the residuary entry. Accordingly, by an order dated 17.02.2016, the assessment order was framed under Section 32 of the Act and a demand amounting to Rs.7,32,83,675/- was raised *qua* the petitioner.

7.2. The demand included tax amounting to Rs.7,25,08,922/- and interest pegged at Rs.7,74,753/-.

7.3. It is this assessment, which led to the petitioner filing its objection with the OHA under Section 74 of the Act. As indicated above, the petitioner made a pre-deposit of Rs.2 crores, to have its objections heard.

7.4. The OHA, after hearing the authorized representative of the petitioner as well as the respondent, *via* order dated 22.03.2017, reversed the view taken by the A.O.

7.5. In brief, the OHA concluded that Apple Watches were not just watches but transmission devices and, therefore, had to be assessed under the residuary entry. In effect, the stand taken by the petitioner that the tax *qua* the said devices would get attracted at the rate of 12.5%, was accepted by the OHA.

7.6. Consequentially, a fresh assessment order was passed on 26.02.2018. This resulted in the tax demand being reduced to nil.

7.7. Enthused by this, the petitioner filed an application for refund of Rs.2 crores made over as a pre-deposit. As noticed above, after some back and forth, in this Court, the said amount was refunded to the petitioner, with interest.

8. Therefore, the only aspect that needs to be adjudicated is: whether the respondent has correctly invoked the provisions of Section 74A of the Act by issuing the impugned show-cause notice dated 15.11.2018, *qua* the order dated 22.03.2017 passed by the OHA and the consequent assessment order dated 26.02.2018 passed by the AO.

9. We may also note that this Court, *via* the very same order whereby it had directed the refund of the amount made over by the petitioner as pre-deposit, had also directed the respondent to furnish reasons for issuing the impugned show-cause notice dated 15.11.2018, to the petitioner. As adverted to hereinabove, this order is dated 08.01.2020.

9.1. There is no dispute that the reasons which were available in the respondent's record, have been furnished to the petitioner's counsel.

Submissions of Counsel:

10. Mr Rohan Shah, who appears on behalf of the petitioner, has, broadly, made the following submissions:

10.1. A perusal of the reasons furnished by the respondent would show that they do not satisfy the twin test prescribed under Section 74A for triggering the revisionary jurisdiction. According to Mr Shah, the authority exercising revisionary jurisdiction would have to demonstrate that the orders passed by the OHA and the AO i.e., orders dated 22.03.2017 and 26.02.2018 respectively were both erroneous and prejudicial to the interests of the revenue.

10.2. It was further contended by Mr Shah that a close examination of the reasons would show that no such error has been flagged in the reasons furnished by the respondent.

10.3. In support of his submissions, Mr Shah has relied upon the following

judgements:

(a) ***Commissioner of Central Excise, Delhi III v. Carrier Aircon Ltd***., 2005 (184) ELT 113 (SC).

(b) ***Malabar Industrial Company Ltd. v. Commissioner of Income Tax, Kerala State*** (2000) 2 SCC 718.

(c) ***Garg Roadlines v. Commissioner of Trade and Taxes*** 2017 (4) 100 VST 275.

11. On the other hand, Mr Satyakam, who appears on behalf of the respondent, in defence of the impugned action taken by the respondent in issuing the show-cause notice dated 15.11.2018, has relied upon both the contents of the said notice, as well as the reasons furnished therein.

11.1. It is Mr Satyakam's contention that there is an error concerning classification which has cropped up in the orders that are sought to be revised; because of which the rate at which tax was paid was substantially lower than that which ought to have been charged in the instant case. Thus, according to Mr Satyakam, the twin test, as stipulated in Section 74A of the Act, stood satisfied.

11.2. It was also brought to our notice by Mr Satyakam that upon Special Leave Petition (SLP) being preferred in the ***Garg Roadlines*** case, leave has been granted.

11.3. On being queried, Mr Satyakam has fairly conceded that there is no stay on the operation of the judgment in the ***Garg Roadlines*** case.

11.4. Mr Satyakam has informed us that in another matter concerning the ***Garg Roadlines***, which pertained to refund, also travelled to the Supreme Court and like in the other matter, the SLP has been converted to an appeal. However, in this matter we are told the operation of the judgment of this

Court dated 22.03.2017 has been stayed.

Analysis and Reasons:

12. We have heard learned counsel for the parties and perused the record. According to us, insofar as the dispute with regard to classification is concerned, it was clearly, in this case, a mixed question of fact and law.

