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

\+ **ST. APPL. 35/2014**

Reserved on: 18th December, 2014

% **Date of Decision: 23rd December, 2014**

ANAND DECORS ..... Petitioner

Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

Versus

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

Through: Mr. V.K. Tandon, Advocate.

ST.APPL. 37/2014

PRINT-N- WRAP ..... Petitioner

Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

Versus

COMMISSIONER OF TRADE &TAXES,DELHI ..... Respondent

Through: Ms.Latika Chaudhary, Adv.

ST.APPL. 38/2014

DIWAN SAHEB FASHINS PVT. LTD. ..... Petitioner

Through: Mr.H.L.Taneja, Adv. with Mr.Sunil,Adv

Versus

THE COMMISSIONER TRADE & TAXES ..... Respondent

Through: Ms.Latika Chaudhary, Adv.

ST.APPL. 41/2014

AL-PACK INDUSTRIES ..... Petitioner

Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

versus

COMMISSIONER OF. TRADE & TAXES, DELHI..... Respondent

Through: Mr. V.K. Tandon, Advocate.

ST.APPL. 42/2014

AFFLATUS INTERNATIONAL ..... Petitioner
Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

Versus

COMMISSIONER OF TRADE & TAXES,DELHI..... Respondent
Through: Mr. Sushil Dutt Salwan and Ms.Latika Dutta, Adv.

ST.APPL. 43/2014

AI- PACK INDUSTRIES ..... Petitioner
Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

versus

COMMISSIONER OF. TRADE & TAXES, DELHI..... Respondent
Through: Mr. V.K. Tandon, Advocate.

ST.APPL. 44/2014

MEENABAZAR ..... Petitioner
Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

Versus

COMMISSIONER OF TRADE & TAXES, DELHI..... Respondent
Through: Ms.Ruchi Sindhwani, Additional Standing Counsel with Ms. Megha Adv.

ST.APPL. 55/2014

AGARWAL AGENCIES PVT LTD ..... Petitioner
Through: Mr.Rajesh Mahna, Mr. Ruchir Bhatia and Mr. Ramanand Roy, Advocates.

versus

COMMISSIONER OF TRADE & TAXES DELHI..... Respondent
Through: Ms.Ruchi Sindhwani, Additional Standing Counsel with Ms. Megha Adv.

ST.APPL. 57/2014

B AND M CORPORATION ..... Petitioner
Through: Mr.Vinod Srivastava and
Mr. Ravi Chandiok, Advocates.

versus

THE COMMISSIONER VALUE ADDED TAX..... Respondent
Through: Ms.Ruchi Sindhwani, Additional
Standing Counsel with Ms. Megha Adv.

ST.APPL. 61/2014

EAST WEST LINKERS ..... Petitioner
Through: Mr. Rajesh Jain, Mr. Virag Tiwari
and Mr. K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX..... Respondent
Through: Ms.Ruchi Sindhwani, Additional
Standing Counsel with Ms. Megha Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.

This common judgment will dispose of the above captioned appeals which stand admitted for adjudication on the following substantial questions of law:

> "(1) Whether the Appellate Tribunal, Value Added Tax, Delhi was right in holding that the sale of motor cars or other capital assets are not exempt under Section 6(3) of the Delhi Value Added Tax Act, 2004?
>
> (2) Whether the Appellate Tribunal, Value Added Tax, Delhi was right in upholding levy of penalty and interest?"

2. The appellants herein are registered dealers under the Delhi Value Added Tax Act, 2004 (DVAT Act, for short). They had purchased motor vehicles/cars and paid sales tax or Value Added Tax (VAT, for short) at the point of purchase, either under the Delhi Sales Tax Act, 1975 (DST Act, for short) or DVAT Act. Input tax credit was not availed/granted on the Sales Tax or VAT paid on the motor vehicles. The appellants were not dealers or traders in motor vehicles, but manufacturers or traders dealing in other commodities. This factual position is undisputed.

