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IN THE WEST BENGAL TAXATION TRIBUNAL

Present :

The Hon'ble : Mr. Justice Malay Marut Banerjee, Chairman

The Hon'ble : Mr. Suranjan Kundu, Judicial Member.

The Hon'ble : Mr. Chanchalmal Bachhawat.,Technical Member.

Case No . RN – 979 of 2017

M/s. Samvijay Power & Allied Industries Ltd. .. (Petitioner No.1)

Versus

DCST., Bureau of Investigation, Unit-I & Ors.

Case No. 977 of 2017

M/s. Automate Electro Engineering Co. Ltd…(Petitioner No.2)

Versus

DCST., Bureau of Investigation, Unit-I & Ors.

Case No. 1531 of 2018

M/s. Fiddle Iron & Steel Pvt. Ltd.. (Petitioner No.3)

Versus

JCST, Kolkata (North)

Case No. 253 of 2020

Radha Enterprise & Anr. … ..(Petitioner No. 4)

Versus

STO., Salt Lake Charge & Ors.

Case No. 743 of 2019

M/s. J.J. House Pvt. Ltd. … (Petitioner No. 5)

Versus

SJCST., Postabazar Charge & Ors.

WEST BENGAL TAXATION TRIBUNAL
Compared with the original
Date 22/2/21 Signature Authorised Officer

For Applicants : Mr. S.S. Sengupta, Advocate.

: Mr. A.K. Dugar , Advocate.

: Late Sumit Chakraborty, Advocate

For Respondents : Mrs. M. Sen, State Representative

(on behalf of Mr. A. Chakraborty, State Representative.)

Heard on : 26.02.2021

Judgement on : 26.07.2021

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Deputy Registrar (Judicial)
West Bengal Taxation Tribunal
Bidhannagar, Kolkata-700091 27.07.21

Hon'ble Mr. Suranjan Kundu.,Judicial Member:

(1) The above numbered five cases are heard analogously. The Petitioners of these cases have challenged the constitutionality of section 22(4A)(a) of WB VAT Act. 2003. Section 22(4A)(a) of the Act has been inserted by way of amendment w.e.f 01.04.2015. It reads as follow:

Section 22(4A). The Input Tax Credit or Input Tax rebate in respect of a transaction involving taxable goods shall be available to the purchasing dealer -------

(a) If the amount of tax is actually paid by the selling dealer in respect of such transactions by way of deposit into appropriate government treasury or by way of including such tax in the total amount of out put tax shown in the relevant return submitted under section 32 by the selling dealer, and upon payment of net tax payable as per return ' and - ……."

(b) the amount of input tax credit or input tax rebate shall not exceed the amount of tax so paid by the selling dealer in respect of such transaction.

(2) The case of the Petitioners, in brief, is that they, being bona-fide registered purchasing dealers, purchased goods from the registered selling dealers and had claimed for ITC but the revenue dis-allowed their claims on the ground that the selling dealers did not pay tax in respect of corresponding transactions by way of deposit into appropriate government treasury or by way of including such tax in the total amount of out put tax shown, as envisaged under section 22(4A) of the WB VAT Act. The Petitioners have alleged that they have no control on the activities or motives of the selling dealers and they cannot be held responsible nor can they be deprived of their legitimate claim of ITC for non-performance of the statutory duty imposed on the selling dealers. The Petitioners have alleged that the impugned Section has failed to differentiate between bona-fide purchasers and mala-fide sellers and is treating unequals equally and therefore this section is arbitrary, oppressive and violative of Article 14, 21 and 19(1)(g) of the Constitution of India.

(3) The submission on the part of the Respondents in brief, is that the right to claim I.T.C is not an absolute right but merely a conditional right as envisaged in section 22(1) of the Act.

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It is argued that the Revenue has been compelled to insert section 22(4A) of the Act by way of amendment in order to curtail huge loses to the State exchequer in some particular cases where purchasing dealers claim ITC on the basis of sell transactions with shadowy selling dealers, most of whom sometimes never exist. It is argued that the purchasing dealers do have sufficient control on the non-performance of the selling dealers regarding payment of taxes and even thereafter, if there is any hardship on the part of the purchasing dealer, the said hardship cannot be a criteria for invalidating a statute.

(4) Before plunging into the discussion let me discuss the fact of the above mentioned cases one by one.

(a) M/s. Samvijoy Power & Alied Industries Ltd. RN- 979/17. This Petitioner has claimed to have made a purchase of Rs. 18,86,94,519/- from one M/s. Mystic Dealtrade Pvt. Ltd. (in short M/s. Mystic) during the period quarter ending 30.06.15 and claimed ITC of Rs. 89,85,453/- against such purchase. The Petitioner, however, has admitted that due to some dispute with Mystic no payment against such purchase has yet been made. It is revealed that Mystic has not filed any return for the concerned period and has not yet paid tax. The Bureau of Investigation then sent a notice u/s. 66(1) of the Act asking the Petitioner to reverse the said ITC as was claimed in its return. The Petitioner has failed to throw any light as to whether Mystic had taken or has ever contemplated to take any legal action against Petitioner for recovery of such huge sum or part thereof though the Petitioner had acknowledged the said amount as liability in its books of accounts.

The further case of this Petitioner is that the ITC Investigation Unit lodged a complaint against the Petitioner before Enforcement Branch of Kolkata Police and an FIR No. 643 was lodged against all the Directors of the Petitioner Company. It is argued on behalf of the Petitioner that since an FIR has already been lodged the revenue by initiating a fresh enquiry on the same matter by sending notice u/s. 66(1) of the Act, made an endeavor to intervene in the sub judice matter. It is argued that it is the duty of the revenue to compel the selling dealer, M/s. Mystic to perform its statutory obligation and to book it if no tax is paid by the offending selling dealer whom the revenue has given the registration after through enquiry. It is alleged that revenue, instead of accusing M/s. Mystic like offending selling dealer, is shifting its burden to the bona-fide purchasing dealer who is being held responsible and is being

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deprived of its legitimate claim of reimbursement of ITC.

(b) Automate Electro Engineering Co. Ltd.- RN-977/2017. This Petitioner too made purchases from the same M/s. Mystic for Rs. 13,21,44,686/- involving an ITC Rs. 62,92,604/-. This company has claimed that out of the total purchases made from M/s. Mystic it had paid Rs. 4,85,25,00/- to M/s. Mystic and had admitted to hold back the remaining sum of Rs. 8,36,19,686/- like M/s. Samvijoy Power and allied Industries Ltd,. This Petitioner company has challenged the constitutionality of section 22(4A) of the Act. on the self same grounds taken by M/s. Samvijoy Power and allied industries Ltd., the Petitioner No.1 above.

By filing another application being CAN-808/19 this Petitioner has challenged the constitutional validity of Rule 19(8) of the WB VAT Rule 2005 which has already been disposed of by this Tribunal.

