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**BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
M.S. WADHWA, MEMBER (J) AND DIWAN CHAND, MEMBER (A)**

Appeal No.384/ATVAT/14-15/
Appeal No.1291/ATVAT/13-14/
Appeal No.274/ATVAT/14-15/

1. M/s. Aluminum Association of Delhi,
B-48, Jhilmil Industrial Area,
Shahdara, Delhi.

2. M/s Virgo Aluminium Ltd.,
D-117, Okhla Industrial Area Phase-I
New Delhi

..... APPELLANTS

3. M/s C.B. Gupta & Sons
B-122, Ashok Vihar Phase-I,
Delhi

VERSUS

Commissioner of Trade & Taxes, Delhi.

..... RESPONDENT

(In 1st appeal)

Present for the Appellant : Sh. R. Chandok, Advocate., Ld. Counsel for the appellant
Present for the Respondent: Sh. C.M. Sharma, Adv., Ld. Counsel for the Revenue.

(In 2nd appeal)

Present for the Appellant : Sh. S.K. Sarwal, Advocate, Ld. Counsel for the appellant
Present for the Respondent: Sh. P.Tara, Adv., Ld. Counsel for the Revenue.

&

(In 3rd appeal)

Present for the Appellant : Sh. B Sangal, Ld. Counsel for the appellant
Present for the Respondent: Sh. P. Tara, Adv., Ld. Counsel for the Revenue.

ORDER

1. Above first two appeals have been filed challenging the impugned determination order dated 27.01.2014 passed by Ld. Commissioner by which application of the applicant Aluminium Trading Company was

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rejected. Though the present appellants were not party to that application under Section 84 but they have assailed this order on the basis of orders passed by this Tribunal on 18.02.2015 in favour of these two appellants. While third appeal titled M/s C.B. Gupta & Sons has been filed challenging the determination order dated 02.04.2014 passed by Ld. Commissioner. This application was rejected on the ground that the determination order have already been passed on 27.01.2014 regarding question whether aluminium sheets, coils and foils fall within the ambit of entry 28 of Third Schedule of DVAT Act, hence it is not maintainable u/s 84(8) of the DVAT Act.

2. While in case of Aluminium Association of Delhi appellants are engaged in manufacturing and trade of aluminium circles which are aluminium sheets in circle shapes, Virgo Aluminium Company is engaged in the manufacture and sale of aluminium sheets, plates and coils. While in case of M/s C.B. Gupta and Sons appellant moved application for determination of rate of tax regarding aluminium sheets, coils and foils. So in all the appeals common question of law involved is whether aluminium circles, sheets, plates and foils are covered by entry 28 of Schedule III of DVAT Act or not. As common question of law and facts are involved in all these appeals so they were heard together and are being disposed off by this common order. First appeal of M/s Aluminium Association of Delhi will be leading appeal, hence, a copy of this common order be placed on the file of other two appeals. The brief facts of the appeal No. 384 M/s Aluminium Association of Delhi are as under:-
3. Aluminium Association of Delhi ("the Association" or "the Appellant") is an association of persons ("the Members") inter-alia engaged in

According to appellants the Goods are covered by the Entry since the same includes ferrous metals, non-ferrous metals and aluminium. In Terms of Section 4 of the Delhi VAT Act sale of goods mentioned in Schedule III appended to the same are liable to VAT thereof @ 5%. Accordingly the Members discharge VAT on intra-state sale of the goods @ 5%.

6. That the Commissioner Value Added Tax, New Delhi ("the Commissioner") passed determination order No.344/CDV AT/2013/232 dated January 27, 2014 in the case of Aluminium Trading Company wherein was held that the Entry only covers extrusions of aluminium and not any other form of the same.

