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

% **Judgment reserved on: 26 September 2023**
Judgment pronounced on: 09 October 2023

\+ VAT APPEAL 26/2022 and CM APPL. 35985/2022 (Interim Stay)

BERGER PAINTS INDIA LTD ..... Appellant

Through: Mr. Karan Sachdev, Mr. Agrim Arora, Mr. Sumit Khadaria, Mr. Kunal Kapoor, Advs.

versus

COMMISSIONER OF TRADE AND TAXES DELHI. .... Respondent

Through: Mr. Rajeev Aggarwal, ASC with Mr. Aadish Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. The appellant company has preferred this appeal under Section 81 of the Delhi Value Added Tax Act, 2004[1] read with Section 45 of the Delhi Sales Tax Act, 1975[2] directed against the impugned orders of even date passed separately i.e., 02 May 2022 by the learned Delhi Value Added Tax Appellate Tribunal, Delhi[3], whereby the appeal preferred by it, bearing No. 1568-1569/ATVAT/2011, challenging assessment and levy of tax was dismissed as also an application for supply of documents.

[1] DVAT Act
[2] DST Act
[3] DVATT

FACTUAL BACKGROUND:

2. The case of the appellant is that it is engaged in the business of manufacturing and marketing of paints and allied products. It is having its headquarters at Kolkata and its network is spread throughout the entire length and breadth of the country. The appellant is having Sales Tax Registration under DST Act bearing TIN 7520017840. It is claimed that appellant is having its factories outside Delhi and used to send goods for storage to Delhi unit from where sales were made.

3. A team of enforcement officials conducted a survey at the premises of the appellant in Delhi on 03 October 1997 pertaining to the period 1996-97 and certain documents including diaries of sales persons and certain gate passes were seized. The Sales Tax Officer, Enforcement eventually passed an assessment order dated 31 December 1999 under Section 23(3) of the DST Act directing the appellant to pay a sum of Rs. 59,49,503/-, comprising of tax component to the tune of Rs. 32,34,254/- plus interest amounting to Rs. 17,26,249/- and penalty for a sum of Rs. 10,00,000/- for the period 1996-97, primarily based on variations in physical stock in comparison to the stock in record. The demand of DST was computed by increasing the sales value of the goods.

4. The second limb of the grievance of the appellant emanates from the purported gate passes inviting an inference by the Revenue that the goods were transferred from the Delhi branch to the Faridabad and Ghaziabad branches on receiving orders from certain dealers and accordingly, an assessment order was issued under Section 9 of the

Central Sales Tax Act, 1975[4] directing the appellant to pay Rs. 58,43,131/- (Tax component of Rs. 38,43,131/- and penalty of Rs. 20,00,000) for the period 1996-1997 and the demand of Central Sales Tax was computed by treating 10% of the stock transfer as inter-State sale.

5. The appellant challenged the aforesaid assessment orders before the Additional Commissioner, Sales Tax, New Delhi, *inter alia*, contesting that the photocopies of the seized documents were not provided to the appellant and that the case of the Revenue with regard to inter-State sale was not sustainable. However, the Special Commissioner, Sales Tax, vide order dated 22 December 2011 dismissed the appeal and confirmed the demand on both counts.

IMPUGNED ORDERS

6. Aggrieved thereby, the appellant filed a second appeal before learned DVATT in terms of Section 43 of the DST Act as also an application under Section 73(8) of the DVAT Act, which were dismissed vide two separate impugned orders, both dated 02 May 2022. In short, as regards the plea of the appellant that the documents seized were not shared with it, learned DVATT held that, firstly documents were seized from the business premises of the dealer in the presence of its representatives and it was not fathomable that the appellant was not aware of the documents seized; and secondly that no protest was lodged by the appellant or its representative before the team of the enforcement branch that the inventory of the documents seized was not provided to him; and thirdly that the representative of

[4] CST Act

the appellant was duly represented by an Advocate and they had appeared before the Assessing Authority for hearings on several dates, but there was nothing recorded as to any objection by the appellant regarding its inability to file a reply on account of non supply of documents.