This Petitioner like the Petitioner No.1 has admitted that due to various disputes over quality of goods, it did not pay Rs. 8,36,19,686/- to M/s. Mystic but declared this amount as unpaid liability in its Books of Accounts. The Petitioner has claimed that it, on good faith entered into the business transactions with M/s. Mystic and since M/s. Mystic is a registered dealer acknowledged by the State it had no occasion or obligation to suspect the intention of M/s. Mystic who did not deposit the tax as per provision of the Act. The Petitioner has claimed that it fully cooperated with the investigation conducted by ITC Investigation Unit (in short IIU) but the revenue instead of initiating legal proceedings against M/s. Mystic for not depositing corresponding taxes with government exchequer, is illegally and arbitrarily insisting upon the Petitioner to pay the said tax and is depriving the Petitioner of ITC u/s. 22(4A) of the Act for no fault of its own. It is argued that the revenue being armed with section 22(4A) of the Act is shifting the burden on the purchasing dealer who is not empowered to seek any documents from the selling dealer other than the tax invoices against the purchases. According to the Petitioner, it is not possible for purchasing dealer to monitor the activities of the selling dealer and denial of legitimate claim of ITC for the misdeed of the selling dealer on which the purchasing

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dealer has no control, is totally unjust, arbitrary and violative of section 14, 19 and 21 of the constitution of India and therefore, this section 22(4A) of the Act be declared ultra-vires.

(c) Fiddle Iron & Steel Pvt. Ltd.- RN-1531/18. This Petitioner was selected for audit u/s. 43 of the VAT Act for the returns submitted for period 4 Q.E ending 31.03.16. It is alleged that the revenue has disallowed the claim of ITC to the tune of Rs. 21,93,860/- on the ground that the selling dealers had not disclosed the sale in its return though the Petitioner had admittedly produced the tax invoices, challan and evidence of payment in support of the said claim of ITC. It is submitted that the selling dealers have also raised no dispute with regard to the tax invoices issued in favour of the Petitioner or the payment received by them from the Petitioner. The Petitioner company has therefore, prayed for declaring section 22(4A) of the VAT Act as unconstitutional, ultra- vires against the principle of natural justice.

(d) Radha Enterprise & Anr. – RN-253/20. This Petitioner filed returns for the period 4 Q.E ending 31.03.2017 and the same were summarily assessed u/s. 47AA of the Act. but subsequently the Revenue issued the notice for assessment u/s. 46 of the VAT Act in form 25 on the ground that the Petitioner had claimed unauthorized ITC during the said period. The Petitioner's case is that the Petitioner company purchased goods from VSP Udyog Pvt. Ltd. and had produced tax invoices, challans and evidences of payment in support of those purchases but the Revenue disallowed the claim of ITC to the tune of Rs. 15,58,761/- on the ground that the selling dealer did not disclose the corresponding sale in their return. The Petitioner company has claimed that there is no dispute form the end of selling dealer with regard to tax invoices issued, collection of tax and payment received by them from the Petitioner. It is alleged that VSP Udyog Pvt. Ltd. sold goods worth Rs. 5,96,22,411/- to the Petitioner and collected tax of Rs. 28,39,154/- from the Petitioner as an agent of government but subsequently the assessing authority found that VSP Udyog Pvt. Ltd. showed much lesser amount as sales to the Petitioner in their return. It is submitted that ITC cannot be disallowed merely on the ground that the selling dealer had filed Nil return or not shown corresponding sale if the same is covered by tax invoices, payment evidence and entry of Books of Accounts which in the instant case were duly

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produced by the Petitioner.

(e) M/s. J.J. House Pvt. Ltd. RN-743/19 . This Petitioner made purchases from one M/s. P.H. Jewels during the period 2016 -2017 and had claimed ITC of Rs. 1,19,23,178/-. It is dis-allowed by the Revenue on the ground that the vendor M/s. P.H. Jewels in its return did not show any sale to the Petitioner in its return. It is argued by the Petitioner that the Revenue cannot dis-allow the claims on such ground especially when the same is covered by the tax invoices, payment evidences and entries of books of accounts. It is submitted that the selling dealer raised tax invoices on the Petitioner and the Petitioner paid to the selling dealer by cheque. It is alleged that the Revenue made no effort to verify the books of accounts of the selling dealer to ascertain if M/s. P.H. Jewels had actually sold the goods to the Petitioner. By drawing an analogy of section 9(2) (g) of the Delhi VAT Act which according to the Petitioner is similar to the impugned section 22(4A), it is argued that in case of failure of selling dealer to deposit tax, the Revenue is free to proceed against the said defaulting dealer but cannot deny the purchasing dealer of its legitimate claim as held by Hon'ble Delhi High Court affirmed by Hon'ble Supreme Court. By submitting a supplementary affidavit the Petitioner has claimed that section 22(4A) of the Act is violative of Article 14 of the constitution and therefore be struck down.

5. (i) We are now inclined to divide these five cases into two categories. The selling dealer of Petitioner No. 1 (M/s. Samvijoy Power) and that of Petitioner No. 2 (Automate Electro Engineering Co. Ltd.) is same namely M/s. Mystic. Here both this Petitioner No. 1 & 2 claimed ITC for the purchases made from M/s. Mystic but admittedly had not yet made full payment to M/s. Mystic against those purchases. Investigation conducted by the Revenue has revealed that M/s. Mystic is a shadowy company and did not file any return showing deposit of tax against the corresponding transactions of the Petitioner No. 1 & 2. The Revenue cancelled the R.C of M/s. Mystic on 16.10.15 and dis-allowed the claim of ITC of the petitioner no. 1 & 2 u/s. 22(4A) of the Act.

5. (ii) the Petitioner No. 3 (Fiddle Iron & Steel Pvt. Ltd.), No. 4 (Radha Enterprise) and Petitioner No. 5 (M/s. J.J. House) belong to second category. Here the Petitioners have claimed to have produced the tax invoices, Challans and evidence of payments made to their respective selling dealers and those selling dealers have not raised any dispute with regard to tax invoices issued in favour of the Petitioners and payment received by them from the

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Petitioners. However, claims for ITC were dis-allowed U/s. 22(4A) of the Act as the selling dealers either filed NIL return or did not deposit taxes corresponding to the sales made to the Petitioner.

6. Ld. Adv. Mr. A. K. Dugar, appearing for Petitioner No. 3 & 4 has submitted that in the White Paper prepared by the Empowered Committee formed for implementation of VAT law, did not utter a single word that ITC will be admissible only when the selling dealers will pay tax on corresponding sales. He submits that had it been the intention, it would have found place since inception that is w.e.f from 01.04.2005 instead of w.e.f 01.04.2015 by way of amendment. Mr. Dugar, has argued that ample powers are given to the authority in section 54 to section 60A, 93 and 94 of the WB VAT Act to realise the unpaid taxes from the offending selling dealer but the Revenue officials, instead of taking recourse of those sections, are fastening liability upon the bona fide purchasing dealers who have already produced tax invoices and payment evidences and are depriving them of their legitimate claim for no fault of their own.