Being aggrieved by the impugned order the appellant has filed present appeal on following among other grounds:

- (i) According to the appellant the impugned order is against law and the impugned order has been passed contrary to the Entry and settled principles of law. According to appellant the entry includes non-ferrous metals and extrusions of aluminium .
 - (ii) That the impugned order is against circular and determination order issued by Ld. Commissioner.
 - (iii) That the impugned order is contrary to Rule of interpretation of statutes.
 - (iv) That the impugned order has been passed without application of mind.
8. The additional facts so far as appeal of M/s Virgo Aluminium Ltd is concerned are as follow:-

- (i) That the company is engaged in sale of aluminium coil, sheets and plates is having TIN No. 7480405765 and in impugned determination order dated 27.01.2014, the above items manufactured and sold by the appellant have been held to be taxable as unclassified goods taxable @ 12.5% and these items appear at Sl. No. 10,11, 16 and 17 in the impugned determination order.
- (ii) According to appellant the Ld. Commissioner has not properly appreciated, the facts, relevant entries in schedule III and case law cited while holding that the items specified in the order do not fall in any of the entries appearing in Schedule III of the DVAT Act, as such are unclassified goods liable to tax @12.5% as against 5% alleged by the applicant.
- (iii) The short question which arises for determination was whether aluminium sheets, aluminium coils or aluminium PP Cap sheets of different sizes would fall under entry 28 of Schedule III or not.
- (iv) There is no doubt that aluminium is non-ferrous metal. Commercially, these metals are produced in rolling mills in the form of sheets, plates, coils, rods or as extrusions in different shapes but Ld. Commissioner has held that items like rolled products are different from aluminium and does not come under extrusions. The word aluminium would cover aluminium in its primary form i.e. ingots or wire rods that are directly cast out of molten metal. The word such as aluminium and extrusion of those would mean and cover item which have passed through the secondary process and would include in its domain products like sheet, plate and coils.
- (v) According to appellant the metal products would be regarded as new commodities different from aluminium but rolled products like sheet, plate

or coil, drawn products like wire, wire rods and extrusions are all understood in their popular sense as semi fabricated aluminium and belongs to same species.

(vi) According to appellant, Ld. Commissioner has failed to appreciate and has committed a manifest error of law and fact because process of rolling or drawing or extrusions does result in any change of character. Aluminium even after the processing in the form of plates, sheets, coils, extrusions remains aluminium and is marketed as metal. These products serve as raw material for the industry. Hence, impugned determination order has been assailed on following additional ground in the present appeal:

- (a) That the finding recorded by Ld. Commissioner that aluminium sheets, plates, coils or wires are not covered by any entry of Schedule III is not sustainable in law.
- (b) Ld. Commissioner has not properly appreciated the true and correct scope of entry 28 of Schedule III. The issue calls for fresh determination.
- (c) The Ld. Commissioner has failed to appreciate that the word "such as" used in Entry 28 of Schedule III is of wider application. It covers aluminium sheets, plates, coils being aluminium metal in its secondary form.

9. On the basis of above facts and grounds of appeal appellants Ld. Counsel have prayed that the impugned order dated 27.01.2014 and 30.06.2014 be set aside and present appeals be allowed.

While in appeal of M/s C.B. Gupta & Sons following additional grounds have been taken to challenge the impugned order:

10. That the Ld. Commissioner VAT was not legally justified in dismissing the application for determination filed before him on the ground that the same is not maintainable in terms of Section 84(8) of DVAT Act, 2004. The fact remains that no effective order was ever passed by him even in the case of M/s Aluminium Tarading Company.
11. That the provisions of Sec. 84(8) of DVAT Act does not confer blanket/ sweeping powers upon the Commissioner VAT to decline to determine a question on the sole basis that such determination has already been made by him. Before arriving at such a conclusion one has to see as to what orders were passed by him and to what extent such determination order comes in way to determine the question raised by a dealer in his application based entirely on different footings and basis.
12. That taking into consideration the language in which Entry 28 of 3rd Schedule is couched, it is more than evident that aluminium which falls within the ambit of non ferrous metal shall embraces all its products in as much as the use of word 'such as' in Entry 28 is of prime importance.
13. That it is further contended that according to settled proposition in law all efforts are to be made to ensure that a particular item falls within a particular item of a schedule and when it is found that it is not possible only then the residual entry can be harnessed against the traders.
14. That it is further contended that burden always lies upon the revenue to prove that a particular item is taxable at higher rate when there is scope to treat the said item covered by another entry in any of the schedule.

