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

Reserved on: 08.07.2020
Pronounced on: 07.10.2020

\+ **S.T.APPL. 1/2020 & C.M. No. 13567/2020**

M/S. IKEA TRADING (INDIA)
PVT. LTD. …Appellant

Through: Mr. P. K. Sahu, Senior Advocate with Mr. Prashant Shukla, Mr. Anuj Bansal and Mr. Anunav Kumar, Advocates.

versus

COMMISSIONER OF TRADE AND TAX,
DEPARTMENT OF TRADE AND TAXES …Respondents

Through: Mr. Ramesh Singh, Standing Counsel (Civil), GNCTD with Ms. Bhawna Kataria, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. By way of this appeal under Section 81 of the Delhi Value Added Tax Act, 2004 [*hereinafter referred to as* **'the Act'**] the Appellant seeks interference of this Court in respect of Stay Order No.41-42/ATVAT/19-20-106-114 dated 27.01.2020 [*hereinafter referred to as* **'impugned order'**] passed by Delhi VAT Appellate Tribunal [*hereinafter referred to as* **'the Tribunal'**], whereby the Appellant has been directed to deposit 10% of the disputed tax demand and interest (amounting to Rs. 12,03,50,412/- and Rs.

8,82,28,495/- respectively) along with 5% of disputed penalty (amounting to Rs. 25,57,46,167/-) involved in the appeal pending before it, for the year 2008-09 [*hereinafter referred to as the* **'disputed period'**].

Brief facts:-

2. The facts of the case, as narrated by the Appellant company in the pleadings are as follows. The Appellant was engaged in local procurement and export of home furnishing products like *carpets, dhurries, fabrics, plastic articles, lamps, soft toys,* etc. It was conferred the status of a 4-Star Export House by the Government of India, and had obtained registration under the Delhi VAT Act, 2004 to meet its statutory compliances. During the disputed period, the Appellant purchased products from a number of domestic vendors situated outside the State of Delhi against Form H in terms of Section 5(3) and 5(4) of the Central Sales Tax Act, 1956 and exported the same to its group companies outside India. All such sales and purchases are outside the tax net in terms of Section 6(1) of the Central Sales Tax Act, 1956. However, the Value Added Tax Officer, Export-Import Cell, Department of Trade and Taxes, Govt. of NCT of Delhi, being the Assessing Authority, [*hereinafter referred to as the* '**VATO'**], issued default assessment notices dated 14.09.2012, for tax, interest and penalty for the disputed period.

3. Ever since, the litigation is continuing at various stages, with matters being remanded to lower authorities on several occasions. As the controversy before us is on a limited aspect, we need not delve deep into the history of the litigation. In sum and substance, this is the second occasion for the Appellant to approach this court in the same *lis*. On the previous occasion, the order of the Special Commissioner, being the Objection Hearing Authority

[*hereinafter referred to as the* '**OHA'**] dated 24.08.2018 was assailed by the Appellant in W.P.(C) No.10576/2018 on the ground, inter alia, of non-application of mind. This Court agreed with the Appellant and, accordingly, *vide* its order dated 12.11.2018, directed the expeditious disposal of the objection by the OHA. The relevant part of the order dated 12.11.2018 passed by this Court is extracted as under:

> *"(…) However, on the merits of the impugned order, the court is of the opinion that the Special Commissioner has not applied her mind to the limited scope of the remand which the first OHA order had required.*
>
> *In these circumstances, the Special Commissioner is directed to decide the issue as expeditiously as possible having regard to the scope of the remand, made by the order of 13.11.2013, by the Special Commissioner while deciding the objection in the first instance against the first assessment order."*

4. In compliance of the above, the OHA had passed an order on 24.06.2019, simply upholding the order of the VATO, offering no findings on the pleas taken by the Appellant. The Appellant submitted that the OHA, while recording the findings, took note of the submissions of Department's representatives, but did not pass a reasoned order. Our attention was invited to para 5 of order of the OHA dated 24.06.2019, which is reproduced herein below:

> *"5. The DR has also made his submission on the impugned orders as well as on the grounds of objection taken by the objector dealer and he has submitted:-*
> *…*
> *VI. Thus, in light of the above stated facts and circumstances and after having perused the assessment order passed on account of tax, interest and penalty and grounds of the objections and written submissions available on record, and also on the non-appearance of the objector and on non-*

production of any material document by the objector, I am of the considered view that the findings tendered by the Assessing Authority in the assessment order is self-explanatory and justified and does not require any sort of interference. Hence, the default assessment order passed by the Assessing Authority under section 32 & section 33 of the DVAT Act on account of misutilization of H Form and its turnover such counts is upheld in accordance with law. Order passed accordingly."