7. Ld. Adv. Mr. Dugar, has further submitted that Revenue, as Principal grants registration to a dealer as its Agent after thorough enquiry and after fully satisfying itself that the dealer is a bona fide dealer as per section 23/24 of the VAT Act and also sometimes on furnishing of security u/s. 26 of the Act. He submits that since the State grants registration to a dealer after taking so many measures to safeguard its interests, and the purchasing dealer enters into business transaction with that registered dealer on good faith, the State, thereafter, cannot take the plea that it has no obligation to realise tax from the offending / defaulting selling dealer who realised tax from the purchasing dealers and issued tax invoices. He submits that in case of non-deposit of tax by the selling dealer as Agent, the State as Principal should take action against the said agent and the innocent purchasing dealer being 3rd party cannot be involved and penalized. Ld. Adv. Mr. Dugar, has reiterated that chapter -XIV of the Act deals with offence and penalty in various eventualities enumerated there in. He submits that as per section 31, 32,33 of the VAT Act a dealer is duty bound to pay taxes, furnish return and is liable to pay interest for non-payment or delayed payment of taxes. Mr. Dugar, wonders that when Revenue is armed with so much power to regulate and supervise the conduct of a registered dealer, how can it abdicate its responsibility of realizing the unpaid tax from the offending selling dealer who collected taxes from the purchasing dealer but not shown the same in their return and not deposited the same in the treasury.

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8. Ld. Adv. Mr. Dugar, has reiterated that the impugned section 22(4A) of the VAT Act has treated innocent purchaser and purchaser in connivance with selling dealer (shadowy or otherwise) equally and the Revenue officials taking umbrage of this section are not taking any pain to distinguish the bona fide purchaser from offending seller by holding necessary enquiries to book them and are simply dis-allowing the legitimate claim of ITC of the innocent purchaser and in this way punishing them instead of giving them any protection. He submits that section 22(4A) has rather given a tool to the careless revenue officials who instead of persuing recovery of tax payable on sale effected by selling dealer despite ample power given to them, are fastening the said liability to the bona fide tax paying purchasers which is unjust unreasonable and unconstitutional in the absence of any mechanism for obtaining information as regards the seller's activity.

9. Ld. Adv. S.S. Sengupta, has argued like Mr. Dugar, that since section -98 treats the return confidential it is not possible for a purchaser to ensure that the selling dealers deposit the said tax, so collected from the purchasing dealer to the State exchequer or shows the same in its return. He submits that since transaction valued less than Rs. 50,000/- are not disclosed in the annexure to the return, the purchasers in those cases cannot be denied of ITC. He submits that there is no preamble in the notification issued for insertion of the impugned section and no guiding principle or policy for making any classification in between bona fide purchaser and offending selling dealer is mentioned in the statement of objects and reasons.

10. Mr. Sengupta, Ld. Adv. for the Petitioner No. 1 & 2 has further submitted that the State by granting registration to the offending selling dealer is inducing the innocent dealer to enter into business transaction with those selling dealer and therefore, State by enacting section 22(4A) cannot impose additional burden upon the purchaser to monitor or control the conduct of the defaulting selling dealer nor can it deny the ITC of the innocent purchasing dealer for the mischief of the selling dealer. Mr. Sengupta, has further submitted that a seller may be debarred from paying tax for many reasons apart from deliberate non-deposit of tax even after collecting the same from the purchaser by issuing tax invoices. He submits that the impugned section has not contemplated the situation when the R.C is cancelled but restored after 6 years and in the intervening period no return was submitted and thus depriving the purchasers of its ITC. He reiterated that the impugned section is treating both the unequals i.e innocent purchasers and defaulting seller equally and by disallowing ITC of the purchaser for

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the fault of the selling dealer it is rather rewarding the selling dealer by letting them scot free.

11. Ld. S.R Mr. A. Chakraborty, in his elaborate written argument has repeatedly mentioned that the purpose of insertion of the impugned section 22(4A) through amendment is to prevent the drainage of State Exchequer caused by unscrupulous traders. He submits that the very purpose of augmentation of revenue for which the VAT scheme has been introduced is frustrated when the purchasing dealer is claiming ITC but the said tax is not deposited by the selling dealer. According to him such incidents are increasing when unscrupulous traders, after opening fake companies are indulging in issuance of false tax invoices on the basis of which the ITC is being claimed and in this way State Exchequer is depleting. He submits that the legislature while introducing VAT scheme in 2005 could not contemplate such situation but when it is experienced that huge amount of revenue is being drained out in this way, the impugned provision is enacted only to plug the said loophole. He submits that the right to claim ITC is not a fundamental, constitutional or common law right but is merely a concession given to the traders on fulfillment of some conditions. He argues that the right to ITC, since originated from a statute, is dependent on all other conditions imposed by other provisions of that statute and the traders once registered under this statute, cannot say that he will take beneficial part of the right but not the onerous part of the conditions.

12. Ld. S.R Mr. Chakraborty, has further submitted that perspective of judging the constitutionality of a legislature dealing with economic matter is quite different from that of the other matters dealing with fundamental rights and liabilities of the citizen such as freedom of speech, religion etc. Mr. Chakraborty, has submitted that the main purpose of the impugned section is to protect the Revenue against clandestine transactions resulting in evasion of tax and therefore, even if two views comes out, one making the statute constitutional and other making it unconstitutional, the former view is to be considered with greater latitude. Ld. S.R has argued that the impugned section may cause some hardship to some innocent purchasers or may increase the burden of some trader but a statute cannot be invalidated merely on such grounds. Mr. Chakraborty, submits that collection of tax is the onerous duty of the State and while setting up mechanism for such collections, if it is found that existing mechanism is being misused resulting in the depletion of State Exchequer, the State has the onerous duty to enact new provision to set the system right.

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WEST BENGAL TAXATION TRIBUNAL
Compared with the original
Date 27/7/24 Signature Authorised Officer

Deputy Registrar (Judicial)
West Bengal Taxation Tribunal
Bidhannagar, Kolkata-700091
27.07.24

13. Citing the first category of cases (RN-979/17 and RN-977/17, the Petitioner No. 1 & 2 respectively) as glaring example, Ld. S.R has submitted that M/s. Mystic, from whom the Petitioners have claimed to have made purchasers, is, after enquiry, found as a non-existing shadowy company and the petitioners have admittedly made no payment to M/s. Mystic but claimed ITC on the plea that they have shown the same in their books of accounts. M/s. Mystic being a shadowy company for obvious reason has not submitted any return and has not deposited any tax in the treasury. Ld. S.R has submitted that had the impugned section 22(4A) not been introduced, the petitioners would have got the ITC legally despite the fact that the petitioner made no payment including tax to M/s. Mystic for the purchasers purportedly made and no tax has yet been deposited in the State coffer.