15. Heard to appellants Ld. Counsel Mr. Ravi Chandok and Sh. C.M. Sharma on behalf of the revenue in the former appeal and Mr. S.K. Sarwal appellants Ld. Counsel & Mr. P. Tara on behalf on behalf of revenue in appeal Virgo Aluminium Ltd. Sh. Balram Sangal and Sh. P. Tara in C.B. Gupta & Sons and perused the files and judgements cited by the appellants Ld. Counsel, in support of their arguments on the basis of which these appeal are being disposed off as follows:-
16. Opening his argument appellant Ld. Counsel, Sh. Ravi Chandok first of all assailed the impugned determination order on the ground that it is against the law. First of all he submitted the definition of non-ferrous metal, extrusions and rolling and submitted that a process in which the product is pushed through a die to convert the same into desired size and shape is termed as extrusion. While through rolling process aluminium is rolled into desired shapes and sizes which are classified as rolled products in common parlance. According to appellant putting above understanding in the instant case, the Entry includes ferrous and non-ferrous metals and alloys; non-metals such as aluminium, copper, zinc and extrusion of those; the Goods being non-ferrous metals would fall under the same. Even if it is assumed that the Goods are extrusions of aluminium, the same would fall under the Entry. Consequently, the Goods would be liable to VAT under the Delhi VAT Act @ 5%. In support of his arguments he referred to the recent judgement of Hon'ble Guhati High Court in the matter of Hindalco Industries Ltd. and another Vs. State of Assam and Others (2013)16 VSTI b-249 (Gau) in "(the Hindalco Case)". Issue before the Hon'ble Court was whether aluminium rolled products such as sheets, plates, foils falls under the purview of Entry No. 26 of Second Schedule appended to the Assam Value Added Tax Act, and exigible to tax thereof @4% or under residual

entry and liable to tax @ 12.5%. According to appellant Entry 26 of the Assam VAT Act and the entry under DVAT Act are similarly worded.

17. Hon'ble Guhati High Court while deliberating whether the Products would be classified as unspecified item and exigible to tax under the Assam VAT Act @ 12.5% the Hon'ble Court held as under:

"Treating any taxable commodity for tax under a taxing statute as a residuary item has to be mandated by legislative intent as well as necessitated by the textual context. It is neither a matter of routine nor of course. Such a course is permissible only if the commodity or the item is not amenable to any other classification."

18. Appellant's Ld. Counsel further submitted that Entry 26 of the Assam VAT Act includes same commodities. Consequently the Goods should also be held to be covered under the Entry and exigible to VAT under the Delhi VAT Act @ 5% and not 12.5% as has been held vide the Impugned Order.

19. Appellant's Ld. Counsel further placed reliance on judicial pronouncement of Hon'ble Madhya Pradesh High Court in the matter of G.K. Micro Metal Private Limited Vs. State of M. P. [(2013)] 64 VST 147 (MP)] {"the G.K. Micro Case"}. In the G.K. Micro Case, the appellant thereof was engaged in manufacturing of aluminium granules (aluminium in powdered form). Entry No. 36 of Shedule II, Part II ("the Entry 36") of the Madhy Pradesh Value Added Tax Act, 2002 ("the M.P. VAT Act") was as follows:

"Ferrous and non-ferrous metals and alloys, non-ferrous metals such as aluminium, copper, zinc and metal scrap – rate 4%".

20. In this case appellant classified aluminium granules in the Entry 36 and discharged VAT under the M.P. VAT Act @ 4% on sale of the same.

Revenue dis-allowed claim of the appellant and levied VAT on sale of aluminium granules @ 12.5% as un-specified item. While setting aside contention of revenue, the Hon'ble Court held as under:

"In the present case, the rate of tax on aluminium has been prescribed as four per cent. The revenue is not permitted to levy the tax at 12.5 percent on the ground that the petitioner has been selling aluminium granules (aluminium powder) because nature of the product has not been changed. It is the aluminium granules which have been supplied by the petitioner to the railways. It is used a aluminium. There is no different use. Hence, in our opinion, the petitioners are liable to pay tax at four percent."