3. The dispute and the question to be determined is whether the sale consideration received by the appellants on the resale of the used motor vehicle to third parties should be added or included in the taxable turnover thereby entailing payment of VAT. The appellants submit that the sale price of the used vehicle cannot be included in the turnover, whereas the Revenue i.e. the Value Added Tax authorities, submit that the sale consideration received is a part of the business turnover.

4. The Appellate Tribunal, Value Added Tax, has held that the sale price of used motor car should be included in the taxable or business turnover of the appellant assessees in view of the wide and broad definition of the term 'business' in clause (d) to Section 2 of DVAT Act, which as per the Explanation states that for the purpose of term 'business' any transaction or sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern, shall be deemed to be the 'business'. Tribunal distinguished judgment of the Delhi High Court in ***Panacea Biotech Ltd. vs. Commissioner of Trade and Taxes and Ors.*** (2013) 59 VST

524 (Delhi), on the ground that the said decision related to DST Act, wherein the term 'business' was given a more restricted meaning. In ***Panacea Biotech Ltd (supra)*** it was, interalia, held that sale of used motor vehicles cannot be treated as part of turnover as this was neither ancillary nor incidental to the business, when the business of the assessee was not dealing with sale and purchase of vehicles. We agree with the Tribunal that ***Panacea Biotech Ltd case (supra)*** would not apply, but express our inability to agree with legal findings and conclusion recorded by the Tribunal.

5. In order to appreciate the controversy, we would like to first reproduce definition clauses 2(d) which defines the term 'business'; 2(f) which defines the term 'capital goods'; 2(t) which defines the term 'non-creditable goods'; 2(zc) which defines "sale"; 2(zd) which defines the term 'sale price' and ; 2(zm) which defines the term 'turnover', and read as under:

> "2. **Definitions**
> **……..**
> (d) **"business"** includes –
>
> (i) the provision of any services, but excluding the services provided by an employee;]
>
> (ii) any trade, commerce or manufacture;
>
> (iii) any adventure or concern in the nature of trade, commerce or manufacture;
>
> (iv) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and
> (v) any occasional transaction in the nature of such service, trade, commerce, manufacture, adventure or concern whether or not there is volume, frequency, continuity or regularity of such transaction; whether or not such service, trade,

commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern.

Explanation:- For the purpose of this clause –

(i) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be business;

(ii) purchase of any goods, the price of which is debited to the business and sale of any goods, the proceeds of which are credited to the business shall be deemed to be business;

xxxxxx

(f) "**capital goods**" means plant, machinery and equipment used, directly or indirectly, in the process of trade or manufacturing or for execution of works contract in Delhi;

xxxxx

(t) "**non-creditable goods**" means the goods listed in the Seventh Schedule;

xxxxxx

(zc) **"Sale"** with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-

(i) a transfer of goods on hire purchase or other system of payment by installments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;

(ii) supply of goods by a society (including a co-operative society), club, firm, or any association to its members for cash or for deferred payment or for commission, remuneration or other valuable

consideration, whether or not in the course of business;

(iii) transfer of property in goods by an auctioneer referred to in sub-clause (vii) of clause (j) of this section, or sale of goods in the course of any other activity in the nature of banking, insurance who in the course of their main activity also sell goods repossessed or re-claimed;

(iv) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(v) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vi) 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;

(vii) 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;

(viii) every disposal of goods referred to in sub-clause 15[(vii)] of clause (j) of this 16[sub-section]; and the words "sell", buy" and "purchase" wherever appearing with all their grammatical variations and cognate expressions, shall be construed accordingly;

xxxxxx

(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 installments, 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 chargesreceived 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 an amount equal to the increase in the prices of petrol and diesel (including the duties and levies charged thereon by the Central Government) taking effect from the 6th June, 2006 shall not form part of the sale price of petrol and diesel sold on and after the date of the commencement of the Delhi Value Added Tax (Amendment) Act, 2006 till such date as the Government may, by notification in the official Gazette, direct:

PROVIDED FURTHER that the first proviso shall not take effect till the benefit is passed on to the consumer:

PROVIDED that an amount equal to the increase in the price of diesel (HSD) (including the duties and levies charged thereon by the Central Government) taking effect from the 25th June, 2011 shall not form part of the sale price of diesel (HSD) sold on or after the date of the commencement of the Delhi Value Added Tax (Second Amendment) Act, 2011 till such date as the Government may, by notification in the official Gazette, direct or if the price of diesel (HSD) falls below the sale price prior to 25th June, 2011, whichever is earlier:

PROVIDED further that if the price of diesel (HSD) further increases from the level of price as on 25th June, 2011, the first proviso shall not have any effect on such further increase:

PROVIDED also that if the price of diesel (HSD) declines but remains above the price prevailing prior to 25th June, 2011, the first proviso shall have effect to the extent of the remaining increase:

PROVIDED also that the first proviso shall not take effect till the benefit is passed on to the consumers.

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.

[Explanation-1.]- A dealer's sale price always includes the tax payable by it on making the sale, if any;

[Explanation.-2 - The amount received or receivable by oil marketing companies for the sale of diesel and petrol shall be deemed to be equivalent to the price on which the retail outlets will sell these commodities to the consumer.]

Xxxxxx

(zm) **"turnover"** means the aggregate of the amounts of sale price received or receivable by the person in any tax period, reduced by any tax for which the person is liable under section 3 of this Act;"

6. Sections 5, 6(3) and 9 of DVAT Act are also relevant and are, therefore, reproduced below:

5. (1) For the purposes of this Act, taxable turnover means that part of dealer's turnover arising during the tax period which remains after deducting therefrom -

(a) the turnover of sales not subject to tax under section 7 of this Act; and

(b) the turnover of sales of goods declared exempt under section 6 of this Act.

(2) In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract excluding the charges towards labour, services and other like charges, subject to such conditions as may be prescribed:

Provided that where the amount of charges towards labour, services and other like charges is not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated at the prescribed percentages."

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6 **Sale exempt from tax**

(1) ……
(2) ……..

(3) Where a dealer sells capital goods which he has used since the time of purchase exclusively for purposes other than making non-taxed sale of goods, and has not claimed a tax credit in respect of such capital goods under section 9, the sale of such capital goods shall be exempt from tax.

xxxxxxx

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.]

(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;

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;

(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.

(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 [(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.

(5) The method used by a dealer to determine the extent to which the goods are used in the manner specified in sub-section (4) of this section, shall be fair and reasonable in the circumstances:

PROVIDED that the Commissioner may -

(a) after giving reasons in writing, reject the method adopted by the dealer and calculate the amount of tax credit; and

(b) prescribe methods for calculating the amount of tax credit or the amount of any adjustment or reduction of a tax credit in certain instances.

Explanation.- A person may object in the manner referred to in section 74 of this Act to a decision of the Commissioner to reject a method of calculating a tax credit.

(6) [Notwithstanding anything contained to the contrary in sub-section (1), where -]

(a) a dealer has purchased goods (other than capital goods) for which a tax credit arises under sub-section (1) of this section;

(b) the goods or goods manufactured out of such goods are to be exported from Delhi by way of transfer to a –

(i) non-resident consignment agent; or

(ii) non-resident branch of the dealer; and

(c) the transfer will not be by way of a sale made in Delhi;

the amount of the tax credit shall be reduced by the prescribed percentage.

(7) For the removal of doubt, no tax credit shall be allowed for -

(a) the purchase of goods from an unregistered dealer;

(b) the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule.

(c) any purchase of consumables or of capital goods where the dealer is exclusively engaged in doing job work or labour work and is not engaged in the business of manufacturing of goods for sale by him and incidental to the business of job work or labour work, obtains any waste or scrap goods which are sold by him.

(8) The tax credit may be claimed by a dealer only if he holds a tax invoice at the time the prescribed return for the tax period is furnished.