14. As regards the argument that the State as 'Principal" after granting registration to the selling dealer as its 'Agent' must realise unpaid tax from the defaulting selling dealer and the purchasing dealer as third party cannot be involved and be denied of ITC and be punished for no fault, nor can the innocent purchasing dealer be burdened with additional trouble of filing of Civil Suit for recovery of unpaid tax from the defaulting selling dealer, Ld. S.R has replied that every business establishment encounters myriad kinds of risk and the purchasing dealer while entering into business contract with the selling dealer for business transactions is supposed to take all kinds of risk of pecuniary liability including that of non-deposit of tax by the selling dealer as collateral risk. Ld. S.R submits that the purchasers cannot deny to bear this risk merely because the State has granted registration to the defaulting selling dealer. Ld. S.R submits that a Statute cannot be held unconstitutional merely because the purchasing dealer is to take additional precaution before entering into a contract with selling dealer. He submits that relation in between the State and a registered dealer cannot be described as a relation in between 'Principal' and 'Agent' as suggested by the Ld. Adv. for the Petitioners, nor can the State be held responsible for non-deposit of tax by the selling dealer. He argues that the purchasing dealer since applied registration voluntarily under WB VAT Act for getting the benefit of ITC cannot say that he will not abide by the other conditions which are mandatory for enjoying the said benefit. If a dealer wants to avail the benefit he has to take it warts and all.

15. Now before judging the constitutionality of Section 22(4A) with reference to the

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Judgements cited by both the parties let us discuss about the impact of this section in various circumstances where claim of ITC has been dis-allowed for non-deposit of tax by selling dealer.

(i) purchasing dealer paid taxes and got tax invoices in a genuine transaction but the selling dealer's R.C was cancelled and no return was submitted and hence ITC of purchasing dealer has been dis-allowed.

(ii) Purchasing dealer claimed ITC but on enquiry it is found that the fake tax invoices were issued by a fake selling dealer and collusion in between them is established.

(iii) Purchasing dealer paid taxes in genuine transactions but the selling dealer after collection of taxes did not deposit and went underground.

(iv) Purchasing dealer paid taxes in genuine transaction, collected tax invoices but the selling dealer failed to submit return showing those transactions as in case of petitioners no. 3,4 & 5.

(v) Purchasing dealer claimed ITC on the purchases made but has not made any payment to selling dealer due to some litigation in between them and therefore, selling dealer did not show in its return.

(vi) Purchasing dealer claimed ITC but admittedly has not made any payment but showed the said payment in its books of accounts and it is found that the selling dealer is a fake shadowy establishment as it is in case of petitioner no. 1 & 2.

(vii) Purchasing dealer claimed ITC after genuine transaction but the selling dealer did not submit return in time as it got extension of time for filing return from the Commissioner u/s. 32 of W.B VAT Act.

16. Ld. Adv. Mr. S.S. Sengupta, and Mr. A.K. Dugar, in support of their argument have mainly relied on the Judgement namely Aparici Ceramica and Ors. V.S. Commission of Trade and Taxes Delhi and Ors. (Aparici) (MANU/DE/3348/2017) on Delhi VAT Act 2004. Section 9 (2)(g) of DVAT ACT is to some extent similar to the impugned section 22(4A) of the WB VAT Act. Section 9(2) of DVAT Act sets out the conditions under which ITC would not be allowed as specified in sub-clauses (a) to (g). Section 9 (2) (g) of DVAT Act reads as *"(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*

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adjusted against output tax liability and correctly reflected in the return filed for the respective tax period". Hon'ble Delhi High Court has been pleased to "read down" this section holdings that the expression "dealer or class of dealer" occurring in section 9(2)(g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transaction with validly registered selling dealer who have issued tax invoices in accordance with Section 50 of the Act where there is no mis-match of transaction in Annexure-2A & 2B.

17. In paragraph no. 33 of the Judgements (Aparici) Hon'ble Delhi High Court held *" Indeed, what Section 9 (2) (g) of the DVAT does give the Department a free hand in deciding to proceed either against the purchasing dealer or the selling dealer or even both when it finds that the tax paid by the purchasing dealer has not actually been deposited by the selling dealer with the Government or has not been lawfully adjusted against the selling dealer's output tax liability and correctly reflected in the return filed by such selling dealer in the respective tax periods. It uses the phrase, "dealer or class of dealers" which could include either the purchasing dealer or the selling dealer. In the situation envisaged by Section 9 (2) (g) itself, clearly the defaulting party is the selling dealer. He has collected the VAT from the purchasing dealer and failed to deposit it with the Government or failed to lawfully adjust it against his output tax liability and has failed to correctly reflect that in his return. For all these defaults committed by the selling dealer, the purchasing dealer is expected to bear the consequence of being denied the ITC. It is this that is being questioned as violative of Article 14 of the Constitution".*

18. Hon'ble Delhi High Court in Paragraph No. 41 of the said Judgement opined *" The Court respectfully concurs with the above analysis and holds that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Alternatively, what Section 9 (2) (g) of the DVAT Act requires the purchasing dealer to do is that after transacting with the selling dealer, somehow ensure that the selling dealer does in fact deposit the tax collected from the purchasing dealer and if the selling dealer fails to do so, undergo the risk of being denied the ITC. Indeed Section 9 (2) (g) of the DVAT Act places an onerous burden on a bonafide purchasing dealer."*

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19. Ld. Adv. Mr. Sengupta, has submitted that in the instant case too the purchasing dealer has no control over the activity of the selling dealer and purchasing dealer cannot be asked to do the impossible. He also submits that the interest of the honest purchasing dealer are not being protected from the act of non-compliance of selling dealers and purchasing dealers cannot be punished for the fault of the selling dealers. He argued that there is no rational classification and therefore, the impugned section 22 (4A) should be struck down as reading down of the said Section is not possible. Ld. S.R Mr. A. Chakraborty, has argued that there is material difference in between Section 22(4A) of W.B. VAT Act and Section 9(2) (g) of DVAT Act. By distinguishing the facts and circumstances of Aparici(Supra) Mr. Chakraborty, has submitted that Hon'ble Delhi High Court while reading down Section 9 (2) (g) of the DVAT Act was much influenced by the lack of means to ascertain failure by seller. By comparing section 98 (3) (j) of the DVAT Act with section 98(3) (c) of WB VAT Act, Ld. S.R has submitted that the purchaser in West Bengal has additional means to ascertain the failure by the seller and if a purchaser, claiming ITC requests the authority for disclosure of information as to whether the selling dealer actually showed the sale and paid tax, the purchaser in West Bengal, unlike their counter parts in Delhi can easily get the information from the authority under section 98(3) (c) of WB VAT Act whereas the purchaser in Delhi do not get such information so easily because of Section 98(3) (j) of DVAT Act which is envisaged to maintain confidentiality more strictly.