21. Referring to above observations of the Hon'ble Court appellant's Ld. Counsel submitted that G.K. Micro Case lays down a principle that change in shape of a commodity cannot be criteria to decide taxability when nature and use of goods is same. Putting the said analogy in the instant case, it is submitted that although the Goods are in circular shape, the same are used as aluminium for manufacturing the Products.
22. He further placed reliance in support of his arguments on the celebrated judgement of Hon'ble Supreme Court in the case of Kalidas Sheet Metal Industries P. Ltd. Vs. State of Kerala [(2008) 13 VST 313 (SC)] ("the Kalidas Sheet Case"). In this case the issue before the Hon'ble Supreme Court was whether entry copper and brass would include copper sheet and brass sheet or not. While holding that copper and brass sheet would be classified as copper and brass, Hon'ble Court held as under:

"A bare perusal of the above quoted entries makes it clear that entry 116A deals with copper whereas entry 116D deals with brass. The short question which arises for determination of this court is whether the copper sheets and brass sheets would fall under the entry Nos. 116A and 116D, respectively. There is no

manner of doubt that copper and brass are metals. In ordinary temperature and pressure these metals occur in solid form. The fact that commercially, these metals are produced in rolling mills in the form of sheets, circles, ingots, strips or rods is not in dispute. It is also not in dispute that copper and brass being metals in solid form, are available in the market in one of the above forms only. Therefore, the argument of the appellant that the words "copper" and "brass" occurring in entry Nos.116A and 116D would not take within its sweep copper sheets and brass sheets, cannot be accepted."

23. In the light of the above observation appellant's Ld. Counsel submitted that the Hon'ble Supreme Court has held that copper and brass in the form of sheet is nothing but copper and brass since the same are produced in the rolling mills in different shapes such as circle, ingots, bars, etc. Further it has been held in the Kalidas Sheet Case that copper and brass are available in the market in one of the said forms, accordingly the same would get classified in the entry copper and brass. He further submitted that facts of instant case are at par with the Kalidas Case. Since aluminium in market is bought and sold in various shapes such as circles, bars, ingots; produced in rolling mills so the Goods are being produced in rolling mills in circle shapes, should be classified as aluminium mentioned in the Entry and liable to VAT @ 5%, but the learned Commissioner vide the Impugned Order has held that the Entry only covers extrusions of aluminium and no other product. The Impugned Order is liable to be set-aside on this ground alone.
24. The second ground on which the Impugned order has been assailed is that the impugned Order is against circular and determination order earlier issued by the Ld. Commissioner.

25. The decisions in the case of G.K. Micro Metal Private Limited, Kalidas Sheet Metal Industries P. Ltd., Hindalco Industries Ltd. case and State of Madhya Pradesh Vs. Hiralal case have been referred by all the appellants Ld. Counsel during the course of their arguments.
26. According to appellants the learned Commissioner issued circular No.4 of 1987-88 No. F. 15 (7)/82-PPR/4868-5117 dated July 21, 1987 ("the Circular"). This circular was issued in order to clarify variety and forms of goods, which would get classified under item 'All non-ferrous metals'. Vide the circular the Learned Commissioner clarified that entry non-ferrous metals would include shapes of the same as mentioned in Section 14(iv) of the CST Act. According to appellants sub-Clause (vi) of clause (iv) of Section 14 of the CST Act includes non-ferrous metals in rolled form. The Goods being in rolled form would get covered under the said clause. In terms of the Circular, the Goods being non-ferrous metals and in shape mentioned in sub-Clause (vi) of clause (iv) of Section 14 of the CST Act, should be classified as non-ferrous metals. Consequently the Goods would get covered under the Entry and exigible to VAT under the Delhi VAT Act @ 5%.
27. Appellants further submitted that Section 4 of the Delhi VAT Act provides that rate of tax on sale of declared goods as defined under the CST Act shall be 5%. In terms of the Circular the goods falling in list of declared goods defined under the CST Act should be liable to VAT under the Delhi VAT Act @ 5% but the Ld. Commissioner, in the impugned order, did not discuss the Circular and passed the impugned order, holding that the Entry only covers extrusion of aluminium and no other product.