5. The Appellant has now preferred an appeal against the aforesaid order of the OHA before the Tribunal, which is still pending. It was accompanied with an application under Section 76(4) of the Act for stay of recovery of the demand during the pendency of the appeal. This stay application came to be decided by way of the impugned order dated 27.01.2020. The relevant portion of the same is extracted below:

"4. (…) Appellant has challenged the impugned orders on various grounds which are not being discussed here as we are at present disposing of stay application during pendency of this appeal.

…

7. The Ld. Counsel for the Appellant further submitted that there is no difference of net sales between balance sheet and the returns revised on November 16, 2012 and there is no mis-utilisation of Form H by IKEA Trading. These need to be examined when the appeals are taken up on merits.

8. In view of these circumstances, as right to appeal is not an absolute right and is subject to fulfilment of just and reasonable condition to be prescribed by this Tribunal, Appellant is directed to deposit 10% of disputed amount of tax & interest and 5% of disputed amount of penalty within a period of 30 days. On compliance of these orders, let these appeals are fixed for hearing on merit on 20.02.2020."

[Emphasis added]

The Controversy:

6. The impugned order, without considering any of the grounds urged by the Appellant in the appeal, directs the Appellant to deposit a percentage of the demand as a condition for entertaining the appeal. The brief impugned order divulges no cogent reasoning for making the afore-said direction and conspicuously proceeds on the premise that the grounds of challenge – or in other words, the merits of the case – are not required to be considered at the stage of deciding the question of waiver of pre-deposit. This viewpoint of the Tribunal forms the fulcrum of dispute between the parties. Thus, in fact, the scope of the present appeal, lies in a narrow compass. We have to examine the legality of the interim (impugned) order passed by the Tribunal, having regard to the wording of section 76(4) of the Act and the law governing the stay of recovery of tax during the pendency of appeals.

Contentions of the parties:

7. On the basis of the afore-noted factual background, Mr. Sahu, learned senior counsel for the Appellant, submitted that without evaluation and appraisal of facts and circumstances of the present case, the Tribunal, being an Appellate Authority, could not have exercised its discretion as prescribed under Section 76(4) of the Act.

8. Mr. Sahu believes and fervently contends that the Appellant has a strong *prima facie* case in its favour. He urges that it can be easily demonstrated that the demand raised in the assessment proceedings is wholly misconceived and unsustainable in law. The Tribunal has wrongly refused to refer to or consider the grounds urged in the appeal, while deciding the stay application. This non-consideration of factual circumstances, he states,

amounts to non-consideration of one of the main and vital ingredients that are weighed by the courts and the tribunals while deciding a stay application *i.e. the existence of a prima facie case*. On this basis, Mr. Sahu submits that the impugned order is erroneous, unjust and inequitable.

9. Mr. Sahu vehemently argued that a *prima facie* peek into the grounds of the appeal would show that the three grounds on which the Central Sales Tax has been demanded are on a non-taxable transactions. His arguments on these points are summarised below:

(a) He urged that, firstly, the allegation of mis-utilization of Form H is entirely untenable. The VATO observed that the amount shown in Form H, being the amount utilized by the Appellant for procuring the goods free of tax, is different from the amount shown as received by the vendors in the books of accounts, for the goods sold by them to the Appellant. On this ground, it demanded Rs. 1,02,69,755/- as tax payable on the differential amount arising between turnover mentioned in the original returns and the amount found in the books of accounts. This was explained by the Appellant to have arisen on account of deficiency in some goods exported, for which the foreign importers had issued debit notes, effectively reducing the export price. The Appellant, in turn, issued debit notes to the vendors from whom such goods were purchased. The goods were not returned by the foreign importers, only the price was adjusted. The export sales are outside tax net in terms of Section 6(1) of the CST Act. Thus, the entire turnover of the Appellant, regardless of any change in price of export sales, has no taxable consequence. Moreover, the Appellant had subsequently also filed

revised returns to regularize the matter, the same were ignored by the VATO.

(b) Secondly, it was argued, that demand of Rs. 10,88,56,636/- as tax on amounts transferred by the Appellant is entirely baseless and without any logic. The tax has been demanded on the alleged amount of duty drawback received by Appellant from the government, as export incentive, which have been passed on to the vendor with respect to the goods procured from them. This, the Appellant argues, amounts to sale made in the course of export, which is exempted from taxation, and does not amount to domestic sale. Had the defective goods been brought back and sold in India in the course of inter-state sale, it would have resulted in domestic tax, which would have been denied to the revenue. On this illogical basis, the amounts in the debit notes have been assessed as "deemed sale", and tax demand has been made by the VATO.