20. Ld. S.R has submitted that the decision in Aparici (Supra) is also not applicable in the instant case in view of absence of any provision like section 40A of DVAT Act. He submits that the Commissioner of Delhi under section 40A of DVAT Act enjoys unbridled power to declare any agreement null and void and to increase or decrease in the amount of tax payable to person if he is satisfied that the said agreement has been entered to defeat the intention and application of the Act. But in the WB VAT Act the Commissioner is not empowered to take such strict action abruptly even after coming to the conclusion that the dealers have colluded with each other to raise fake claims of ITC. By referring paragraph 4.6 of the Judgement Aparici(Supra) Ld. S.R has submitted that in Maharastra VAT Act, 2002 too there is no section like 40A of DVAT Act and for that reason Hon'ble Delhi High Court has distinguished the decision of Hon'ble Bombay High Court in Maha Laxmi Cotton Ginning Pressing & Oil Industries (Maha Laxmi) wherein the constitutionality of Section 48 (5) of MVAT Act 2002 has been upheld.

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21. By referring paragraph 46.3 of the decision Aparici (Supra) Ld. S.R Mr. Chakraborty, has further submitted that the Hon'ble Delhi High Court took the decision in the given circumstances where there is no mis-match in between the purchases claimed by the purchaser disclosed in Annexure-2A of his return and the sales claimed by the selling dealer disclosed in Annexure- 2B of the seller's return. But in the instant case under consideration some of the cases involved sales- purchase mis-match, some because of non-filing of return which is equivalent to mis-match. Ld. S.R has argued that because of existence of mis-match, the ratio of Hon'ble Delhi High Court Judgement is not applicable in the instant case.

22. As regards the argument of the petitioner on purchaser's inability to control or to anticipate the future activity of the selling dealer, Ld. S.R has given an example of inter State sales when the seller after selling their goods to the purchasers of different State, wait for declaration Form C to be filed up and signed by the purchasers before claiming concessional rate of tax. He submits that for failure of purchaser to furnish Form C, seller has to pay extra amount of balance tax. He argues that in such case, the sellers never pleaded the provision of concessional rate u/s. 8 (1) of CST Act 1956 as unconstitutional in view of lack of control over the purchaser to compel him to supply such Form C. Mr. Chakraborty, by citing the Judgement in case of M/s. Reebok India Company V.S H. Rehanulla of Hon'ble Delhi High Court has submitted that a seller in such case has remedy to file a Civil Suit for recovery of extra amount by way of a money decree. Ld. S.R contends that the remedy lies in filing a Civil Suit was not argued before the Hon'ble Delhi High Court and for this reason too, the decision in Aparici (Supra) cannot have any persuasive authority in the instant case.

23. Ld. S.R has further submitted that the impugned section 22(4A) does not expect that the purchasing dealer will wait for claiming ITC till the selling dealer files return and pays tax. He submits that in the existing system the purchaser is entitled to claim ITC in his return anticipating that the seller will fulfill his statutory obligation. There is a time lag between preference of claim of ITC by filing return and allowance of ITC by an order of assessment and during this intervening period if the purchaser, through departmental information or otherwise, comes to know that there is mis-match or non filing of return by the seller, then only the purchaser is to take legal action against the seller. He submits that law is not prohibiting the purchasing dealer from claiming ITC but the law requires him to confront and sue the seller for enforcement of contract in between them on which

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the State has no control or role to play. Ld. S.R contends that when the dealers, both registered under WB VAT Act, enter into a business transaction, it is impliedly agreed that both will abide by all the terms and conditions of the Act and deposit of tax with the State exchequer after collecting the same from the purchaser is one of those implied terms of the agreement in between them and since this agreement is independent of any role or intervention of the State, the purchaser, later in the event of non-deposit of tax by the seller, cannot expect the State to be responsible for the failure of the seller nor can the purchaser abdicate its responsibility to enforce compliance of the terms of the agreement by defaulting seller merely for the fact that the State has granted registration. Ld. S.R submits that the purchasing dealer in this regard has enough control over their sellers and the impugned section is not at all expecting the purchaser " to do the impossible" as observed by Hon'ble Delhi High Court in Aparici (Supra), the facts and circumstances of which is quite different from that of the instant case.

24. Ld. Adv. for the Petitioner Mr. S.S. Sengupta by referring the decision of Hon'ble Bombay High Court in the matter Maha Laxmi Cotton Ginning Pressing & Oil Industries (Supra) has submitted that the Hon'ble Bombay High Court held the constitutionality of section 48 (5) of BVAT Act valid after making a harmonious construction of section 48(2) of that Act, which gives an opportunity to the purchasing dealer to obtain a certificate from the selling dealer that the selling dealer's R.C is valid and due tax has been or shall be paid. Mr. Sengupta contends that in W.B VAT Act there is no section like 48 (2) of BVAT Act and therefore, the purchaser under WB VAT Act has no power to supervise the Status of paymet or to enforce payment of tax by the seller. He submits that the Hon'ble Bombay High Court held the section 48(5) constitutionally valid after making harmonious construction with section 48 (2) of MVAT Act but since in WB VAT Act there is no such section the decision in the matter of Mahalaxmi (Supra) will not come to the aid of the State.

24. Ld. S.R Mr. Chakraborty, opposing the above has submitted that a certificate from seller containing an undertaking as regards payment of tax does not provide any additional right like supervisory power or control over the future conduct of a seller. Mr. Chakraborty, submits that as per WB VAT Act a seller, even in the absence of certificate as prescribed in section 42(8) of MVAT Act, is under legal obligation to file return showing the sale and paying tax thereon. He contends that non-issuance of certificate

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does not take away any power from the purchasing dealer to sue the defaulting selling dealer nor does it give the said registered selling dealer any opportunity to deny its obligation to deposit tax. Ld. S.R contends that it is futile to assume that Hon'ble Bombay High Court in the matter of Mahalaxmi (Supra) held the section 48(5) of MVAT Act constitutionally valid only for existence of section 48 (2) of that Act as argued by Mr. Sengupta.

26. As regards the argument advanced by Mr. Dugar that the State as Principal must be directly accountable for the lapses of the selling dealer who its Agent, Ld. S.R by referring paragraph 18, 19 and 20 of the Judgement of Mahalaxmi (Supra) has submitted that a purchaser is not duty bound to pay tax, he is concerned only on the total consideration amount which he is prepared to spend for the goods and it is only the seller who is accountable to the State for deposit of tax on sale price. He submits that a seller may sell his goods at loss or at a profit and accordingly he fixes the sale price after adding tax payable to the State for that transaction. As such Ld. S.R contends that the analogy that the seller is collecting the tax from purchaser for depositing the same to the State Exchequer and therefore, the seller is the Agent to the State is erroneous. He contends that a seller has legal obligation to pay on sales, be it after collecting the same from the purchaser or from his own pocket and therefore, a seller never acts as a collecting agent of the State as held by Hon'ble Bombay High Court in the decision Mahalaxmi (Supra).