7. Further, learned DVATT did not find any flaw in the assessment order issued under Section 9 of the CST Act read with Section 23 of the DST Act, as it contained all the relevant details and that the appellant assessee was called upon to produce all relevant evidence including the declarations and Form 'C' & Form 'F' and certificates in Forms 'D', 'E-1' and 'E-2' referred to in the Central Sales Tax (Registration & Turnover) Rules, 1957, pursuant to which the Accounts Officers of the appellant along with an Advocate appeared before the Assessing Authority from time to time. As regards the stock transfers that was adjudged to be inter-State sale, learned DVATT upheld the stand of the Assessing Authority to the effect that the seized gate passes brought out that the goods had been sent to Ghaziabad and Faridabad branches outside Delhi pursuant to the orders received from the customers viz., FEDCO, BGM and NTPC and the plea of the appellant that the gate passes were meant for internal records of the company to maintain track of the stocks was rejected. Thus, the transactions were held to be a case of inter-State sale covered by Section 3(a) of the CST Act.

8. In arriving at such decision, learned DVATT observed that the appellant had failed to produce any gate pass books on the pretext that old records were not available and thus, found justification in the

decision of the Assessing Authority that the gate passes, which pertained to September 1996, were sufficient to raise an inference of sales from April 1996 to August 1996. Learned DVATT also agreed with the Revenue about its case of finding discrepancies in the stock registers and that the assessee had neither explained the variations nor the sales had been accounted for. It was observed that in the given set of facts and circumstances where the dealer had withheld relevant documents or records, the Assessing Authority was left with no option but to carry out best judgment assessment and took a reasonable view by enhancing sales by 10% of the net GTO after deducting the stock transfer figure of the GTO. Thus, while agreeing with the decision of the First Appellate Authority, it remanded the case to the Assessing Authority on the sole point to consider 2 'C' forms and 1 'ST-35' form which could not be submitted earlier by the appellant and the impugned assessment order was upheld except for doing away with the penalty.

9. Further, the application under Section 73(8) read with Section 75 of DVAT Act and Regulation 21 of the DVAT (Appellate Tribunal) Regulation, 2005 moved by the appellant, the same too came to be dismissed vide separate impugned order dated 02 May 2022 on the ground that the application had been filed belatedly and the appellant failed to observe due diligence as it did not take any steps to avail certified copies, despite sufficient time available at its disposal.

GROUNDS OF APPEAL:

10. The appellant has assailed the impugned separate orders both dated 02 May 2022, *inter alia*, on the grounds that learned DVATT failed to appreciate that the photocopies of the seized documents were never supplied to it despite specific objections taken before the Assessing Authority, failing to appreciate that even its interim orders dated 20 November 2012, 23 May 2013 and 08 July 2013 by which the Revenue had been directed to produce statement of the authorised persons present at the time of survey as well as relevant records, were not complied with, so much so that the record produced on 05 February 2014 was not containing the statement of a responsible person. It is contended that learned DVATT formed an arbitrary and perverse opinion in as much as the demand of Central Sales Tax had been allowed to be sustained by treating 10% of the stock transfer as inter-State supplies and which was not supported by any evidence except for the five gate passes, which were otherwise meant for internal records. The appellant, therefore, has made a prayer to quash or set aside the impugned orders, both dated 02 May 2022, passed by learned DVATT.

CASE OF THE RESPONDENT/REVENUE:

11. A short affidavit has been filed by Mr. Awanish Kumar, Special Commissioner-II, Department of Trade & Taxes, challenging the appeal and relying on documents to the effect that

the notings/ proceedings sheets before the Assessment Authority bring out that appellant had duly rebutted the documents put to him during the assessment proceedings on 18 November 1999, 25 November 1999, 29 November 1999, 02 December 1999, 08 December 1999, 16 December 1999, 24 December 1999, 30 December 1999, 31 December 1999, 04 January 2000, 07 January 2000, 20 January 2000, 24 January 2000 and 28 January 2000 and no prejudice had been caused to the appellant.

ANALYSIS AND DECISION:

12. Having given our due consideration to the submissions advanced by the learned counsels for the rival parties at the Bar and on meticulous perusal of the record, we firstly deal with the first limb of the demand that pertains to the variations in the physical stock vis-à-vis the quantity shown in the books of account. In this regard, it would be relevant to extract the reasons that prevailed in the mind of the Assessing Authority, which read as under:

> "…….One diary was also in this record. Page No. 14 of this diary reads MRG-20Kg.-2142-20.09.96 and etc. The dealer state that MRG stand for Magat Ram Gupta and the stock of the batches was lying with the dealer but same has not be returned by the MRG to Company. Page-15 of the same dairy reads BAWD having a quantity of various paints. He stated that it is order of some dealer but the names of dealer not known. Similarly page No. 35 of the same dairy reads Suresh (J.E), Sh. Paramjeet (J.E.),CPWD, on the account of M.L. Vig contractor, 20x20 white. He stated that it is order from some one but name not known neither supply made. These pages were not satisfactorily explained as evident from the above explanation. A loose paper No.1 dated 12.08.96 in shape of internal letter head shows some transactions from Ashok Kumar to Fyare Lal directing to take Rangoli A.E. Base 36x4 lt. The dealer stated that these goods were returned back as these were purchases by M/S Mahabir Pd. And Co. But no paper of such return back was

produced. The visiting team also visited Janak Puri Branch and there they found certain loose papers. The paper No. 1 a challan No. 974 dated 29.09.96 is delivery challan in favour of Spread Coating in account with Berger Paint 14. The details of goods transfer from Udyog Nagar, Gujrat to Delhi Berger and similarly another challan No. 8190 dated 29.09.96 of similar No. 8190 dated 29.09.96 of similar nature was also confronted to the dealer. He stated that the concerned officer was on leave and record was with him and the same could not be produced and remained unexplained. The physical mock taking was also made by the visiting team and total stock of 4249.5 Kg 192 Kg. Of material was available, whereas the quantity given by the dealer at the time of assessment as on 03.10.96 at Janakpuri was 116823 Lt. & 43726 Kg. There is thus variation the both the figures. It shows the concealment of the sale /purchase and nothing else. It has also been reported that the challan mentioned above were not entered the record of the dealer and the suppression as per the report at the Janakpuri Branch comes to Rs. 1163867/-. Besides the dealer could not explain some of the paper taken from Okhla Branch. SL No. 51 & 54 are mentioned as bill. The dealer could not produce the record to explain the figures. Similarly pages 62 is the detail of good in value as well as in quantity he could not produce any record to give the satisfactory explanation. Similarly Page No. 87, 12/12 Rangoli Raw Material containing the quantity also remained unexplained. Sl. No. 166 which contains the details of consignment dispatched and Page No. 170 containing the similar details, 171 & 172 of similar nature and page No. 178 also remained unexplained on the ground that his record was with in charge of Spread Coating Unit and he was not available. The visiting team also reported the physical stock position but could not calculate variation at various places since the rates list were hot provided. The dealer was issued ST-32 & 31 and he filed trading accounts on 3.10.96 in terms or quantity and not in value. It was further explained that there has not been any suppression as most of the record has been explained the remaining could not be explained on account of the officer in charge on leave, & the record was with him. The above mentioned record which pertain to sale and purchase stock was neither found as recorded in its books nor satisfactorily explained cannot be over looked moreover large variation has been noticed at one of the branches and similarly all other places of the business. Therefore version of the dealer that there is no suppression is not convincing one.

In view of finding mentioned above like variation in stock, unsatisfactory explanation of the adverse material discussed above, interstate sale in the shape of transfer of goods procedure, the

> return version of the dealer is beyond satisfactory and reliability and thus needs to be considered accordingly. The return version of the dealer is, therefore rejected. Its sale is enhanced by the 10%, of the net GTO after deducting the stock transfer figure of GTO and taxed under the Local Act 10% along with the interest."

13. On a careful perusal of the aforesaid order, we are unable to find any illegality, perversity or incorrect approach adopted by the Assessing Authority in its order dated 31 December 1999 as regards unaccounted sales as also variations in the physical stock. The findings on merits in so far as the conclusion which was drawn with regard to transactions at pages 14 and 15 of the diary that was seized at the time of search cannot be re-appreciated at this stage particularly when the learned DVATT has taken a balanced view of the matter that the Assessing Authority was not justified as regards taking into consideration the entry at page No. 35 of the diary as transaction of sale in the absence of better evidence. There is no gainsaying in pointing out that as per Section 6 of DST Act, the burden of proving that sale was not effected and that no tax was liable to be paid, was upon the appellant. It is in the said context we find no flaw in the decision that the appellant did not make any request to the Assessing Authority to produce the party, namely M/s. Mahabir Prasad and Company as regards transaction of sale shown in the loose paper No.1 dated 12 August 1996 coupled with the fact that no explanation was further submitted by the appellant with regard to case of suppression of sale of Rs. 11,63,867/-. It is also evident that no documents in the nature of stock reconciliation, certified by the Auditors of the

company or for that matter by the Accountants concerned, was furnished either.

14. In view of the aforesaid facts and circumstances where the discrepancies in the sales figures as well as physical stock were not explained by the appellant, we find that the assessing authority took a fair, just and reasonable view of the matter in proceeding to carry out a best judgment assessment thereby enhancing sales by 10% of the net GTO after deducting the stock transfer figure of GTO, and accordingly, the levy of tax with interest cannot be said to be unpalatable or an unconscionable exercise of powers.