(c) Thirdly, it was submitted that the demand of Rs. 12,24,021/- on sale of assets is without any evidence on record for such "sales". The VATO had noted that the Appellant had shown loss on assets, which represented the terminal value of the assets that were written off, assets being no longer of any use. He submitted that it is thus apparent that the VATO had mistaken the same as sale of assets and demanded further tax of the same.

10. Mr. Sahu next submitted that the VATO has wrongly imposed penalty under Section 86 of the Act on the tax deficiency determined by him. The penalty under taxation law can be imposed only when assessee has deliberately concealed material particulars in order to defraud revenue, which

cannot be delineated in the present case. The monthly VAT returns filed with the Department as well as annual balance sheets reflect that the Appellant is in regular compliance of the prescribed procedure. Thus, the penalty imposed and confirmed upon the Appellant under Section 86(12) of the Act is bad in law and liable to be set aside.

11. Lastly, Mr. Sahu contended that since the Appellant has a strong *prima facie* case and the demanded amount is *ex-facie* liable to be set-aside in the appeal, insistence on pre-deposit is unjust and inequitable. He further argued that there is no bar for granting relief of stay in favour of the Appellant to the extent of the full amount of tax demand, till the disposal of the appeal pending before the Appellate Authority. On the basis of the aforesaid, Mr. Sahu submitted that there is a non-application of mind on the part of the OHA, which had already once been disapproved of by this Court. He argued that the only difference between the orders of the OHA dated 24.08.2018 and 24.06.2019 is that, in the former order, the OHA had remanded the matter to the VATO, finding the error on its part for not considering the relevant documents and submissions, and in the order subsequent to this Court's order, the OHA has wholeheartedly upheld the VATO's order.

12. Per contra, Mr. Ramesh Singh, learned, Standing Counsel appearing on behalf of the respondent, assisted by Ms. Bhawna Kataria, Advocate, contended that the impugned order is well-reasoned and equitable and called for no interference. He stressed that pre-deposit provisions are to be interpreted strictly based on their wording. In support of this proposition, he relied upon the decision in ***State of Haryana* v. *Maruti Udyog & Ors***, (2000) 7 SCC 348. He submitted that in view of the specific wordings of Section 76(4) of the Act, the merits of the dispute are not required to be gone into by

the Tribunal in the exercise of its discretion while passing such an order. He further argued that, at this stage, the only aspect that is required to be considered is whether irreparable loss or likelihood of prejudice to the public interest is not caused to the State by the order passed under the first proviso to Section 76(4) of the Act, and that the focus has to be on the interest of the revenue alone. The Tribunal is required to justify under the said proviso as to how the order of dispensation of the pre-deposit amount, whether in whole (alongwith the corresponding value of security) or part (alongwith the corresponding value of security of the dispensed amount) is for / against the interest of the revenue. He further argued that under the scheme of the Act, for the purpose of dispensation of pre-deposit, even at the first appeal stage [under the third proviso to Section 74(1)(b)], there is no requirement to go into the merits of the dispute, which has been so interpreted by the Division Bench of this Court in **W.P.(C.) 10265/2019** titled ***M/S Mitsubishi Corporation India Pvt. Ltd. v. Commissioner Value Added Tax and Ors.***, on 10.12.2019.

13. Mr. Singh further argued that the proviso in question does not use the terms '*hardship*' or '*undue hardship*' caused to the Appellant, which clearly indicates that the merits of the dispute are not relevant. To support his contentions, he relied upon ***Bongaigaon Refinery and Petrochem Ltd. v. Collector of Central Excise***, 1994 (69) ELT 193. He further submitted, that absence of the aforesaid phrases also indicates that even financial condition of the assessee is not a relevant consideration under the proviso, and referred to this Court's judgment in ***Schneider Electric India v. GNCTD***, 2007 (139) DLT 35. Without prejudice to the aforesaid, he submitted that if this Court would like to go into the financial health of the Appellant, the finances of the

holding company would also be required to be looked into by invoking the principle of single economic activity and cited the judgment in ***Vodafone International Holdings B.V. v. Union of India and Anr***., (2012) 6 SCC 613 and ***Pankaj Aluminium Industries Ltd. v. Bharat Aluminium Co. Ltd***., (2011) 166 SCC 864.