Decision with reasons

27. Ld. Adv. for the Petitioners mainly relied upon the decision of Hon'ble Delhi High Court in the matter Aparici (Supra) wherein the section 9 (2) (g) of DVAT Act has been read down. The factors which influenced the Hon'ble Court to take such decision are mentioned in paragraphs no. 30, 31, 32 and 34 of the Judgement. The purchaser under DVAT Act has little access to the return filed by the seller as per section 98 (3) (j) of the Act, unlike section 98 (3) (c) of the WB VAT Act which gives wide power to the Commissioner to divulge information about seller's return easily if asked for.

Section 93 (3) (j) of DVAT Act reads as follows:-

" nothing in this section shall apply to the disclosure :

(j) for any information relating to a class of dealer or class of transaction if in the opinion of the Commissioner it is desirable in the public interest to publish such information".

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Section 98 (3) (c) of WB VAT reads as follows:-

" nothing in this section shall apply to the disclosure of any particular referred to in sub-section (i) :

(c) where it is necessary to make such disclosure for the purpose of the Act".

On reading both the above sections we find it palpably clear that the confidentiality clause of DVAT Act is more strict and the Commissioner before giving order for disclosure of seller return must satisfy himself if such disclosure is necessary for public interest. But the Commissioner under WB VAT Act while giving order for disclosure of seller's return does not face such difficulty like his counterparts as there is no prohibition on disclosure and therefore the purchasers in W.B can easily obtain such information unlike their counterparts in Delhi.

Such strict confidentiality clause of DVAT Act has also influenced the Hon'ble Delhi High Court in the decision of Shanti Kiran India Pvt. Ltd. V.S Commission of Trade and Tax Department (MANU/DE/0058/2013) where Hon'ble Court in paragraph -12 of the Judgement has been pleased to observe ..... *" This Court is of the opinion that in the absence of any mechanism enabling a purchasing dealer to verify if the selling dealer deposited tax, for the period in question, and in the absence of notification in a manner that can be ascertained by men in business that a dealer's registration is cancelled (as has happened in this case) the benefit of input credit, under Section 9(1) cannot be denied. Furthermore, this Court notices that the cancellation of both selling dealers' registration occurred after the transactions with the appellant."* In West Bengal the purchasers can easily get all the information about the selling dealer and therefore, the view taken in Shanti Kiran (Supra) is not applicable in the instant case.

28. The decision in Aparici is much influenced by section 40 (A) of the DVAT Act which postulate that if the Commissioner is satisfied that the agreement between the dealers has been entered into to defeat the purpose of the Act, he can declare the said arrangement void " so as to counteract" any tax advantage obtained by that dealer under that arrangement. Hon'ble Delhi High Court by mentioning this section has opined that department is not helpless if the selling dealer defaults and this section empowers the department to proceed to recover the tax. But in WB VAT Act there is no such section which could have empowered the Commissioner

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to declare any such transaction void and to initiate proceeding to recover tax. We do not agree with the submission of Ld. Adv. A. Dugar, that the Commissioner in West Bengal is similarly equipped and empowered u/s. 93 (4)(a) of the WB VAT Act. We agree with the submission of Ld. S.R that the decision in Aparici from this point of view too is not applicable in the instant case.

29. The petitioner no. 1 Samvijoy Power & Alied Industries and No.2 M/s. Automate Electro Engineering Co. Ltd. have claimed ITC on the purchases claimed to have made from the M/s. Mystic though admittedly no payment has yet been made to M/s. Mystic for the purported purchases. Later, on enquiry it was revealed that M/s. Mystic is a shadowy company, the Director of which came from very modest means earning mere Rs. 6,000/- only per month as salary. Those Directors in writing have admitted that there was no sale or purchase but only papers were made to be signed by the persons who floated that shadowy company. That the M/s. Mystic is a shadowy company floated only to claim false ITC in connivance with the Petitioner no. 1 & 2 is further established when we find that M/s. Mystic has not yet taken any legal action against the petitioner no. 1 & 2 for withholding as much as Rs. 26 crores and such conduct on the part of M/s. Mystic is unbelievable and suspicious. Later R.C of M/s. Mystic was cancelled and since no return was filed by M/s. Mystic showing the statement of tax deposited for corresponding sales, the claim of ITC was rejected u/s. 22(4A) of the WB VAT Act and the Petitioner no. 1 has been asked to reimburse the ITC already availed.

Having considered these facts we are in agreement with Ld. S.R that insertion of section 22(4A) was an imminent necessity to put a check on drainage of State revenue.

30. The decision in Aparici (Supra) was based on a given circumstances when there was no mis-match between Annexure-2A (purchaser's return disclosing purchases) and Annexure-2B (seller's return disclosing sales). Hon'ble Delhi High Court in Aparici has not negotiated any other circumstances such as non-filing of return by the seller or the sellers have already gone underground or were found shadowy company as in the case of petitioner no. 1 & 2. We, therefore, opine that decision in Aparici is not coming to the help of petitioner from this point of view too.

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31. As regards the second category of cases i.e, the petitioner no. 3, 4 & 5 the main argument of the petitioners is that the purchasers were not in collusion or connivance with the sellers and hence committed no fault, so cannot be punished. Ld. S. Sengupta has referred paragraph 26 of the decision in Gheru Lal Bal Chand Vs. State of Hariyana & Another (45 VST 195) where Hon'ble Punjab and Hariyana High Court held that ..... *" no liability can be imposed on the principle of vicarious liability. Law cannot put such onerous responsibility on the assessee otherwise....."* On perusal of this Judgement we find that here section- 8(3) of Hariyana VAT Act 2003 was challenged but Hon'ble Court did not declare this section ultravires but has read down the same with the observation that the department must allow the claim once a proper declaration is furnished and in case of any suspicion on genuineness of a certificate or declaration, it is the taxing authority who will examine the same. This observation has however, been distinguished by the Hon'ble Supreme Court in paragraph -55 of the decision in Mahalaxmi (Supra) where in Hon'ble Supreme Court has been pleased to hold that the said Judgement (Gheru Lal Bal Chand) of Hon'ble Delhi High Court ..... *"did not involve a challenge to a provision such as section 48(5) of MVAT Act 2002"*. The impugned section 22(4A) of the WB VAT Act is similar to section 48 (5) of MVAT Act 2002. Hence, we find that the decision in Gherulal (Supra) is not applicable in the instant case. The decision in State of Kerala Vs. Haji K Haji K Kutty Naha and Ors. (MANU / SC/0392/1968) and Kunnathat Thathumuni Moopil Nayar Vs. State of Kerala and Ors. (MANU/SC/0042/1960) as referred by Ld. Adv. S. Sengupta, are equally not applicable in the instant case, in view of the fact that those decisions relate to lack of classification with respect to levy of tax whereas the instant case relates to a facility of ITC the eligibility of which depends on compliance of some conditions enumerated in the provision itself. The facts and circumstances of the decision in the matter of Ram Krishna Dalmia Vs. Justice S.R Tendulkar and Ors. (MANU/SC/0025/1958) where a notification published in exercise of power conferred U/s. 3 of Commission of Enquiry Act 1952 was partly read down, has no relevance in the facts and circumstances of this case.