15. This brings us to the second limb of the demand on account of the purported stock transfer made by the appellant, which has been treated as inter-State sales. Again, it would be relevant to reproduce the reasons assigned by the Assessing Authority, that read as under:

> "The Officers from the Enforcement Branch visited dealer's premises on 03.10.96 for survey etc. They found certain papers, registers and other documents which the dealer could not explain property and thus the same were surrendered in the visiting Officers at its various places/additional places of business. The dealer was confronted with such material. He produced sales bill, Sales Tax Account Registers, Stock register and other excise record. Some papers were verified from the such records. One gate pass book containing gate passes No 501 to 533 written (rest blank) was also surrendered and gate pass No. 502 dated 10.09.96 reads GZBD(NTPC) and it has a quantity 4000 pack. The dealer explained that these goods were transferred to Gaziabad Branch and the bill was raised by the Gaziabad Branch in favour of NTPC. Similarly Gate No. 504 dated 13.09.96 containing 4000 packs to Faridabad (Fedco pnp). It was explained that these good were sent to Faridabad Branch and bill was raised by them in favor of (Fedco PNP) The gate pass No. 515 dated 24.09.96 reads Faridabad (BGM India) for 2000 pack, he explained that goods were sent to Faridabad Branch and the bill was raised by them in favour of BGM India. Similarly Gate pass no. 517 & 518 reads the same as

gate pass no. 504. The gate passes mentioned above were entered in the record as transfer to the branches mentioned above. He was also asked to produce remaining gatepass books, but he informed that the old record was not available though he tried best to trace the same. The above mentioned gate passes particulars revealed that the goods have been sent to branches in pursuance of the orders received from customers like Fedco, BGM and NTPC etc. by the branches in their state. Its mean that the branches got the order from the dealer mentioned in gate passes and thereafter the these out side branches placed order on Delhi Branch to send the goods to them for onward transfer to those dealers. Therefore such types of transfer cannot be deemed as a plain transfer but inter state sale to such dealer whose names are mentioned in these gate passes. These are gate passes for month of Sept. only and similarly in other months of year for which gate passes were not available such sales cannot be ruled out. In view of the above, it is clear that the dealer is making sales interstate but showing it mere transfer to the branches. Keeping in view these examples 10% of the transfers are taken as interstate sale and taxed @ 10% under the Central Sale Tax Act."

16. In order to arrive at a decision, it would be pertinent to refer to the definition of 'sale' as provided vide Section 2(g) of CST Act as also definition with regard to inter-State trade or commerce besides the issue as to the burden of proof under the CST Act that read as under:

"[(g) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes,-
(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
(iii) a delivery of goods on hire-purchase or any system of payment by instalments;
(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
but does not include a mortgage or hypothecation of or a charge or pledge on goods;]

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"3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.- A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-
(a) occasions the movement of goods from one State to another; or
(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.
Explanation 1.--Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee. "
Explanation 2 and 3 not relevant.

"6A Burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale. —(1) Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of despatch of such goods [2] [and if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale].

> (2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer under sub-section (1) [are true and that no inter-State sale has been effected, he may, at the time of, or at any time before, the assessment of the tax payable by the dealer under this Act, make an order to that effect and thereupon the movement of goods to which the declaration relates shall, subject to the provisions of sub-section (3)] be deemed for the purpose of this Act to have been occasioned otherwise than as a result of sale.
>
> (3) Nothing contained in sub-section (2) shall preclude reassessment by the assessing authority on the ground of discovery of new facts or revision by a higher authority on the ground that the findings of the assessing authority are contrary to law, and such reassessment or revision may be done in accordance with the provisions of general sales tax law of the State.]"

17. On a conjoint reading of the aforesaid provisions, it is clearly brought out that sale is transfer of property in goods from one person to another for cash or deferred payment or for any other valuable consideration. In other words, sale is transfer of ownership in the goods as per any contract between seller and the buyer, and it is pursuant to a contract of sale that when goods move from one State to another that Section 3 of the CST Act comes into play. Without further ado, we find that in the instant matter learned DVATT failed to appreciate that except for 5 gate passes that showed movement of goods from Delhi to the branches outside Delhi NCR, there was no other material available so as to conclude that such movement of goods had been effected pursuant to any sale as between the appellant and the buyers. Therefore, no presumption in law is invited merely because the goods moved from Delhi to the depots/warehouses or storage facilities of appellant outside Delhi. At the cost of repetition, unless and until movement of goods is predicated by contract of sale,

the movement of goods pursuant thereto could not be termed as inter-State sale thereby making the transaction subject to levy of tax under the CST Act.