14. Further, Mr. Singh also submitted that, even assuming the assessee has a good *prima facie* case, the same is not sufficient justification for granting an order of dispensation of pre-deposit, as there is no balance of convenience in favour of the assessee. He submitted, that an order of dispensation can only be passed if there is not even the slightest indication of a likelihood of prejudice being caused to the public interest, and cited the case of ***Assistant Collector of Central Excise v. Dunlop India***, AIR 1985 SC 330. He argued that this Court, while dealing with the present provision in ***Schneider Electric*** (*supra*), has affirmed the principle laid down in the case of ***Dunlop India*** (*supra*).

15. Lastly, Mr. Singh asserted that, before the Tribunal, arguments on the aspect of penalty as well as difference between net sale and misutilisation of Form H were the only arguments. No argument regarding VAT liability of Rs. 10.88 crores *viz-a-viz* drawback amount of Rs.87.08 crore seems to have been made by the Appellant, and hence the question of going into the merit of the dispute *viz-a-viz* the tax liability of Rs.10.88 crores out of the total tax liability of Rs.12.03 crores and corresponding interest amount did not arise.

Analysis and Findings:

16. In view of the above-noted rival contentions of the parties, we are of the considered opinion that the legal aspect pertaining to the scope of enquiry/satisfaction required to be undertaken while exercising discretion

under the Act, is required to be determined first, before we proceed to examine the correctness and legality of the impugned order. Let us briefly take note of the relevant provision, which, for ready reference is extracted herein below:

> *"76 Appeals to Appellate Tribunal*
>
> *(4) No appeal against an assessment shall be entertained by the Appellate Tribunal unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute and any other amount assessed as due from the person:*
>
> *Provided that the Appellate Tribunal may, **if it thinks fit, for reasons to be recorded in writing**, entertain an appeal against such order without payment of some or all of the amount in dispute, on the Appellant furnishing in the prescribed manner security for such amount as it may direct:*
>
> *Provided further that no appeal shall be entertained by the Appellate Tribunal unless it is satisfied that such amount as the Appellant admits to be due from him has been paid."*
>
> [Emphasis added]

17. The first proviso to Section 76(4), gives discretion to the Tribunal to entertain an appeal against an assessment order, without payment of whole or part of the amount in dispute, on the furnishing of security by the Appellant. First and foremost, we must give due regard to the fact that the proviso in question, conferring power to the Tribunal for dispensation, is legislated to be an exception. The main provision puts an obligation on the Tribunal to not entertain an appeal against an assessment order, unless it is accompanied by satisfactory proof of the payment of the disputed amount. This makes the payment of the disputed amount a mandatory condition for entertaining an appeal. However, at the same time, legislature has also conferred discretionary power upon the Tribunal to dispense with the aforesaid

condition, as is evident from the use of the phrase *'if it thinks fit'* appearing in the first proviso. This discretion to entertain the appeal has a wide range, and has to be exercised judiciously, in deserving cases, which is evident from the expression *'for reasons to be recorded in writing'* used therein. This condition is a safeguard mechanism to ensure that the relaxation of the pre-deposit condition is exercised for reasons that are germane to the scope of the power conferred by the statute. The objective behind the requirement of recording of reasons is that it would disclose the rationale of the authority and ensure that exercise of power is not done arbitrarily or for extraneous reasons. It will also ensure that the superior court, while exercising judicial scrutiny, is able to examine whether the tribunal has applied its mind and also discerned if the satisfaction arrived at has reasonable nexus to the facts and the law involved in the case.

18. The guiding principles for grant of stay order, pending disposal of a matter before the concerned forum, have been well-entrenched by way of several judicial pronouncements. It is a settled principle of law that the Courts must consider the *prima facie* merits of the case, the balance of convenience, and the possibility of causing irreparable injury to the parties, while considering an application for grant of stay. However, the revenue contends that the wording of the statute is water-tight and requires the Tribunal to insulate itself from the above, while exercising its discretion for dispensation of the pre-deposit amount. We do not agree. Let's elaborate on this aspect and deal with the case laws cited by the Revenue.