28. Appellants Ld. Counsel further argued that Ld. Commissioner passed determination order No. 183/PACST/87 dated July 13, 1987 in the matter of India Foils Ltd. having 100% aluminium and those having 98% aluminium and 2% ink are non-ferrous metals. According to appellants like the goods in question aluminium foil is manufactured out of raw aluminium by rolling process. When aluminium foil is determined to be classified as non-ferrous metal, by no stretch of imagination it can be inferred that the goods would be out of scope of the Entry, which cover both non-ferrous metal and aluminium. According to appellants since it has been determined vide this Determination Order that aluminium in different forms such as foil would fall under the non-ferrous metal, the appellants fail to understand that the Ld. Commissioner vide the impugned order held that the goods in question would not fall under the entry.
29. Appellants Ld. Counsel further submitted that the circular and order were issued and passed respectively by the Ld. Commissioner, which have neither been withdrawn nor set-aside, the same are binding on departmental authorities. In terms of judicial discipline, the learned Commissioner was required to follow the Circular and the Determination order. In support of their argument they referred to the judgement of Supreme Court in the matter of Paper Products Ltd. Vs. CCE [(1999)] 112 ELT 765 (SC)], wherein it has been held that apart from the fact that the circulars issued are binding on Department, the Department is precluded from challenging correctness of the said Circulars even on the ground of the same being inconsistent with statutory provision. Further it has been held that ratio of judgment of Hon'ble Supreme Court further precludes right of the Department to file an appeal against correctness of binding nature of circulars. It has been held that so far as the Department is

concerned, whatever action it has to take, the same will have to be consistent with circular which is in force at relevant point of time.

30. In view of above the impugned order of determination is liable to be set aside on this ground alone.

31. The next ground on which impugned order is assailed is that impugned order is contrary to rule of interpretation of statutes. It is a settled principle of law that in a taxing statute rule of strict interpretation should be followed. Words used in the statute should be given meaning and understood in ordinary sense. In taxing statute there is no room for addition or deletion of words to understand meaning of a particular entry. In many judicial pronouncements it has been held that while interpreting items in statutes like Sales Tax Acts resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or meaning attached to them by those dealing in them, that is to say, to their commercial sense. Going by the said principle the goods in question are known in trade as aluminium in circle shapes. However, the Ld. Commissioner in the impugned order has mentioned various scientific processes such as hot extrusion, cold extrusions, rolling, etc., which relates to manufacture of the goods but when the Entry is unambiguous and clearly includes entire variety and forms of aluminium, in terms of settled position of law, the Ld. Commissioner should have held that the entry includes the goods in question. In case words and language of an entry are clear full effect should be given to them as there is no scope for intendment or ought to be. Since the impugned order is contrary to rule of interpretation of statutes, the same is liable to be set aside on the above grounds also.

32. The next ground on which appellants assailed the impugned order is that impugned order was passed without application of mind. According to appellants the Ld. Commissioner while passing the impugned order did not apply his mind to the fact that the Entry includes entire variety and form of aluminium. No demarcation has been made by legislature in the Entry with reference to aluminium, which implies that aluminium being industrial product, legislature intended to levy tax on the same under the DVAT Act @ 5%. Further legislature was also aware of the fact that aluminium is required to be molded into various shapes for the purpose of use in different manufacturing industry. For the said reason it appears that no specific form of aluminium has been mentioned in the Entry.
33. The Ld. Commissioner while passing the impugned order did not apply his mind to the fact that for deciding taxability under tax laws, rule of strict interpretation has to be followed. Had the Ld. Commissioner followed rule of strict interpretation, it would have been held that the goods are covered by the Entry and liable to tax under the Delhi VAT Act @ 5%.
34. It has been held in large number of judicial pronouncement that any order which is passed without application of mind is liable to be set aside. In this regard appellants placed reliance on judicial pronouncement of the Hon'ble Supreme Court in the case of Assistant Commissioner, Commercial Tax Department Vs. Shukla & Brothers [2010 (254) ELT6 (SC)]. The relevant portion is being reproduced below:

"The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of

them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders."

35. To support the argument that impugned order was passed without application of mind, appellants Ld. Counsel also referred to the case of State of H.P. Vs. Sardara Singh [2008(229)ELT 496 (SC) wherein it has been held

"Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

36. In the light of the above observations and reasons, appellants Ld. Counsel argued that the impugned order has been passed without application of mind, hence the same is liable to be set aside.