13. The OHA, *via* its order dated 22.03.2017, considered the contentions advanced by the petitioner as well as the respondent. It is thereafter that the OHA concluded that Apple Watches were essentially transmission devices. The relevant portion of the order is extracted hereafter:

> " *xxx* *xxx* *xxx*
>
> *I have heard both the parties and I am of the view that if Apple Watch is fully synced with the main device only then it would show correct time and it would not work if it is not paired and synced with the main device like an Iphone 5S or above category and the correctness of time cannot be ensured if the main device is taken away beyond the specified range. Moreover, except time various other features are available for the use of patrons like receipt of message, email, display of incoming calls, taking up of calls, making outgoing calls and other application based features like health, fitness, music, camera, navigation etc. therefore restricting classification simply to be a watch does seem prudent moreover it should be classified as a transmission device which works only with the mother device when paired and connected.*
>
> *The contention of the objector that the device Apple watch qualifies to be a transmission device is well substantiated by the Ministry of Finance notification No. 12/2016 – Central Excise (N.T) dated 01.03.2016. Also the Advance Ruling Authority for Central Excise, Customs and Service Tax also held that Apple Watch is a transmission device under Chapter 85. The principal function of any product is the determining factor for classification of any product under any category, as the main function of Apple Watch is related to the Mother device Apple I Phone 5S and above without which the*

Apple watch will not work as such Apple Watch should be termed as an accessory and classifiable under Entry 41A of the Schedule III of the DVAT Act. With the above observation, I am of the view that the impugned order needs to be revisited by AA and the same is set aside. The case is remanded back AA for reframing the assessment order after duly considering the classification under Central Excise and Customs Classification and Higher Court Rulings."

14. Therefore, the contention that is now sought to be advanced on behalf of the revenue by Mr Satyakam, that there was error of law in classifying the devices in issue i.e., Apple Watches, as transmission devices, needed to be considered by the revisionary authority, does not impress us.

14.1. The approach to be adopted in these matters, as correctly pointed out by Mr Shah, is that an error has to be found in the underlying order which is sought to be revised.

14.2. As noted above, the error concerning classification cannot be separated from the facts obtaining in the case.

15. We may, at this juncture, also note that Mr Satyakam has contended that the recourse to revisionary power was taken, as no appeal was available against the order passed by the OHA i.e., order dated 22.03.2017.

15.1. Mr Shah, in his submissions, has refuted this contention and in this behalf, has drawn our attention to Section 76 of the Act. Section 76 of the Act reads as follows:

*"**76: Appeals to Appellate Tribunal (Rules 57A to 57C)***

(1) Any person aggrieved by a decision made by the Commissioner under sections 74, 84 and 85 of this Act may appeal to the Appellate Tribunal against such decision:

PROVIDED that no appeal may be made against a non-appealable

order under section 79 of this Act

Explanation. The Commissioner does not appeal to the Appellate Tribunal but may make a re-assessment of tax where he is of the opinion that further tax is owed.

xxx xxx xxx"

16. We are of the view that Mr Shah is right, an appeal would lie from the order passed by the OHA, which is an order passed under Section 74, and which is one of the sections referred to in Section 76(1). This provision enables an appeal to be preferred with the Appellate Tribunal.

16.1. The explanation to Section 76 of the Act (extracted above), on which reliance is placed by Mr Satyakam, to contend that no appeal would lie against the order of the OHA, seems to be confined to those cases where the Commissioner chooses not to appeal to the Appellate Tribunal, but instead, opts to make a reassessment of tax where he is of the opinion that further tax is owed.

16.2. If Mr Satyakam's submission is accepted that an error concerning classification had crept in, then, in our view, an appeal could have been instituted with the Appellate Tribunal, which then would have examined the issue, both on facts as well as the law.

16.3. However, that opportunity seems to have been lost by the respondent/revenue, by not triggering the appeal process under Section 76 of the Act.

17. Be that as it may, this aspect need not detain us, for the reason that the reasons placed before us, which, as indicated above, are embedded in the respondent's record, do not even remotely suggest as to how the

OHA's/A.O.'s order is erroneous.