19. The Respondents have placed reliance upon ***Maruti Udyog*** (*supra*), to state that pre-deposit provision is to be interpreted based on strict wordings of the provision. While we agree with the principles set out therein, it is

necessary to point out that the provision under question in ***Maruti Udyog***, being Section 39 (5) of Haryana General Sales Tax Act, 1973, is vastly different from Section 76(4) of the Act under which the present appeal is filed. The Supreme Court in ***Maruti Udyog*** laid emphasis and placed reliance on the meaning of the words *"unable to pay the whole of the amount of tax assessed"* as found in Section 39(5) of the 1973 Act to hold that it refers to the paying capacity and financial position of the Assessee/Appellant and not its legal or actual liability to pay the amount. In this context, it was held that the wording of the section does not give more leeway to the Authority to see the *prima facie* nature of the case. However, the first proviso of Section 76(4) of the Delhi VAT Act, 2004, with which we are concerned at present, is worded in an open-ended manner and does not specifically provide for the consideration of financial inability of the Assessee as a mitigating factor for pre-deposit. Instead, it leaves room for the Appellate Authority/Tribunal to apply its mind and, after recording its reasons in writing, waive some or all of the pre-deposit amount. For these reasons, we are unable to see how this judgment can become an impediment for the Appellant to seek the relief sought in the present appeal.

20. The Respondents have next placed reliance upon this Court's judgement in ***Mitsubishi Corporation*** (*supra)*. This was a case of first appeal, under the third proviso of S. 74(1)(b) of the Act, wherein the OHA had ordered for pre-deposit of 5% of the total demand. Purely on this basis, it can be distinguished from the facts of the present case, and renders no assistance to the case advanced by the Respondent. However, we would like to point out that, in para 3 of the said judgement, it was stressed upon by this Court, that the OHA passed its order for pre-deposit of amount, after looking into the

overall case and the arguments of the Assessee. Thus, as the application of mind on the part of the OHA was easily discernible, this Court was satisfied that the OHA has exercised its discretionary power in a reasonable manner, and decided to not to interfere with its order. The Respondent has mis-interpreted this case to contend that the appellate authority is not to go into the *prima facie* merits of the case at all. Instead, we are inclined to agree with the holding of the ***Mitsubishi Corporation***'s case, that for the purpose of deciding the pre-deposit amount and/or its waiver by any Appellate authority, a *prima facie* case must be considered, and a cursory look at the overall merits of the case would indeed amount to the application of mind by the Appellate Authority. In such a scenario, this court will doubtlessly be circumspect in interfering with the rationale of the Appellate Authority. But, in the present factual matrix, the impugned order is a non-speaking order, and we are therefore unable to agree with the Respondent's contention.

21. Next, the Revenue has placed emphasis upon ***Dunlop India***'s case (*supra*), to argue that even the establishment of a *prima facie* case by the Assessee is not sufficient to justify the grant of stay order against a pre-deposit requirement. However, upon a perusal of this case, it is seen that the case stems from a writ petition filed in the High Court seeking interim stay from deposit of demand in an appeal matter. In this case, under Central Excise and Salt Act, 1944, the company claimed benefit of exemption under the first schedule, but the Department viewed that the company was not entitled to the exemption as it has cleared the goods earlier without paying central excise duty, by furnishing Bank Guarantees under various interim orders of courts. The Supreme Court, in this case, disapproved of the practice of High Courts to grant interim order staying the collection of taxes under writ jurisdiction,

and urged the High Courts to exercise restraint and circumspection, as it is settled principle that a stay should not be granted as a matter of routine, but only in cases where gross violation of law and injustices are perpetrated or about to be perpetrated. In light of the above discussion, the ratio of the ***Dunlop India*** judgement is not applicable to the facts of the present. We would, however, like to quote from ***Union of India v. Oswal Woollen Mills Ltd.,*** [1985] 154 ITR 135 (SC) which was also cited in the *Dunlop India* judgment:

> *"5. (…) All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facia case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to the*

consumer, any interim relief should at all be given to the manufacturer, dealer and the like."

22. The Revenue has next relied upon this Court's judgment in ***Schneider Electric***'s case *(supra),* to urge that even the financial condition of an assessee is not relevant for passing an order under the present proviso, and to place further emphasis on the ***Dunlop India*** judgement which has been heavily relied by the Court herein.

23. The Counsel for the Respondent also relies upon the obiter in para 15 of ***Schneider Electric***'s case to say that even in an enquiry into the *prima facie* aspects of a case, the court may interfere with the impugned order if patently perverse grounds are present – such as lack of jurisdiction, or palpably incorrect / perverse order – and not when the merits of the case are of an arguable nature.

