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

\+ **ST.APPL. 28/2013**

AERO CLUB ..... Petitioner
Through: Mr. Rajesh Mahna with Mr. Ruchir Bhatia, Advocates.

Versus

COMMISSIONER, TRADE & TAXES, DELHI ..... Respondent
Through: Mr. Devvrat, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **31.08.2015**

1. This is an appeal under Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') against an order dated 13th June 2013 passed by the Appellate Tribunal, Value Added Tax, Delhi ('Tribunal') by a majority of 2:1 whereby the appeal of the Appellant was dismissed.

2. The background to the present appeal is that the Appellant is a registered dealer of Ward-42/KDU, dealing with footwear and readymade garments under the brand name 'Woodland'. Certain goods were imported from China in 404 cartons. They were cleared by the Customs Department on 28th July

2011. The consignment was further transported on that day i.e. 28th July 2011 from the Airport Cargo warehouse in two tempo vehicles bearing registration Nos. DL 1LM 2175 and DL IM 3534. The relevant documents pertaining to the consignment was with the driver of the tempo bearing registration No. DL 1LM 2175. Although both tempos were initially travelling together, the tempo bearing registration No. DL 1LM 3534 got separated and was intercepted by the Value Added Tax Officer (VATO) (Enforcement-II). The VATO, Mr. Sanjiv Kumar Sharma, issued a '*Mal Roko Aadesh*' i.e. an impounding order under Sections 59/61 of the DVAT and recorded the reason for doing so as: "Goods without Bill". The person to whom the goods belonged was asked to appear before the VATO along with the driver within seven days. At the same time the statement of the driver of the temp, Mr. Dheeraj, was recorded in which he stated that he was unable to produce the required documents in respect of the said goods. In this statement too the same reason was indicated viz., "Goods without Bill".

3. A letter was addressed by the Appellant to the VATO on 29th July 2011 by the Appellant in reply to the impounding order. It was stated *inter alia* that the goods were loaded in two tempos and that the necessary documents such as bill of entry etc. were with one of the two vehicles. It was explained that although the two vehicles were running together, the one which was not

carrying the documents got separated and was intercepted by the VATO. Along with the letter, the Appellant enclosed the documents of import, registration certificate etc.

4. The VATO passed a penalty order dated 5th August 2011 creating a penalty demand of Rs. 8,98,997 under Section 86 (19) of the DVAT Act and further stipulated the deposit of the said penalty as a precondition for the release of the seized goods. A release order was passed on 8th August 2011 by the VATO (Enforcement) after noting that the penalty as assessed by the VATO has been deposited.

5. The Appellant then filed objections before the Objection Hearing Authority ('OHA') *inter alia* contending that there was no default by the owner of the imported goods as the relevant documents were carried by one of the two tempos travelling together. It was pointed out that there was no loss to the Revenue and, therefore, the penalty which had been paid under protest, was illegal and arbitrary.

6. The OHA passed an order on 18th October 2011 confirming the imposition of the penalty. Although it was noted that the Objector had filed photocopies of the invoices, packing list, air way bill, challan of the Central Excise & Customs etc, the OHA held that the Objector had "failed to file any

documents in favour that the place where the goods was to be unloaded/stores in Bijwasan is a declared place of business of the dealer required as per provisions of the CST Act." It was further held that the Objector did not file any proof to show that the vehicles were in his name in support of the contention that no GR was required to be carried with the vehicles in local movement of goods in Delhi.

7. Aggrieved by the above order, the Appellant filed an appeal which came to be heard by the Tribunal comprising three members. While two members viz., Mr. D.C. Anand Members (Judicial) and Ms. Nita Bali Member (A) by their respective orders dated 13th June 2013 upheld the order of the OHA, Mr. S K Kaushik, Member (Judicial), by a separate order of the same date, dissented.

8. Mr. D.C. Anand came to the conclusion that the penalty was rightly imposed on the Appellant since admittedly the tempo which was intercepted was carrying goods without the requisite documents. Further since on the checking of the vehicle at Mahipal Pur, the driver of the vehicle in question Mr. Dheeraj admitted that the vehicle was moving from Airport Cargo to Bijwasan although the registered address of the Appellant was at Joshi Road, Karol Bagh, New Delhi, the possibility of the goods passing to some other

party, detrimental to the interest of the Revenue, "cannot be ruled out."