32. Ld. Adv. S. Sengupta, has relied upon a decision of Hon'ble Supreme Court in the matter of Chiranjit Lal Chowdhury Vs. Union of India and Ors. (MANU/SC/0009/1950) and by referring paragraph -92 of the said Judgement has submitted that since there is no preamble in the notification inserting section 22(4A) in the parent Act suggesting that the purchasers will

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be penalised in the event of seller's failure, the impugned section is violative of Article -14 of the Constitution. We have perused the Statement of Objects and Reasons prepared and published on 21.03.03 at the time of placing the WB VAT Bill 20003 as well as the WB Finance Bill 2015 published on 28.02.15 before amendment. We find that the very purpose for introduction of VAT Scheme i.e, to say to abolish the cascading burden of tax, has been clearly explained and the Legislators' intention has been adequately expressed. The concept of allowing Input Tax Credit only when the selling dealer deposit the same in the State Exchequer is the fulcrum of the VAT mechanism. We hold that no additional preamble is required to get the impugned section constitutionally valid in the facts and circumstances of the instant case as it was in the matter of Chiranjit Lal (Supra).

33. Ld. Adv. Mr. A. Dugar, by referring the decision of Hon'ble Jharkhand High Court in the matter of M/s. Tarapore & Co. [W.P. (T) No. 773/18] has submitted that punitive action cannot be taken against the bonafide purchaser by depriving him of his legitimate claim of ITC for the fault of selling dealer. On perusal of this Judgement we find that here the selling dealer has appeared as respondent and had admitted in counter affidavit that the purchases were made by the petitioner from that respondent and VAT was paid but due to circumstances beyond control the respondent could not file its statutory return. Inspite of such admission on the part of the respondent / selling dealer, the revenue dis-allowed the ITC of the purchaser and for that reason Hon'ble Jharkhand High Court allowed the Writ Petition giving proper relief without entering into the challenge to the vires of section 18(8) (xviii) of Jharkhand VAT Act. In the instant case none of the selling dealers have been impleaded as respondent and we are not in a position to know the selling dealer's point of view regarding the claim of the purchasing dealer.

34. It is no doubt a fact that the impugned section 22(4A) after being inserted through amendment has to some extent increased the hardship of the purchasing dealer who are now supposed to be more careful before entering into the contract of business transaction with the selling dealer. But the increase of hardship cannot be a ground for invalidating a provision which deals in revenue matters. Hon'ble Supreme Court in paragraph no. 35 of Mahalaxmi Cotton (Supra) has held *"the Supreme Court observed that the condition on which the concession was granted was mandatory and a liberal view could not be taken merely on the*

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ground that there was hardship to the dealer. Issues of hardship, ruled the Supreme Court, are for the Legislature to consider. In that context, the Supreme Court observed as follows (page 347 in 139 STC):

" We also realise that the section and the rules as they stand may conceivably cause hardship to an honest dealer. He may have lost the something for which he is not responsible but it is for the Legislature or for the rule-making authority to intervene soften the rigour of the provisions and it is not for this Court to do so where the provisions are clear, categoric and unambiguous."

35. We are in agreement with Ld. S.R that the State had no other alternative but to insert section 22(4A) in order to stop drainage of exchequer. In our considered opinion the provision of section-22(4A) is not unconstitutional. we must be cautious in exercising the power of Judicial reviews. Hon'ble Supreme Court in paragraph 41 of the Judgement in the matter of Government of Andhra Pradesh Vs. Smt. P. Laxmi Devi has been pleased to view the following: *" Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is broad separation of powers under the Constitution, and the three organs of the State the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed"*

35. As regards the argument of the Petitioners that the revenue cannot abdicate its responsibility to take punitive action against the defaulting selling dealer, we are of the view that there are several provisions in WB VAT which empowers the revenue to book a defaulting selling dealer and to realise the unpaid tax from him. But such power of revenue does not make a purchasing dealer free from his obligation of taking reasonable care to study the antecedents of a selling dealer before entering into a business transaction, nor does it

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buttress the argument of the petitioner that the ITC of a bonafide purchasing dealer cannot be denied for selling dealer's fault. The purchasers must fulfill the condition imposed for availing of the concession of ITC. Hon'ble Supreme Court in the matter of Jayam & Co. [2016] 96 VST (SC) has been pleased to hold ..... *"It is a trite law that whenever concession is given by the statute or notification etc. the condition thereof are to be directly complied with in order to avail of such concession. Thus it is not right of the dealer to get the benefit of ITC but it is a concession granted by virtue of section 19 (Tamil Nadu VAT Act 2006)".*

37. As regards the argument on the point of impossibility that the bonafide purchasing dealer has no scope to get back the tax which was supposed to be deposited by the selling dealer, Ld. S.R by referring the Judgement dated 09.03.18 of Hon'ble Delhi High Court in the matter of M/s. Reebok India Co. Vs. H. Rehamulla Sarif has rightly argued that the purchasing dealer can file a Civil / money suit against the defaulting selling dealer for realisation of tax which the purchasing dealer was supposed to get back in the form of ITC.

38. Both the Ld. Adv. Mr. S.Sengupta and Mr. A. Dugar, have submitted that there was no necessity to introduce section 22(4A) as there are various other provisions which are adequately empowering the revenue to recover tax from the defaulting selling dealer but it was introduced only to protect the indolent, inefficient Revenue Officials who without proper verification are granting registration to the selling dealer, thus giving them the authority to collect tax from the purchasing dealer and in this way the bonafide purchasing dealer are being duped and deprived of ITC when the selling dealer defaults. The perception behind such submission is that since the State is authorizing the selling dealer to collect tax, the State cannot avoid its responsibility of recovering the same from the defaulting sellers and cannot be allowed to fasten the liability of payment of tax on the purchasing dealer. Hon'ble Supreme Court in the matter of Central wines, Hyderabad etc. Vs. Special Commercial Tax Office etc. [1987 AIR 611] while dismissing the argument of the appellants that the amount collected specifically as tax from the vendee cannot be deemed to be a part of the consideration for the sale of goods and as such cannot form a part of turn over, has opined that the *"sales tax component of sale price charged by the vendor to the vendee is not collected by him as an agent of the revenue (State Government)"*

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It is held that the selling dealer is no doubt required to deposit tax on the sales effected by him and such liability to pay sales tax is analogous to his liability to pay municipality tax or income tax etc. The revenue is not interested to know if the seller while selling goods collected tax from the purchaser or not. But a seller must pay due tax on the sales effected by him. A seller may or may not collect tax from the purchaser, collection of tax from the buyer is seller's choice, not compulsion. A registered seller is not prohibited from selling goods without recovering sales tax from the purchaser. Therefore, a seller, while fixing the total consideration amount for the goods includes the tax with the said amount and fastens himself into the liability to paying tax on the entire consideration amount. A seller may opt for loss by reducing the consideration amount after waiving the collection of tax from the purchaser but he cannot avoid his liability to pay tax on the said consideration amount.