24. We have read the ***Schneider Electric*** judgement extensively. In this case, demand was raised for A.Y. 2003-04 under Section 43 of the Delhi Sales Tax Act, 1975 (later repealed by the Delhi VAT Act, 2004 with effect from 01.04.2005). The Assessee approached the High Court under writ jurisdiction, seeking a stay on recovery of demand till the disposal of appeal by the Additional Commissioner under section 76 of the Act. Let's first note the relevant provision i.e. Sub-sections 5 and 6 of Section 43, which reads as under:

"(5) No appeal against an order of assessment with or without penalty or against an order imposing the penalty shall be entertained by an appellate authority unless such appeal is accompanied by a satisfactory proof of the payment of tax with or without penalty or, as the case may be, of the payment of the penalty in respect of which the appeal has been preferred:

Provided that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order— (a) without payment of the tax and penalty, if any, or as the case may be, of the penalty, on the Appellant furnishing in the prescribed manner security for such amount as it may direct, or (b) on proof of payment of such smaller sum, with or without security for such amount of tax or penalty which remains unpaid, as it may direct:

Provided further that no appeal shall be entertained by the appellate authority unless it is satisfied that such amount of tax as the Appellant may admit to be due from him has been paid.

(6) The appellate authority may, after giving the Appellant an opportunity of being heard – (a) confirm, reduce, enhance or annul the assessment (including any penalty imposed), or (b) set aside the assessment (including any penalty imposed) and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed, or (c) pass such order as it may think fit."

25. Section 43 of the Delhi Sales Tax Act, 1975 is worded almost identically to Section 76(4) of the Delhi VAT Act, 2004. However, a key distinction in the facts of the case, which the Respondent failed to consider, is that while the present case was filed by the Appellant herein as a Sales Tax Appeal, the assessee in ***Schneider Electric***'s case had approached this court under writ jurisdiction, seeking a stay of recovery of demand till the disposal of appeal by Additional Commissioner. In such a scenario, it is a settled principle of law that this court has very limited grounds of enquiry and interference by way of an interim order of stay in a writ petition under Article 226 of the Constitution. It is thus, that reliance has been placed upon ***Dunlop India***'s case which too dealt with a similar factual position. However, in the present instance, the facts of the case before us are vastly different and the

holding of ***Schneider Electric***'s case cannot be applied in the present matter. On the contrary, we are of the opinion that this judgment goes against the revenue on the proposition being advanced before us. ***Schneider Electric***'s case nowhere seems to suggest that the *prima facie* merits of the case advanced by the Appellant are not relevant for arriving at a satisfaction for stay / waiver of the pre-deposit. Emphasis is placed on paragraph 6 of the judgement, which is as follows:–

> *"Thereafter in the context of Section 43(5) of the DST Act Vijay Power specifically held that in exercising the discretion contained in the said provision the concerned authority has only to consider (a) the existence of a prima facie case in favor of the assessed, (b) balance of convenience qua the deposit or otherwise, (c) irreparable loss, if any, to be caused in case stay is not granted and (d) safeguard of public interest. This discretion has to be exercised according to law, reason and justice and not as a result of private opinion or humour or arbitrariness. Moreover, all these factors should coexist as they are of equal importance."*

26. The court had also noted that the Supreme Court in ***Mehsana District Cooperative Milk P.U. Ltd. v. Union of India,*** 2003 (154) ELT 347 (SC), had remanded the case to the Appellate Authority, on the ground that the Appellate Authority did not apply its mind, gave unsatisfactory reasons, and focused only on *prima facie* balance of convenience without addressing the *prima facie* merits of the case, in the impugned order.

27. In para 8 of the ***Schneider Electric*** judgment, the court observed that the Legislature has made a deliberate departure from the appellate system of Customs, Excise and Municipal statutes wherein the provision for appeals calls for deposit as a pre-consideration for the hearing of the appeal, but in Sales Tax or VAT statutes, the mandatory pre-consideration of deposit on the

Assessee/Appellant is only to the extent of tax which is not disputed by it. In this regard, it was noted that:–

> "*The Appellate Authority may thereafter reduce or waive the amounts in controversy and may at best require the furnishing of a security by the applicant/dealer.*"

28. Then in para 9 of the judgment it was observed that: –

> *"While exercising discretion to waive or reduce the tax and penalty challenged by the Appellant, the Appellate Authority must satisfy itself of the existence or absence of a prima facie case set-up by the Appellant, in whose favour the balance of convenience must lie, and who would be visited with irreparable loss unless interim orders are passed; it should always be mindful that public interest or interests of the Revenue are not endangered. So far as the Sales Tax and DVAT Acts are concerned it appears to us that safeguarding the interests of the Revenue is adequately achieved through the requirement of the furnishing of security or a surety."*

