Court Information	Delhi High Court
Judgment Date	01-Oct-2015
Party Details	1. Jagriti Plastics Ltd., 2. N.F. Impex Pvt. Ltd. **Vs** Commissioner of Trade & Taxes
Case No	ST APPL Nos. 5 & 23 of 2015
Judges	S. Muralidhar and Vibhu Bakhru, JJ.
Advocates	For Appellant: Mr. Puneet Agrawal, Mr. Deepak Anand Mr. Saurabh Bhutra, Advocates, Mr. Ruchir Bhatia, Advocate and For Respondents: Mr. Satyakam, Additional Standing counsel and Mr. Prakash Kumar Singh, Advocate
Acts	Delhi Value Added Tax Act, 2004 - Sections 11, 9(7)(c); Orissa Value Added Tax Act - Sections 2(25), 2(27); Delhi Value Added (Amendment) Act, 2009; Madhya Pradesh Value Added Tax Act - Section 14(1)(a); CENVAT Credit Rules, 2004 - Rules 2(l), 3(1)(ii)
Cases Referred	Vikas Sales Corp. v. CCT, 1996 (4) SCC 433; Yash Overseas v. CST & Ors., 2008 (17) VST 182 (SC); Oil & Natural Gas Corporation Limited v. Commissioner of Central Excise, Sales Tax & Custom, Raigad, 2013 (32) STR 31 (Bom); Coca Cola India Pvt. Ltd. v. Commissioner of Central Excise Pune-III, 2009 (15) STR 657 (Bom); Deepak Fertilisers and Chemicals Corporation Ltd. v. CCE, Belapur, 2013 (32) STR 532 (Bom); National Aluminium Co. Ltd. v. Deputy Commissioner of Commercial Taxes, 2012 (56) VST 68 (Ori)

Judgment:

Dr. S. Muralidhar, J.

1. ST Appeal No.23 of 2015 by N.F. Impex Pvt. Ltd. (NFIPL) is directed against the impugned order dated 6th August 2014 passed by the Appellate Tribunal Value Added Tax ("ATVAT") for the assessment year ("AY") 2008-09. ST. Appeal No.5 of 2015 is by Jagriti Plastics Ltd. (JPL) and is directed against the order dated 11th August 2014

passed by the ATVAT for AY 2007-08.

2. The common question of law that arises in both the appeals as framed by this Court (by its order dated 6th May 2014 in ST Appeal No. 23 of 2015 and 14th July 2015 in ST Appeal No. 5 of 2015) is whether the Appellant Assessees are entitled to input tax credit on purchase of duty entitlement pass book ("DEPB") scrips?

3. The second issue that arises as a corollary of the first above mentioned issue is whether the Appellant Assessees in both cases are liable to pay penalty under the Delhi Value Added Tax Act, 2004 (DVAT Act)?

4. Both the Appellants, who are registered dealers under the DVAT Act, are engaged in the business of import and sales of goods. While NFIPL is engaged in import of sale of ferrous and non-ferrous metals, JPL is engaged in the trading of imported chemicals, plastic dana and raw materials.

5. Both the Appellants purchased DEPB scrips from registered dealers on payment of value added tax ("VAT") under the DVAT Act in the course of their regular business activity. They used the DEPB scrips for payment of customs duty on the imports made by them. Both Appellants thereafter sold the imported material in the local market after charging output VAT. The Appellants adjusted the input tax paid by them on the purchase of the DEPB scrips against the output tax liability and the balance net tax in terms of Section 11 of the DVAT Act was deposited by them.

6. As far as JPL was concerned, pursuant to an audit conducted for 2007-2008, the officials of the Department of Trade and Taxes (DTT) were of the view that the DEPB scrips could not be treated as capital goods and could not have been taken to have been 'used' even indirectly for making the sale of the imported goods but only used for the limited purposes of paying customs duty on such imported goods. Therefore JPL was not allowed to avail of the input tax credit in respect of the VAT paid on DEPB scrips. On 27th August 2010, JPL was issued a notice calling on it to pay the default tax, interest and penalty.