18. At the cost of repetition, it is stated that the learned DVATT failed to appreciate that the decision by the Assessing Authority dated 31 December 1999 was merely based on five gate passes purportedly showing movement of goods from Delhi to Ghaziabad and Faridabad, but evidently there was no material as to any documents evidencing actual date of receiving invoices/bills, date of delivery of goods etc. so as to hold that the movement of goods occurred to meet any purchase orders from the buyers located outside Delhi. It is manifest that the Revenue only advanced a sweeping submission that the goods were ultimately supplied from the said depots/godowns/storage facilities to some buyers, which by itself was not sufficient.

19. In arriving at such decision, we find support from a decision in the case of **M/s. Hyderabad Engineering Industries v. State of Andhra Pradesh**[5]**.** It was a case where the assessee had its registered office at Hyderabad, and was a registered dealer under Andhra Pradesh General Taxes Act, 1957 as well as CST Act. It was engaged in manufacturing and sale of electric press, sewing machines, fuel injections parts and accessories. The assessee entered into an agreement with M/s. Usha Sales Limited (subsequently known as Usha International Limited)[6], whereby the latter agreed to organize sale and distribution of the products of the assessee, as also to arrange

[5] MANU/SC/0172/2011
[6] UIL

for sale promotion measures of the products besides providing after sale services. The assessee claimed exemption from being taxed in the course of inter-State trade, which was negatived by the Assessing Authority holding that there were monthly indents showing supply of goods to UIL at its various branches all over the India but the sales had been camouflaged as branch transfer with a view to evade tax liability. Suffice it to state that the Apex Court interpreting Section 3 of the CST Act held that Clause (b) of Section 3 included "*sales in which property in goods passes during the movement of goods from one State to other by transfer of documents of title thereto whereas Clause (a) of Section 3 covers sales, other than those included in Clause (b), in which the movement of goods from one State to another is result of a covenant or incident of the contract of sale, and the property in goods passes in either State*". It was held further held that "*with a view to find out whether particular transaction is an inter-State sale or not, it is essential to see whether there was movement of goods from one State to another as a result of prior contract of sale or purchase*". On a conjoint reading of Section 3 and Section 6A of the CST Act, the legal proposition was explained as under:

> "18. What follows from a conjoint reading of these provisions is that every dealer is liable to pay tax under the Central Act on the sale of goods effected by him in the course of inter-State trade or commerce during the year of assessment. Where the department takes advantage of the presumption under Section 3(a) and/or to show that there has been a sale or purchase of goods in the course of inter-State trade or commerce and if the assessee disputes that there has been a sale or purchase of goods in the course of inter-State trade or commerce, then the assessee can rebut the presumption by filing declaration in form 'F' under Section 6A of the Central Act to prove that the movement of goods was occasioned not by reason of sale but otherwise than by way of sale.

> When the department does not take advantage of the presumption under Section 3(a) of the Central Act, but shows a positive case of inter-State sale in the course of inter-State trade or commerce to make it liable to tax under Section 6, the declaration in Form 'F' under section 6A would be of no avail."

20. In view of the aforesaid, we have no hesitation in holding that the impugned order dated 02 May 2022 insofar as it pertains to second limb of demand, namely, the levy of tax under CST Act, cannot be sustained in law. However, we find no legal infirmity, perversity or incorrect approach adopted by the learned DVATT in dismissing the application under Section 73(8) read with Section 75 of the DVAT Act read with Regulation 21 of the DVAT (Appellate Tribunal) Regulation, 2005 as we find that there was no prejudice caused to the appellant and objections with regard to non supply or sharing of documents were not taken at the opportune time before the Assessing Authority.

RELIEF:

21. In view of the foregoing discussion, we partly dismiss the appeal thereby sustaining the demand for local tax insofar as it is levied by the impugned order under Section 3 read with Section 23 of the DST Act. We also dismiss the appeal insofar as it is emanating from dismissal of the application under Section 73(8) of the DVAT Act. However, the appeal is partly allowed to the effect that the demand for tax levied under CST Act vide the impugned order dated 02 May 2022 is set aside and the matter is remanded back to the learned DVATT to decide the matter afresh with regard to assessment and levy of tax under the CST Act after affording a fresh opportunity

of hearing to the parties and granting liberty to the parties to file fresh documents, if any, in accordance with the law.

22. The appeal is disposed of accordingly. The pending application also stands disposed of.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

October 09, 2023
Sadique