17.1. For the sake of convenience, the reasons are extracted hereafter:

> *"1) The issue at hand is* ***an interesting matter*** *wherein VATO of W-208(KCS) raised a demand of approx. Rs.7.5 crore for Oct-Dec 2015 quarter vide its order dt 17/2/16 i.e. with in a month of filing of return for that quarter. It was subsequently objected by the assessee before OHA, who in turn remanded it back to ward VATO after setting aside the previous demand of Rs. 7.5 cr. and by stating that Apple watches are transmission devices as a part of iphone and not independent watches, thus attracting VAT rate @ 12.5 % (as applicable for iphone) and not @ 20% (as applicable for watches of value > Rs.5000).*
> *2) It is a continuous production/sale by the said company. So, the* ***revenue implications to the deptt. are not limited to that particular quarter only, but for future indefinite period*** *till such production/sales and its pairing continues.*
> *3)* ***further, it has "revenue implication" as other manufacturers/traders may also start pairing two products attracting two different tax rates as a single product with lower tax rates of the two.***
> *4) It is also* ***a matter of technical domain*** *as to whether the paired products can be used independently at all or not.*
> *5) According to me,* ***given the huge revenue implications in the matter, and more so given the typical issue involved, it is more a matter of determination than objection****.*
> *However, the matter is put up for your perusal and necessary directions please."*

17.2. If one were to summarize the reasons given by the authority concerned, on which the impugned notice dated 15.11.2018 is predicated, it appears that the said authority based its decision on the following reasons:

(i) It found the issue "interesting".

(ii) There were revenue implications for the department, which were not limited to a particular quarter but could possibly extend to an "indefinite period".

(iii) The issue could have revenue implications in other matters, as well i.e., in respect of other manufacturers/traders as well.

(iv) The matter fell in the technical domain i.e., whether the paired products could be used independently. (The concerned authority, we believe, is alluding to the fact that whether the watch is to be used without the mobile device.) Which is, in a sense a replication of the second concern raised by the concerned authority, which also veered around revenue implications.

(v). The possibility of the other manufactures pairing products bearing different rates of tax and thus getting unintended benefit of lower rate of tax.

18. None of these issues zeroed down on what was the error committed by the OHA. As noted above, the concern of the respondent primarily was that it could have revenue implications, both in the concerned quarter, as well as in the future.

18.1. These reasons, if at all, could only have fulfilled the prerequisite captured in the second limb of Section 74A i.e., prejudicial to the interests of revenue.

18.2. However, as indicated above, the concerned authority was also required to demonstrate that the order was erroneous. The twin test that the revising authority was required to meet, was clearly not met in the instant case.

18.3. In the context of Section 263 of the Income Tax Act, 1961, which is a *pari materia* provision, the Supreme Court in ***Malabar Industrial Company***

Ltd. case has made the following apposite observations.

> ***"5.*** *To consider the first contention, it will be apt to quote Section 263(1) which is relevant for our purpose:*
>
> *"263. Revision of orders prejudicial to Revenue.—(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*
>
> *Explanation.—***"*
>
> ***6.*** *A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent — if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue — recourse cannot be had to Section 263(1) of the Act.*
>
> ***7.*** *There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.*

xxx ***xxx***
xxx

> ***10.*** *The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law…"*

18.4. Since no such aspect is referred to in the reasons furnished to the petitioner, the impugned notice, in our view, cannot be sustained.

19. We may also note that the concern that this decision would impact revenue collections in the future, we are told, has been neutralized, as watches now attract a uniform tax rate of 12.5%.

19.1. The reason for the same, we are told, is that Entry 11 obtaining in the Fourth Schedule at the relevant point in time, stands deleted w.e.f. 09.05.2016.

19.2. Thus, in a sense, the revenue implications are confined to three quarters i.e., two quarters of Financial Year (F.Y.) 2015-2016 and the first quarter of F.Y. 2016-2017.

20. Thus, for the foregoing reasons, as indicated above, we are inclined to set aside the impugned notice dated 15.11.2018.

20.1. It is ordered accordingly.

21. We may note, in the course of the submissions, Mr Satyakam had also

contended that since there was a specific entry in the fourth schedule *qua* watches of a value exceeding Rs.5,000/-, the OHA could not have held that the petitioner's product "Apple Watches" should be placed in a residuary entry.

21.1. As noted by us hereinabove, this contention is not sustainable for the reasons given above, as this was a mixed question of fact and law. It is after the OHA considered the facts obtaining in the case, that it concluded that the devices in issue i.e., "Apple Watches" ought to be placed in the residuary entry i.e., entry 41A.

22. At the risk of repetition, we may point out that if the respondent/revenue had any doubt as to the appreciation of facts or evidence by the OHA, it had the leeway (by way of an appeal to the Tribunal) which it chose, for whatever reasons, not to take recourse to.

23. The writ petition disposed of, in the aforesaid terms.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JULY 14, 2022/aj

Click here to check corrigendum, if any