Hon'ble Supreme Court in the decision of Central wine (Supra) has held *" So far as the statute is concerned it does not cast any obligation on the purchaser of the goods to pay any tax and therefore what is collected by the vendor from the vendee by way of consideration for passing the property in the goods to the vendee is the price charged by him and not tax collected by him from the purchaser. The amount of money which goes from the pocket of the vendee to the pocket of the vendor as a condition or consideration for passing of the property in the goods is thus the sale price and not the tax. It is the amount, but for the payment of which, the vendor would not transmit his title to the goods in favour of the vendee, and not any amount paid by the vendee towards any tax liability incurred by him on making the purchase of the goods".*

In view of the above explained principle we are unable to contribute with the submission made by the Ld. Advs. for the petitioner that the selling dealer has been authorized to collect tax from the purchasing dealer and the selling dealer as an agent of the State collect the same on behalf of the State.

39. As regards the argument that the impugned section suffers from want of thorough and proper classification and has resulted in unequals being treated equally and thereby falls foul of Article 14 of the Constitution of India we are inclined to rely upon the decision in the matter of Mahalaxmi Cotto (Supra) where Hon'ble Supreme Court held in paragraph no. 36

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..... *"While dealing with a challenge to the constitutional validity of the provisions of section 48(5) on the ground that it violates article 14 of the Constitution, the court which exercises the power of judicial review, must be conscious of the limitations of judicial intervention, particularly in matters relating to the legitimacy of economic or fiscal legislation. While enacting fiscal legislation, the Legislature is entitled to a great deal of latitude. The court would interfere only where a clear infraction of a constitutional provision is established."*

Hon'ble Supreme Court in the matter of R.K. Garg and Ors. Vs. Union of India has been pleased to clarify in paragraph- 10 of the Judgement in the following manner. *" Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. That the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Dond 354 US 457 where Frankfurter, J. Said in his inimitable style:*

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and

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contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meager and un-interpreted experience." Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."

In view of the principle laid down above we hold that the impugned section cannot be declared violative of Article 14 of the Constitution.

40. Ld. Adv. for the petitioners have divided the purchasing dealers in two groups- one whose selling dealers paid taxes and filed returns and another whose selling dealers have defaulted. According to the petitioners, the impugned section treated both of them equally and bonafide purchaser being different from and unequal to malafide one have not been separated. In our opinion section- 22(4A) does not single out a bona fide purchaser for disallowance of ITC. Classifying them as bona fide and mala fide is not a sufficient factor to declare the impugned section ultra vires. A purchasing dealer is not a consumer or end user. His registration under VAT Act as trader entitles him to the concession of ITC. A trader is a purchasing dealer in one transaction and a selling dealer in another transaction. The said dealer though playing dual role is governed by single Act. Grant of set off is the essence of VAT mechanism which depends on realization of tax. There is no alternative system which can afford the grant of set off to a bonafide purchaser inspite of non-deposit of tax by the selling dealer. The State with limited number of revenue officials is not expected to trace out and prosecute each and every selling dealers for augmentation of revenue. The State coming out wiser after suffering drainage of exchequer had to insert the impugned section 22(4A) by way of amendment and this section is not flagrantly unconstitutional. The registered trader cannot say that he will avail the benefit of ITC but will not abide by the conditions which are mandatory for enjoying the said benefit.

41. As regards the problem raised by Ld. Adv. Mr. Sengupta, that the purchaser will not get ITC against the purchases less than Rs. 50,000/- in one transaction since such transaction are

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not disclosed in the Annexure to the return, we hold that cross-verification of the records of both parties will reveal gross mis-match and the purchasing dealer will come to know the exact amount of tax the selling dealer has failed to deposit and he may take action against the selling dealer by filing Civil / money suit as per contract in between the parties.

42. As regards the argument advanced by Mr. S. Sengupta, that in the event of recovery of tax from the defaulting selling dealers at later date, there is no mechanism by which the reversed ITC collected from the purchasing dealer will be refunded, we are of the opinion that no separate mechanism is required to be evolved. In case of the petitioner no. 1 (Samovijoy Power) the respondent has already informed in writing to the petitioner that such taxes if recovered from the defaulting seller at a later date will be refunded to the petitioner. We also hold it an important responsibility of the State to ensure prompt refund of such taxes realized from the selling dealers.

43. Apart from the prayer for declaration of section 22(4A) as ultra vires the petitioner no. 3 M/s. Fiddle Iron & Steel Pvt. Ltd. has challenged the audit report prepared under section 43 of WB VAT Act on the ground that the said audit as per provision of section 43 (4) of the Act. was not completed within 6 months and there is no whisper in the said report that necessary permission was taken from the Commissioner. On perusal of the audit report we also found no such whisper and the respondent has not mentioned the same in the affidavit in opposition as to whether such permission from the Commissioner was obtained or not. While adjudicating on the constitutionality of provisions of section -22(4A), we direct the respondents to file a written submission, duly supported by relevant documents, if any, within 30th July, 2021 with copy to the petitioner no. 3. This application will appear for further order on 02.08.2021.

44. No tax structure and tax realizing machinery can be completely flawless. People are generally averse to payment of tax and therefore, the Legislature inspite of its best and cautious effort to enact a law which will not infringe any fundamental principles of Constitution often fails to achieve the said goal. What we have to see as watch dog is whether the Legislature after considering all the parameters / repercussions has enacted the provision in order to maintain a balance in between the collection of tax which is prime

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WEST BENGAL TAXATION TRIBUNAL
Compared with the original
Date 29/7/24 Signature Authorised Officer

Deputy Registrar (Judicial)
West Bengal Taxation Tribunal
Bidhannagar, Kolkata-700091
27.07.24

unavoidable task of the State and fundamental principles of equality and equal treatment as enshrined in the constitution. We hold that the State while introducing the impugned section under section 22(4A) of WB VAT Act. through amendment has successfully maintained this balance and therefore we are not inclined to declare section 22(4A) as ultra vires to the Constitution of India and we hold it valid and only workable solution for smooth augmentation of revenue.

45. The application of the Petitioner no. 1, 2 , 4 & 5 are dismissed on contest but without costs. The application filed by the petitioner no. 3 as regards the challenge to constitutional validity of section 22(4A) of WB VAT Act is dismissed. However, the allegation of non-compliance of section 43 (4) of the WB VAT Act in consequence invalid audit report submitted under section 43 of the Act. as raised by M/s. Fiddle Iron (Petitioner no.3) will be heard by this Tribunal later and hence RN-1531 of 2018 is disposed of in part.

sd/-
(Suranjan Kundu)
Judicial Member

sd/-
(C. M. Bachhatwat)
Technical Member

sd/-
(Malay Marut Banerjee)
Chairman

WEST BENGAL TAXATION TRIBUNAL
Compared with the original
Date 27/07/24 Signature Authorised Officer

Deputy Registrar (Judicial)
West Bengal Taxation Tribunal
Bidhannagar, Kolkata-700091
27.07.24