(9)(a) Notwithstanding anything contained to the contrary in sub-sections (1) and (3) and subject to sub-section (2), tax credit in respect of capital goods shall be allowed as follows: -

(i) 1/3rd of the input tax on such capital goods arising in the tax period, in the same tax period;
(ii) balance 2/3rd of such input tax, in equal proportions, in corresponding tax periods, in two immediately successive financial years :

PROVIDED that, where the dealer sells such capital goods, the dealer shall be allowed as tax credit, the balance amount of the input tax, if any, in respect of such capital goods as has not been earlier availed as tax credit, such tax credit shall be allowed in the tax period in which such capital goods are sold and only after adjusting the output tax payable by him:

PROVIDED FURTHER that where the dealer transfers such capital goods from Delhi otherwise than by way of sale before the expiry of three years from the date of purchase, he shall, after claiming the balance amount of input tax, if any, not availed earlier in respect of such capital goods, reduce the input tax credit by the prescribed percentage of the purchase price of such capital goods and make adjustments in the input tax credit in the tax period in which these capital goods are so transferred:

PROVIDED ALSO that where a dealer has purchased capital goods and the capital goods are to be used partly for the purpose of making sales referred to in sub-section (1) of this section and partly for other purposes, the amount of tax credit shall be reduced proportionately:]

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed if such capital goods are used exclusively for the purpose of making sale of exempted goods specified in the first schedule:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed on that part of the value of such capital goods which represents the amount of input tax on such capital goods, which the dealer claims as depreciation under section 32 of the Income Tax Act, 1961 (43 of 1961).

(c) If any capital goods in respect of which tax credit is allowed under clause (a) of this sub-section is transferred to any other person otherwise than by way of sale at the fair market value before the expiry of a period of five years from the date of purchase, the tax credit claimed in respect of such purchase shall be 9[reversed] in the tax period during which such transfer takes place.".

(10) Notwithstanding anything contained to the contrary in sub-section (1), where -

(a) a dealer has purchased goods (other than capital goods) for which a tax credit arises under sub-section (1) of this section; and,

(b) the goods or goods manufactured out of such goods are to be exported from Delhi by way of sale made under sub-section (1) of Section 8 of the Central Sales Tax Act, 1956, the amount of the tax credit shall be reduced by the prescribed percentage.]

(11) Subject to sub-section (1), (2) and (3) of this section, the tax credit of goods to be used for sale, as defined in sub-clause (vi) of clause (zc) of subsection (1) of Section 2 of the Act, shall be allowed as follows:

(a) 1/4th of the input tax on such goods arising in the tax period, in the same tax period;

(b) balance 3/4th of such input tax, in equal proportions, in corresponding tax periods, in three immediately successive financial years.

The definition clauses and their interpretation

7. (i) The term 'business' as defined in Section 2(d) includes any trade, commerce or manufacture, any adventure or concern in the nature of trade, commerce, manufacture, adventure or any occasional transaction in connection with, incidental or ancillary to such trade, commerce, manufacture, adventure or concern. The Explanation expands the scope of the term 'business' to include any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern. The said transactions of capital assets are deemed to be a business.

(ii) The expression 'capital goods' has been defined in Section 2(f) to mean plant, machinery and equipment used directly or indirectly in the process of trade, manufacture or for execution of the works contract in Delhi. Thus, all plant, machinery and equipment used directly or indirectly in the process of trade, manufacture or execution of works are treated as capital goods. The words 'capital goods' has to be distinguished from the expression 'capital assets' for a good reason. 'Capital goods' would include moveable goods but not immovable property, but the 'capital assets' would include immovable property. We also observe that the "capital assets" may include goods other than those specified in Section 2(f) i.e. plant, machinery, equipment which are not directly or indirectly used in the

process of trade, manufacture or for execution of works contract. The said possibility cannot be ruled out, though such cases nature may be rare and not a general rule.