9. Mr. S.K. Kaushik, however, noted that the *Mal Roko Aadesh* dated 28th July 2011 issued by the VATO only pointed out one reason for the impounding viz., the absence of the Bill. It was noted that the Appellant promptly complied with that order and on the very next day produced the requisite documents which were verified by VATO. In the circumstances, the penalty sought to be imposed could not be justified on some other ground. A reference was made to the decision of this Court in ***Magicon Impex Pvt. Ltd. v. Commissioner, Trade and Taxes (2012) 47 VST 367 (Del).*** Even otherwise, the particulars which were required to be indicated in the GR, Form DVAT-32 were set out in the customs examination certificate and in the bill of entry.

10. The third member, Ms. Nita Bali, concurred with the view of Mr. D.C. Anand and held that the impugned order of the OHA suffered from no infirmity or illegality and that the appeal should be dismissed.

11. The question of law framed by the Court by its order dated 19th July 2013 while admitting the present appeal reads thus:

> "Whether the majority decision was right in holding that the bill of entry was not a valid document or invoice and, therefore, the penalty

under Section 86 (19) of the DVAT Act has been correctly imposed?"

12. This Court has heard the submissions of Mr. Rajesh Mahna, learned counsel for the Appellant and Mr. Devvrat, learned counsel for the Respondent.

13. It requires to be noticed at the outset that the '*Mal Roko Aadesh*' in the present case cited only one reason for the impounding of the goods , viz., namely, 'goods without bill'. Further it is clear that at the first available opportunity, i.e., 29th July 2011 the Assessee replied explaining the circumstances under which the tempo that was intercepted did not contain the relevant documents. Enclosed with the letter were copies of the relevant documents, i.e., documents of import, registration certificate etc. It is not the case of the Revenue that these documents did not pertain to two consignments in question. In this context, the following findings of fact in the opinion of Mr. Kaushik, in relation to the said documents, are relevant:

> "38. The bill of entry (page 20 and 31 of appeal file) shows number of imported pieces as 27,187 (10,999 + 6,048 + 2,660 + 7,480). Packing list (page 32 of appeal file) shows number of imported pieces as 27,187 (6,048 + 2,660 + 7,430 + 10,999) and number of imported cartons as 404 (76 + 59 + 166 + 103). Custom examination receipt dated 28th July 2011 (page 22 of appeal file) shows that in total 404 packets were imported. The

dealer just on the next day, i.e., on 29th July 2011 submitted, before the VATO, the detailed inventory (page 23 of appeal file), which is in two parts viz: (i) 250 cartons containing 16516 pieces detained by VATO, and (ii) 154 cartons containing 10671 pieces received in the godown of the Appellant. The details provided by the dealer also include design and rate. The VATO in the order dated 5th August 2011 has categorically admitted by stating that "**the inventory of the goods in the vehicle has been prepared by the VATI and is tallying with the inventory submitted by Mr. Mahna/Sharma**". Order dated 5th August 2011 of the VATO shows that the number of pieces found loaded in the detained vehicle No. DL-1M 3534 was 3864+6349+1263+5040, which totals to 16516 and this figure of 16516 pieces tallies with the inventory of the detained goods prepared by VATI as well as the dealer. The fact that there were only 16516 pieces in the detained tempo and remaining 10671 pieces had reached the godown of the Appellant undoubtedly corroborates the reply of the Appellant that there were two tempos and vehicle No. DL-1M 3535 was left behind when Vehicle No. DL-1LM 2175 moved away. I, therefore, hold that this contention of the learned counsel for Revenue is without any merit."

14. The above facts corroborate the version of the dealer that there were two tempos carrying the entire consignment. This basic fact was not considered by the two Members who took the view that the penalty order was justified.

15. In ***Magicon Impex Pvt. Ltd.*** (*supra*) in more or less similar facts, the Court found that in the counter-affidavit the Respondent had taken a stand different from that stated in the *Mal Roko Aadesh* and cited a different new reason for the imposition of penalty viz., that the GR was not available with the driver. In those circumstances, the penalty order was quashed.

16. In the present case, there is no mention of the absence of GRs in the '*Mal Roko Aadesh*'. The only reason cited is that the goods were 'without bill". The relevant documents of import, including the B/E, customs certificate etc. were produced by the dealer on the next day along with the letter dated 29th July 2011.

17. The third reason mentioned in the opinions of the majority is that the statement of the driver substantiated the case of the VATO. This statement was, however, never put to the Appellant and has been held to be inadmissible by Mr. Kaushik.

18. The Court is satisfied that in the facts and circumstances of the present case, there was no legal justification for issuance of the impugned penalty order under Section 86 (19) of the DVAT Act.

19. Consequently, the question framed by the Court is answered in the negative, i.e, in favour of the Assessee and against the Revenue. The impugned majority order dated 13th June 2013 of the Tribunal is hereby set aside.

20. The appeal is allowed but, in the facts and circumstances of the case, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 31, 2015/*Rk*