29. From the above discussion we can easily conclude that the *prima facie* merits of the case are an important factor to be taken into account at the stage of deciding a stay application. The first proviso of Section 76(4) of the Act gives the discretion to the Appellate Tribunal to dispense with the requirement of a pre-deposit. The provision, to our mind, is widely worded and does not put any fetter or constraint on the Tribunal. The *prima facie* view of the merits of the matter is one of the cornerstones of any application seeking dispensation of the pre-deposit. No application for dispensation can be decided devoid of an inquiry into the demonstrable merits of the case. Supreme Court, too, has disapproved the approach of deciding the stay application without analysing the factual scenario involved in a particular case. If an Appellant has a strong *prima facie* case and on a cursory glance it appears that the demand raised completely lacks foundation, this aspect of the

matter has to be necessarily considered by the Appellate Tribunal while deciding the application under Section 76(4) of the Act.

30. In ***ITO v. M.K. Mohammed Kunhi,*** [1969] 71 ITR 815 (SC), in the context of Income Tax proceedings, the Supreme Court held that the Appellate Tribunal should stay the recovery of tax, where a strong *prima facie* case is shown. The relevant para read as under:

> *"13. (…) It could well be said that when S. 254* [of the Income Tax Act 1961] *confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory.*
>
> *14. A certain apprehension may legitimately arise in the minds of the authorities administering the Act that if the Appellate Tribunals proceed to stay recovery of taxes or penalties payable by or imposed on the assesses as a matter of course the revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunals. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."*

31. However, this discretion is not to be exercised arbitrarily or capriciously in an unreasonable manner. In ***Alok Spices vs. Deputy Commissioner (Appeals) & Anr.***, [1988] 071 STC 0347 Ker, the Kerala High

Court was of the view that instead of a mechanical order, the appellate authority must look into the questions involved in the appeal as part of its discretionary powers while considering a stay application. Para 6 of the judgement reads as under:

> "*The appeals preferred before various appellate authorities under the various taxing statutes may involve many questions - from simple estimated additions to complicated questions of law. It is only after an evaluation and appraisal of the facts and circumstances in each case, the appellate or the assessing authority should decide as to the nature of the order that should be passed in the stay petitions. If without an independent evaluation and appraisal of facts a mechanical order is issued, it will cause irreparable injury to the Revenue and public interest is likely to suffer. For example, if a particular aspect or issue taken in appeal is covered by a decision of the Supreme Court or a decision of this Court in favour of the Revenue, the questions raised in the appeal may not disclose a prima facie case for stay of recovery proceedings. By the same token, if the question that is posed in the appeal is prima facie governed by the decision of the Supreme Court or the High Court in favour of the assessee, it may disclose a prima facie case for the stay of recovery proceedings. Then, plea raised in the appeal is not frivolous. In order to decide as to whether the Appellant has made out a Prima facie case, as against a frivolous one, the appellate or the assessing authority should look into the questions that are involved in the appeal. If it is not done and a mechanical order like exhibit P9 is passed, the exercise of discretion will cause hardship and irreparable injury to the parties, to the assessee or the Revenue, as the case may be.*"

32. There are several other cases where the pre-condition of deposit of demand has been dispensed with and we need not refer to all of them, as there cannot be any rule of universal application. Each case will turn on its own facts and the appellate authority will have to weigh the factual scenario

involved. The fact that a wide-ranging discretion has been vested with the appellate authority necessarily implies that the exercise of this power has to be based on a case-to-case basis. However, we can emphatically say that we do not agree with Mr. Ramesh Singh that the *prima facie* merits of the case are not required to be gone into at the stage of consideration of application under Section 76(4) of the Act.

33. That said, it must be remembered that if, assuming an assessee has established a *prima facie* case, it would not *ipso facto* entail sufficient justification for grant of dispensation. This principle has to be borne in mind while deciding the stay application. The Supreme Court has held that the appeal should not be disposed of in a routine manner, unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. In ***M/S Pennar Industries Ltd. v. State of A.P.***, 2015 (322) E.L.T. 25 (S.C.), while dealing with the challenge relating to an order granting partial stay of realization of the demand, the Court observed as under:

> *"6. The applicable principles have been set out succinctly in* Siliguri Municipality and Ors. v. Amalendu Das and Ors. *(AIR 1984 SC 653) and* M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors. *(AIR 1985 SC 61) and* Assistant Collector of Central Excise v. Dunlop India Ltd. *(AIR 1985 SC 330).*
>
> *7. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be*

passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

8. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Dunlop India cases (supra) without analysing factual scenario involved in a particular case."