(iii) The expression 'turnover' as defined in Section 2(zm) means aggregate of the amounts of sale price received or receivable in any tax period, reduced by any tax for which the person is liable under Section 3 of the DVAT Act.

(iv) The expression 'sale price' has been defined in Section 2(zd) as the amount paid or payable as valuable consideration for any sale. We need not refer to the sub-clauses.

(v) The definition of term 'sale price' must be read along with definition of term 'sale'. The term sale 'sale' as defined in Section 2(zc) refers to its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another. It is a very wide definition but it relates to transfer of property in goods and not immovable property. Therefore, in spite of wide definition of the term "business" which also in the Explanation refers to capital assets, when we refer to the expression 'sale price', we have to keep in mind the definition of the word 'sale'.

(vi) Section 2(t) states that goods mentioned in the seventh schedule are not taxable.

Sections 9 of the DVAT Act

8. Under Section 9(1) of DVAT Act, the assessee who is a dealer including a registered dealer is entitled to tax credit of the turnover of purchases incurred during the tax period in the course of

activities as a dealer and in respect of the goods used by him directly or indirectly for the purpose of making sale that are liable to tax under Section 3 of the DVAT Act and also sales which are not liable to tax under Section 7 of the DVAT Act. Thus, Input tax credit is granted on the purchase price of capital goods which are used directly or indirectly for the purpose of making sales or stock-in-trade, which are liable to tax under Section 3 and may not be liable to tax under Section 7. However, sub-section (1) is subject to sub-section (2) to section 9. Sub-section (2) to section 9 significantly qualifies that no tax credit shall be allowed in a case covered by any of the sub-clauses mentioned therein. We are only concerned with clause (b) as in the present case. The said clause to section 9(2) is applicable as the motor cars purchased and sold were non-creditable goods and they were/are included in the seventh Schedule of the DVAT Act.

9. The effect of section 9(2) would be that no credit would be granted to a dealer like the appellants on the VAT paid on the purchase of motor vehicles as they were not dealers trading in motor vehicles. Thus, the motor vehicle would be a capital good as defined in Section 2(f) and purchase thereof would form part of the business, but input tax credit of VAT paid would not be available.

10. Sub-section (9) of Section 9 of the DVAT Act, is a non-obstante clause overriding sub-sections (1) and (3). However, primacy and overriding effect of sub-section (2) to Section 9 is not negated by sub-section (9). Dominance of Section 9(2) is not disturbed or over-ridden by sub-section (9) to section 9 of the DVAT Act. Sub-section (9) deals with tax credit in respect of capital goods. Clause (a) to Section (9) stipulates the manner in which tax credit on

capital goods is to be granted. In other words, sales tax or VAT paid on capital goods would predicate and qualify for tax credit, but only if, the dealer can cross hurdle and input tax credit is not prohibited/barred under sub-section (2) to Section 9. It follows logically that the provisos to the sub-section (9) would not be applicable, when such tax credit is barred or prohibited under sub-section (2) to section 9. Sub-section (9) including the provisos would not apply and operate, when input tax credit cannot be granted under sub-section (2) to Section 9. This is simple interpretation of interplay between sub-section (9) and sub-section (2) to Section 9 of the DVAT Act. Therefore, in case sub-section (2) to Section 9 applies, then we need not refer to sub-section (9) and the provisos, to examine whether or not they would be applicable.

Section 6(3) of the DVAT Act and its interpretation

11. This brings us to sub-section (3) to Section 6, which relates to exemption from VAT. The price sale received and covered by section 6(3) is not be included in taxable turnover. The sub-section can be divided into parts for better and more accurate appreciation and interpretation. The first part specifies that the sub-section relates to sale of capital good which has been used since the time of the purchase. It refers to the use of the capital good sold by the dealer. Thus, the capital good referred to in the said sub-section are distinguishable and do not include or refer to goods in which the dealer is trading i.e. goods that form a part of the stock in trade. Section 6(3) states that the capital good should be used i.e. should not be new. The time or period of use, however, is immaterial. Sub-