7. NFIPL was likewise also not permitted to avail of input tax credit as regards the VAT paid by it on the DEPB scrips and was issued notices of demand of tax, interest as well as penalty for each of the four quarters of 2008-09.

8. Both the Appellants filed their respective objections to the demand notices. In the case of JPL by orders dated 26th February 2011 and 24th September 2012, the Objection Hearing Authority ("OHA") negatived its objections. Likewise the objections of NFIPL were rejected by an order dated 28th October 2011 by the OHA.

9. NFIPL's appeal Nos. 1138-45/ATVAT/11-2012 were dismissed by the ATVAT by order dated 6th August 2014. JPL's appeal Nos. 53 & 93-97/ATVAT/11-2012 and Objection No.1258-1261/ATVAT/11-2012 were dismissed by the ATVAT order dated 11th August 2014. The ATVAT in both impugned orders held as under:

(i) The DEPB scrips were not goods for the purpose of sale directly or indirectly by the dealer.

(ii) The Appellants did not use the DEPB scrips in the course of their business activities as dealers.

(iii) The purchases made by the Appellants fell within the purview of Section 9 (7) (c) of the DVAT Act.

(iv) There was no deliberate defiance by either of the Appellants in paying the requisite tax and interest. Accordingly the penalty amount was remitted to 10% of that fixed by the VAT Officer.

10. This Court has heard the submissions of Mr. Puneet Agrawal, learned counsel for the Appellants and Mr. Satyakam, learned Additional Standing counsel for the Respondents.

11. The first issue that arises is whether DEPB are 'goods' for the purpose of the DVAT Act? There has been no serious contest by the Respondent that they are indeed 'goods'. The two decisions which settle the legal position in this regard, in the context of other similar taxing statutes, are Vikas Sales Corp. v. CCT(1996) 4 SCC 433 and Yash Overseas v. CST & Ors. (2008) 17 VST 182 (SC).

12. The central controversy revolves around the issue of input tax credit in terms of Section 9 of the DVAT Act. It should be recalled that the periods with which these appeals are concerned are 2007-08 and 2008-09.

13. Up to 31st March 2010, Section 9 (1) read as under:

"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.

Explanation.- Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries."

14. With effect from 1st April 2010, Section 9(1) stood amended by the Delhi Value Added (Amendment) Act, 2009 (Delhi Act 1 of 2010) as under:

"(a) in sub-section (1), for the words "where the purchase arises", the words "to the extent of proportion of the goods which have been put to sale" shall be substituted."

15. This change, however, lasted only till 30th September 2011. With effect from 1st October, 2011 by virtue of the Delhi Value Added Tax (Second Amendment), 2011, the above inserted words were deleted. As a result, with effect from 1st October 2011, Section 9 (1) read the same as prior to 1st April 2010.

16. The resultant position was that input tax credit can be claimed in respect of the turnover of purchases made for all of the aforementioned periods except the period 1st

April 2010 to 30th September 2011 in respect of the purchases arising in the course of the Assessee"s activities as a dealer. As already noticed hereinbefore the periods with which these two appeals are concerned are prior to 1st April, 2010. Therefore, during that relevant period the change brought about by the DVAT Amendment Act 2009, was not operational.

17. The next question that, therefore, arises is whether it can be said that the DEPB scrips on which input tax had already been paid by the Assessee at the time of purchasing the DEPB scrips could be adjusted against output tax collected by them at the time of sale of the imported commodity? The case of the DTT is that unless the DEPB scrips are "used" in the imported goods which are then sold, no such input tax credit can be availed of. According to Mr. Satyakam, the mere using of DEPB scrips as cash to reduce the incidence of customs duty cannot constitute usage for the purposes of Section 9(4) of the Act.