34. Thus, to summarize, we would say that the discretionary power is not to be exercised as a matter of course. It is only in such cases where the Tribunal would find that there is a very strong *prima facie* case made out in its favour, should the Tribunal consider whether to grant stay and dispense with the pre-deposit in terms of Section 76(4) of the Act. On the face of it, the Tribunal must be satisfied that the entire purpose of the appeal would be frustrated or rendered meaningless by allowing the recovery proceeding to continue during the pendency of the appeal. The Tribunal also has to be mindful of the consequences that would follow from an order that required the Assessee to deposit the whole or part of the demanded amount. While exercising this discretion, the Tribunal should not act in a mechanical manner and exercise discretion after taking into account the totality of circumstances which include the *prima facie* case of the Appellant.

35. Next, we are also unable to agree with Mr. Singh that the lack of the terms '*hardship*' or '*undue hardship*' in the wording of Section 76(4) and its provisos indicate that the merit of the dispute is not a relevant consideration in a stay application. Mere absence of the terms does not indicate deliberate

omission, much less lead to the inference that the merits of the case are irrelevant. The respondent's interpretation is contrary to the plain reading of the provision. On the contrary, we are of the opinion that the provision is wide enough to consider various aspects which may contribute to mitigating factors, including the aspect of undue hardship or weak financial condition of the assessee.

36. This Court in the case of ***Schneider Electric*** (*supra*) has also observed that "*Accordingly, in all fiscal statutes even in the absence of an overt expression or articulation, the twin considerations of balance of convenience and irreparable loss are manifest in the concept of undue financial hardship"*. The question of hardship, especially in the context of financial health of the assessee, is also a relevant factor for passing an order under the proviso in question.

37. Now, coming to the impugned order in the present case. We noticed that the Tribunal has declined to go into the merits of the case. The *prima facie* case of the Appellant has not been evaluated by the Tribunal while exercising its discretion under Section 76(4) of the Act. The Appellant had pleaded strong *prima facie* case for complete waiver of pre-deposit, on the several grounds including: **(a)** Non-establishment by the VATO of the existence of domestic sales; **(b)** Wrongful allegation of misuse of Form H by the Revenue; **(c)** Levy of tax on the amounts of debit note, through which price of export sales was reduced, being price of goods which were not returned to India. (The export sales being outside tax net in terms of Section 6(1) of the CST Act. Thus, the entire turnover of the Appellant, regardless of any change in price of export sales, has no taxable consequence); **(d)** misconceived demand on the amount of duty drawback received by

Appellant from the government as export incentive,which has been passed on by the Appellant to the vendor, with respect to the goods procured from them in the course of export, thus amounting to sale in the course of export, which is exempted from tax levy; and **(e)** Misconceived demand on written off assets being misinterpreted as sale of assets.

38. To our mind, all these aspects enumerated above are pertinent. Unfortunately, the same have not been taken into consideration. While the Tribunal is correct in observing that these questions would have to be examined when the appeals are taken up finally on for disposal, but at the same time, these aspects would also have to be cursorily examined for arriving at the satisfaction about the *prima facie* on merits, for deciding the stay application.

39. We would also like to observe that the impugned order also does not record any valid or cogent reason which would indicate application of mind on part of the Tribunal. Since the order does not contain any material grounds for rejection of stay application, it is liable to be quashed on this ground itself. In our view, this kind stereotypical, mechanical order without application of mind to the facts of the case, is not in accordance with the law and the decisions of the courts laying down guidelines for appellate authorities to exercise its discretion under the provisions of the Act.

Conclusion:

40. In view of the aforesaid, the impugned order is set aside. Let the matter be remanded back to the DVAT Appellate Tribunal. The Tribunal shall now decide the application under Section 76(4) of the Act afresh,

having regard to the views expressed by us in this order, after affording opportunity to both the parties for hearing. The tribunal will also examine the question of financial hardship of the Appellant. On this aspect, Revenue shall be free to urge and request the Tribunal to consider the financials of the holding company of the Appellant, and cite case laws in support thereof. Needless to say, we have not examined the merits of the case and the observations made in this order shall not be read or construed to be the reflection of our opinion on the merits of the case. Having regard to the fact that the appeal is yet to be heard, we direct the Appellate Tribunal to decide the application as expeditiously as possible. With the aforesaid directions, the appeal is allowed. The pending application is also disposed of accordingly.

SANJEEV NARULA, J

MANMOHAN, J

OCTOBER 07, 2020
v