section (3) thereafter postulates two other requirements for the sale of such capital goods to be treated as exempt from sale. First requirement relates to the business of the dealer. Use of double negative is somewhat confusing but considered examination makes the legislative mandate clear. It is only when the registered dealer uses the capital goods exclusively for sale of non-taxed goods that this requirement of sub-section (3) to Section 6 is not satisfied. If the capital goods are used for purposes of taxed and non-taxed sale of goods, this requirement for claiming exemption under Section 6(3) would be satisfied. The last requirement is that the dealer should not have taken tax credit in respect of capital goods. Once the aforesaid requirements are satisfied, the sale of such capital goods is treated as exempt from tax. To crystallize, the four conditions stipulated in Section 6(3) of the DVAT Act, to claim exemption are:

(1) There should be sale of capital goods;

(2) The said capital goods should have been used by the dealer from the time of purchase till sale;

(3) The purpose for which the capital goods were used should be for making sale of taxable goods or taxable goods and non-taxable goods. The capital goods should not be exclusively used for making sale of non-taxable goods.

(4) The dealer should not have taken tax credit in respect of such capital goods under Section 9.

12. The aforesaid interpretation to Section 6(3) is in consonance and accord with the underlining principle and objective of a VAT Legislation. VAT prevents cascading effect of taxation and also reduces tax evasion. The White Paper on State level VAT Act by

the empowered committee of State Finance Ministers dated 27th January, 2005, under the heading 'justification of VAT and background' has elucidated that in the earlier structure the inputs were first taxed and then after the commodity was produced with input tax load, output was taxed again. This caused unfair double taxation. VAT ensures set off is given for input tax as well tax paid on the previous purchases. The essence of VAT Act is to give set off of tax paid earlier and this is given effect to, through concept of input tax credit/rebate. VAT or Value Added Tax is based on the value addition to the goods and related VAT liability of the dealer is calculated by deducting input tax credit from the tax collectable on sales during the specified period.

13. The State Legislations relating to VAT may provide for inclusion of capital goods or industrial inputs in some cases. The definition of capital goods and the manner and mode of input tax credit in relation thereto varies from State to State in terms of the applicable enactment. The justification and reason given for including and giving tax credit in respect of capital goods, which do not form a part of the stock in trade, is that it leads to capital formation of the country, when depreciation is made deductible from the tax base and, therefore, tax paid on capital goods used directly or indirectly for the purpose of business should be set off against VAT liability. These are, however, areas in the realm of Legislation. The courts only interpret the Statutes as enacted. Therefore, we are not concerned with the rationale behind of allowing input tax credit on capital goods or the reason for denying input tax credit under sub-section (2) to Section 9. Albeit what is discernible is that a dealer is given tax

credit for the goods purchased or used as inputs, which are set off from the tax payable on the turnover which would include the sale price received on the sale. Therefore, when input tax credit is granted in respect of capital goods under section 9(9), consequences emanate and ensue on the sale of the said capital goods. But section 9(9) of the DVAT Act is not applicable and appellant dealers were/are not entitled to input tax credit on motor vehicles. Once this is clear, we can appreciate the legislative mandate in granting exemption in respect of sale price paid in respect of capital goods provided the conditions mentioned section 6(3) of the DVAT Act are satisfied. Therefore, the requirements; the capital goods should have been used by the dealer; that the capital goods should have been used for the purposes of business of the assessee and the said business should not be restricted or exclusively relating to non-taxable goods and the assessee should not have taken or granted tax credit on the capital goods.

In the cases of the appellants, if these conditions are satisfied then the sale price received by the appellant dealers on sale of used motor vehicles would not be included in the turnover for it would be exempt from tax under Section 6(3) of the DVAT Act. Therefore, in view of the accepted and admitted facts, section 6(3) of DVAT Act would be applicable and the benefit cannot be denied.