37. In view of the above submissions, appellants Ld. Counsel submitted that the impugned order passed by Commissioner is bad in fact and law, hence, liable to be set aside and present appeals be allowed.
38. Appellants Ld. Counsel further argued that the question involved in the present appeals is whether aluminium sheets, foils, coils and plates falls within the ambit of entry 28 of Schedule III. That the words "aluminium, copper and extrusion of those are preceded by the words" 'such as' hence the item aluminium, copper, zinc and extrusions are illustrative and not exhaustive as has been held by the Hon'ble Supreme court of India in the case of Royal Hatcheries (P) Ltd. Vs State of Andhra Pradesh and another reported as 1994 (92 STC) page 239 so it means that the word aluminium would not cover aluminium in its primary form i.e. ingots or wire rods that are directly cast out of molten metal. The word such as aluminium and extrusion of those would mean and cover items which have passed through the secondary process and would include in its domain products like sheet, plate and coils.
39. Appellants Ld. Counsel further argued that burden to prove that a particular item is taxable in a manner and at such rate as department claims is upon Revenue. In this regard they referred to the case of Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner Central Excise, Nagpur (2006) 145 STC 200 (SC) in which Hon'ble Court held -

"On the other hand the Revenue led no evidence of any sort to rebut the evidence led by the assessee. It is settled law that the burden of showing correct classification lies on the revenue. The Revenue has done precious little in this case to discharge this burden.."

In this regard they also referred to the case of Shriya Enterprises Vs. Commissioner Taxes Uttarakhand (2012) 51 VST 413 in which Hon'ble High Court held as follows:

"Unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, recourse cannot be had to the residuary category and if there is a conflict between entries, then, the residuary category should not be taken into consideration."

40. Appellants Ld. Counsel further assailed the impugned order on the ground that when two views regarding classification of an item are possible, the view which is beneficial to the assessee is to be applied. According to appellants Ld. Counsel the claim of the appellants dealer is that aluminium sheets, foils and coils are covered by Entry 28 of III Schedule. On the contrary, revenue maintains that these items do not fall within the ambit of Entry 28 and are taxable @12.5% being unspecified goods. According to appellants when a provision is capable of two opinions, the opinion which is in the favour of the assessee should be given effect to. In support of this principle, they referred the judgement of Shalimar Chemicals Works Ltd. Vs. State of Assam and others (2012) 50 VST 253 in which Hon'ble Court held that

"It is the settled position of law that if two views are possible regarding classification of goods, the benefit must go to the tax payers. The statute, namely, the Assam Value Added Tax Act, 2003 never intended that coconut oil should not be included or would not come under the fold of edible oils in entry No. 24 (i) of the Second Schedule and thereby the tax payers would not be given the benefit of rate of tax, i.e., at four per cent as prescribed in the Second Schedule. Mere fact that majority of people in Assam do not use coconut oil for cooking purpose or the fact that coconut oil is being used popularly as hair oil would not create any legal bar to include the coconut oil in entry 24(i) of the Second Schedule to the Value

Added Tax Act and in giving the benefit of payment of lesser tax provided in the said Schedule. Therefore, the coconut edible oil manufactured and marketed by the petitioner is liable to tax at four per cent under the provision of the Second Schedule to the Act and not at 12.5 per cent as prescribed under the Fifth Schedule."

41. The impugned order has also been assailed on the ground that the Department has changed the opinion. Earlier Department had taken constant view in past so change is not warranted. According to appellants Ld. Counsel when the aluminium sheets, foils and coils etc. have been constantly taxed @ 4% and now 5% falling within the ambit of Entry 28 of Schedule of DVAT Act, 2004 from the very inception of the Act in April, 2005 and the VAT Department has regularly been accepting the returns of aluminium dealers so far as rate of tax 4% (now 5%) on sale of aluminium sheets, foils and coils etc. are concerned, the Department cannot now take abruptly U turn and change its opinion and start subjecting/levying tax @ 12.5% upon the sale of these items particularly since there is no change in between. To support their argument they referred to the case of Ponds India Ltd. Vs. Commissioner of Trade & Tax reported as (2008) 15 VST 256/281 in which Hon'ble Court held as follows:

"if any entry had been interpreted consistently in a particular manner for several assessment years, ordinarily it would not be permissible for the Revenue to depart there from, unless there is any material change."