18. Section 9(4) has to be read with Section 9(3) both of which read as under:

"9. Tax credit:-

.....

(3) The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods shall be the amount of input tax arising in the tax period reduced in the manner described in sub-sections (4), (6) and (10) of this section.

(4) Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately."

19. There can be no doubt that the price of the goods imported has an element of customs duty paid on such goods. The component of customs duty is reduced to the extent of the usage by the Assessee of the DEPB scrips. The reduced customs duty is embedded in the resale price of the imported goods. Thus, the use of the DEPB scrips is for the purpose of the Assessee selling the imported goods. 'Usage' in this context has to be seen as a use that affects the price of the goods although it may not be used tangibly in the goods themselves. There is no warrant to limit the understanding of the word "use" to an actual direct tangible or physical use in the imported goods.

20. It is possible in this context to draw an analogy with CENVAT or MODVAT credit, the purpose of which, like VAT, was to mitigate the cascading effect of multiple taxes at various stages of the trade in goods. In Oil & Natural Gas Corporation Limited v. Commissioner of Central Excise, Sales Tax & Custom, Raigad 2013 (32) STR 31 (Bom.) the facts were that the Appellant set up a plant to make economic use of the crude oil and associated natural gas extracted from the oil wells. This resulted in production of lighter hydro carbons, natural gas and other downstream products. The crude oil was exempted from payment of excise duty, which was therefore, an exempted commodity. Inasmuch as ONGC also manufactured the downstream products, which were dutiable, it availed of the CENVAT credit in respect of the service tax paid on the input services in terms of the facility extended to manufacturer of excisable goods under the CENVAT Credit Rules. The Department took the stand that CENVAT credit pertained to the input service availed of and used exclusively at the oil fields of Mumbai

Offshore and that since the crude oil and natural gas were exempted from excise duty, the CENVAT credit was not admissible. Allowing the appeal of ONGC against the confirmation of the demand the Bombay High Court interpreted the word "input service" occurring in Rule 2 (l) as well as Rule 3(1)(ii) of the CENVAT Credit Rules, 2004 to comprehend within its meaning "a service which is used by the manufacturer even indirectly, or in relation to the manufacture of a final product." It was noticed that the manufacture of the dutiable final products could not take place without the process in question.

21. The High Court of Madhya Pradesh in M/s. Commercial Engineers & Body Building Company Ltd. v. Divisional Deputy Commissioner, Commercial Tax Office (decision dated 5th August 2015 in WP No.7628/2015) was dealing with the claim of an Assessee to input tax credit under the Madhya Pradesh Value Added Tax Act (MPVAT Act). There certain components on which the input tax was paid were used for fabricating plant and machinery used in the manufacture of the final product, i.e. the motor vehicle body. The Court was called upon to decide whether the Assessee would be eligible for rebate of input tax under Section 14 of the MPVAT Act. It was held that the intention of the legislature in providing rebate of input tax was akin to provisions of MODVAT credit and CENVAT credit. Section 14(1)(a) of the MPVAT Act stated where "goods purchased by a registered dealer from another registered dealer after payment of duty is used by the purchasing registered dealer or is consumed in the manufacturing or processing of something or used as a plant, machinery, equipment and parts in respect of goods then the final product would be entitled for input rebate." The High Court rejected the contention of the Department that the material on which input tax was paid should itself be sold and should not be further used in respect of anything for the making of a final product which is ultimately sold.

22. In Coca Cola India Pvt. Ltd. v. Commissioner of Central Excise Pune-III 2009 (15) STR 657 (Bom.) it was held in the context of CENVAT credit that service tax paid on advertisement sales promotion and market research was admissible as credit for payment of excise duty on the soft drink concentrate particularly when such expenses formed part of the price of the final product on which excise duty was paid. In para 13 of the said judgement it was held "in order to avoid the cascading effect the benefit of CENVAT credit on input stage goods and services must be ordinarily allowed as long as a connection between the input stage goods and services is established. Conceptually as well as a matter of policy, any input service that forms a part of the value of the final product should be eligible for the benefit of CENVAT credit."