14. At this stage, we must deal with two other contentions raised by the counsel for the State/Revenue. The first contention was that the last part of Section 6(3) would not apply if the dealer cannot be granted tax credit in terms of Section 9(2) of the DVAT Act. In other words, the submission of the Revenue is that the assessee voluntarily

should not have taken input tax credit, though he was entitled to claim input tax credit under Section 9(1) of the DVAT Act. The argument is farfetched and is to be only noted to be rejected. This is not the intention of the Legislature and it is even difficult to perceive and accept that this could be the intention behind the words used in Section 6(3) of the DVAT Act. Rationality and the common sense would affirm that every dealer would like to mitigate his tax liability and avail input tax credit. This was the effect and purpose behind input tax credit in the VAT legislation. Only when the dealer is not entitled to input tax credit, he would not claim benefit of input tax credit. The interpretation put forward by the Revenue is too narrow and is not pragmatic or realistic. This interpretation is certainly not the intention of the Legislature. This is equally not approvingly reflected in the words used in section 6(3) of the DVAT Act. The Legislature was also conscious that goods in the Schedule VII are not creditable goods. They did not expressly or impliedly excluded "capital good" mentioned in schedule VII from application of the section 6(3) of the DVAT Act.

15. The second contention raised by the Revenue is that motor vehicles are not capital goods as defined in Section 2(f) of the DVAT Act for they cannot be treated as plant, machinery or equipment used directly or indirectly in the process of trade or manufacture etc. Reliance was placed upon the decision of the Supreme Court in ***Commissioner of Central Excise, Allahbad vs. Ginni Filaments Ltd.*** AIR 2005 SC 1330. This contention is also fallacious and without merit. In ***Ginni Filaments (supra)***, the Supreme Court was examining an exemption notification under the Excise Act, 1944, which was

restricted to the goods used in manufacture and packaging. In view of the restrictive language of the notification which granted exemption for goods used in manufactured by an 100% Export Oriented Unit, it was held that the goods actually used in manufacture or production were exempt. The words used in the notification were contrasted from the phase "in connection with" manufacture. The said words, it was observed were broader and wider and not restrictive. Thus, tables, chairs, air conditioners purchased and installed in the unit where cotton or filament yarn for export were manufactured, were not treated as exempt under the notification, for the reason that the said articles were not goods used in the manufacture as an input. The restrictive meaning is clearly missing in section 2(f) of the DVAT Act which expressly states, to quote, "capital goods, means plant, machinery and equipment used directly or indirectly, in the process of trade or manufacture"… . Section 9(1) which deals with tax credit, also uses the expression goods to be used directly or indirectly for the purpose of making sales liable to tax under Section 3 of the DVAT Act and sales which are not liable to tax under Section 7 of the DVAT Act. The Legislature has deliberately used the words "directly or indirectly" to reflect the wider meaning which they wanted to give to the expression 'capital goods'.

16. The word 'plant' has not been defined in the DVAT Act and in ordinary sense it includes whatever apparatus is used by a business man for carrying on his business but not his stock-in-trade which he buys or makes for sale. Plant includes all goods and chattels fixed or movable, live or dead which is required for his business (see observations of Lindley LJ in ***Yarmouth vs. France*** [(1887) 19 QBD

647)]. However, generally a place in which the business is carried out is not treated as a plant. It is also clear that the word 'plant' or 'machinery' is not restricted only to mechanical processes or apparatus. The Supreme Court in the case of ***Scientific Engineering House Pvt. Ltd. vs. CIT*** (1986) 157 ITR 86 (SC) has observed:

> "Plant will include any article or object fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. However, in order to qualify as plant, the article must have some degree of durability. The test to be applied for such determination is : Does the article fulfill the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If answer is in the affirmative, it will be a 'plant'."

17. In view of the aforesaid findings, the first substantial question of law has to be answered in favour of the appellant dealers and against the respondent Revenue. The second question need not be answered in view of the findings on the first question. The appeals are accordingly disposed of with no orders as to costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

December 23rd, 2014/kkb