42. While Ld. Counsels for the revenue argued that impugned determination orders dated 27.01.2014 and 30.06.2014 has been passed after the full discussion as per law. The entry 28 of the third Schedule does not cover all the products referred by the appellants, hence, they were rightly

classified as unspecified items covered under Section 4(i)(e) of the DVAT Act and taxable @ 12.5 %. Hence present appeals be dismissed.

43. These three appeals filed by M/s Aluminium Association of Delhi, M/s Virgo Aluminium Pvt. Ltd. and M/s C.B. Gupta & Sons has challenged the determination orders dated 27.01.2014 and 30.06.2014. Last determination order dated 30.06.2014 was passed in the case of M/s C.B. Gupta & Sons. Appellant Aluminium Association of Delhi is engaged in manufacturing and trading of aluminium circles while Virgo Aluminium Ltd. is engaged in selling of aluminium sheets, plates and coils and M/s C.B. Gupta is engaged in selling of aluminium sheets, coils and foils. These appeals raise the common question of interpretation of Entry 28 of Schedule III. The short controversy which this tribunal has to decide is whether goods in which these company are dealing are covered under above entry or can they be classified under this entry and if they are not covered under any entry then are they liable to tax @ 12.5% as unscheduled item. So in order to determine the question posed for consideration it would be appropriate to refer to entry 28 of schedule III in question which is as follows:

"Ferrous and non-ferrous metals and alloys; non-metals such as aluminium, copper, zinc and extrusion of those."

44. As mentioned above appellant, Aluminium Association of Delhi manufactures and sales aluminium sheet in circle shapes while other appellant Virgo Aluminium Pvt. Ltd. deals in sale of aluminium sheets, plates and coils and M/s C.B. Gupta is engaged in selling of aluminium sheets, coils and foils. Perusal of above entry shows that aluminium, copper, zinc have been mentioned as non non-metal though they are metals as was observed by Hon'ble Guhalti High Court in the case of

Hindalco Industries Ltd. and another Vs. State of Assam and Others (2013)16 VSTI b-249 (Gau). In the above case Hon'ble High Court held "There is no manner of doubt that aluminium is metal." Yet in Entry 26 aluminium has been dubbed as a non-metal. So also copper and zinc. There is obviously a mistake."

45. Appellants Ld. Counsel have assailed the determination orders on various grounds First ground is that the determination order is against law and to support their argument they took the help of various judgements by Hon'ble Supreme Court and different High Courts. The gist of these cases is that if the nature of the goods is same and it does not undergo any change then in whatever shape or form they are sold taxability will remain the same. In Kalidas Sheet Metal Industries P. Ltd. Vs. State of Kerala [(2008) 13 VST 313 (SC)] Hon'ble Supreme Court held that copper and brass would include copper sheet and brass sheet. Similarly in the case of G.K. Micro Metal Pvt. Ltd. Hon'ble Madhya Pradesh High Court High Court held that aluminium granules are covered under Entry 36 of Schedule II which relates to aluminium.
46. If we go through impugned determination orders dated 27.01.2014 passed by Ld. Commissioner we find that he took lot of pains in explaining the meaning of extrusion, process of extrusion, hot extrusions, cold extrusions, warm extrusions, meaning of process of rolling, meaning of slug, meaning of sheet, process of production of aluminium sheets etc. while he was supposed to determine whether the products regarding which application for determination of rate of tax was moved fall under entry 28 of Schedule III or not. He simply summed up the issue by observing that all the products are not covered under any of the Entry of any Schedule. The

Entry 28 of Schedule III covers ferrous and non ferrous metal and alloys. Secondly it covers non-metal such as aluminium, copper, zinc and extrusion of those. The products or goods which are in question in these appeals are basically made of aluminium. Different processes are used to give them different shapes. As has been argued by the appellants Ld. Counsel by process of extrusion objects of a fixed cross sectional profile are manufactured. In this process the material is pushed or drawn through a die of the desired cross-section while in case of rolling, metal stockage pass through one or more rolls to reduce thickness and to make thickness uniform. It means that extrusion and rolling are species of the same genus. The basic form is aluminium and for commercial use they are given different shapes so that small industries may use them according to their requirements. Appellant Aluminium Association of Delhi manufactures aluminium sheets in circle shapes and these sheets are used in manufacture of pressure cooker, utensils and other kitchen items but all these ultimate products are made of aluminium in sheet form of circle shape.