23. Other decisions which hold likewise include Deepak Fertilisers and Chemicals Corporation Ltd. v. CCE, Belapur 2013 (32) S.T.R. 532 (Bom.) and National Aluminium Co. Ltd. v. Deputy Commissioner of Commercial Taxes (2012) 56 VST 68 (Orissa). In the latter decision, the Orissa High Court was considering the question: "Whether coal, alum, caustic soda, and other consumables used for generation of electricity is to be treated as an "input" as defined under section 2(25) of the Orissa Value Added Tax Act and the tax which has been paid on purchase of coal, alum, caustic soda and other consumables, etc., can be claimed as input-tax credit under Section 2 (27) of the OVAT Act against the tax payable on sale of finished product, i.e., aluminium, aluminium ingots and sheets, etc.?" In answering the said question in the affirmative, the Orissa High Court held:

"It is not at all necessary that coal, alum, caustic soda and other consumables, etc.,

purchased on payment of tax and used in manufacturing of electrical energy in order to qualify as input should directly go into composition of the finished products, what is required is that those goods should be directly used in manufacturing and processing for production of finished goods. The expressions "directly go into composition of finished product" and "directly used for manufacturing or processing of finished products" are not one and the same thing. There is a clear distinction between the two. In the former, while the goods directly go into the composition of finished products, in the latter the goods are directly used in manufacturing/processing of the finished products. Therefore, coal, alum, caustic soda and other consumables, etc., which are used for manufacturing/generating of electrical energy, are inextricably connected with the manufacturing process of aluminium and aluminium ingots; they are nothing but input and tax paid on purchase of such input shall qualify for set off against output tax paid/payable on sale of finished products."

24. The Court finds no reason why in respect of the input tax credit provided under Section 9 (1) read with Section 9(4) of the DVAT Act a similar approach should not be adopted. The usage by the Assessees, who are registered dealers, of the DEPB scrips purchased by them from another registered dealer after paying the input tax for reducing the incidence of customs duty should be held to constitute use of such DEPB scrip for the purposes of sale of the imported commodity. The DEPB scrip has contributed, if not directly then indirectly, to the price of the imported commodity sold by the Assessees in the market. There could be any number of intangibles that have an impact on the value of the final product like advertisement costs in respect of which input service tax credit may have been availed of, as was in the case of Coca Cola India Pvt. Ltd. (supra). All that is to be shown is that such input tax paid goods have contributed to the sale of the final product in some way directly or indirectly.

25. The Court also rejects the other contention of the DTT that input tax credit cannot be availed of unless the Assessees are themselves dealing in DEPB scrips. In other words, in order to avail of the input tax credit in the present case it is not necessary that the Assessees have to be dealers in the same commodity, i.e. the DEPB scrips which were used in payment of customs duty on the imported goods in which they were dealing. Such an interpretation will negate the object of introducing the system of value added taxes, i.e. to reduce the cascading effect of multiple taxes at various stages. As long as it is shown that use of the DEPB scrip has impacted the cost of the product that is sold, either directly or indirectly, the credit of the input tax paid on the DEPB scrip cannot be denied to the Assessees.

26. For the aforementioned reasons, the question framed is answered in the affirmative, i.e., in favour of the Assessees and against the Revenue. The demands created on the Appellant Assessees, forming the subject matter of these appeals, are held unsustainable in law. Consequently, the question of payment of penalty does not arise and the orders levying penalty on each of the Appellants are also set aside.

27. The impugned orders dated 6th August 2014 and 11th August 2014 of the ATVAT and the corresponding orders of the OHA and VATO are hereby set aside. The appeals are allowed but in the circumstances no orders as to costs.

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