47. In case of State of Madhya Bharat Vs. Hiralal [1966] 17 STC 313 (SC) the question before the Hon'ble Supreme Court was whether the iron bars, flats and plates are not iron and steel within the meaning of item No. 39 of the notification. "iron and steel" means iron and steel in the original condition and not iron and steel in the shape of bars, flats and plates argued revenue's Ld. Counsel. In this regard Hon'ble Supreme Court held as follow:-

"In our view, this contention is not sound. A comparison of the said two Notification brings out the distinction between raw materials of iron and steel and the goods prepared from iron and steel : while

the former is exempted from tax, the latter is taxed. Therefore, iron and steel used as raw material for manufacturing other goods are exempted from taxation. So long as iron and steel continue to be raw materials, they enjoy the exemption. Scrap iron purchased by the respondent was merely re-rolled into bars, flats and plates. They were processed for convenience of sale. The raw materials were only re-rolled to give them attractive and acceptable forms. They did not in the process lose their character as iron and steel. The dealer sold "iron and steel" in the shape of bars, flats and plates and the customer purchased "iron and steel" in that shape. We, therefore, hold that the bars, flats and plates sold by the assessee are iron and steel exempted under the notification."

48. The ratio of this case applies to the facts of the present case. In these appeals also appellants have through the process of rolling given aluminium different shapes to make them attractive and useful for the different industries. By this process they do not lose the basic character of aluminium so they are covered by entry 28 of Schedule III.
49. In the case of Hindalco Industries Ltd. and another Vs. State of Assam and Others (2013)16 VSTI b-249 (Gau) the question before the Hon'ble Guhati High Court was whether aluminium rolled products such as sheets, plates and foils are distinct and separate item from aluminium. Hon'ble High Court held that they are covered under the entries relating to aluminium metal so taxable at the same rate. It would not be out of place to mention that in Assam Value Added Tax Act Entry 26 in Schedule II is same as given in DVAT Act under Entry 28 Schedule III. In our view the ratio of the above judgement applies to the facts of the present case.
50. On the basis of decision of Hon'ble Supreme Court in Kalidas Sheet Metal Case, Hon'ble Madhya Pradesh High Court in the matter of G.K. Micro Private Limited, Guhati High Court Judgement in Hindalco Industries case and on the basis of judgement of Hon'ble Supreme Court in case of State

of Madhya Bharat Vs. Hiralal [1966] 17 STC 313 (SC) it can be concluded that if the nature of the goods does not change and they are available in market in different shapes and sizes, they will be classified under the same entry. On the basis of ratio of these cases, in our view, determination order dated 27.01.2014 and 30.06.2014 were passed by Ld. Commissioner against the law.

51. The impugned determination order has also been assailed on the ground that it is against circular issued on 21st July, 1987. We have gone through this circular. By this circular it has been clarified that what form and variety of goods may be classified as non-ferrous metal and vide this circular the Ld. Commissioner clarified that non-ferrous metal would include shapes of the same as mentioned in Section 14(iv) of the CST Act. In sub-Clause (vi) of clause (iv) of Section 14 of the CST Act rolled non-ferrous metals has been mentioned. So on the basis of circular also the items in question in rolled form are covered by this circular. There is no iota of doubt that aluminium is a non-ferrous metal and hence, aluminium (in rolled form) as non-ferrous metal are covered within the sweep of entry 28 of Schedule III.

52. Appellants Ld. Counsel have challenged the determination order also on the ground that it is contrary to the earlier determination order No. 183/PACST/87 dated July 13, 1987 which was passed in the case of India Foils Ltd. In this determination order Ld. Commissioner determined that Foils having 100% aluminium and those having 98% aluminium and 2% ink are non ferrous metal. According to appellants Ld. Counsel the goods in question i.e. aluminium foil etc. are manufactured out of raw aluminium by rolling process. By the above determination order aluminium foil have

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been determined to be classified as non ferrous metal so in in their cases also aluminium foil should have been classified as non-ferrous metal which is covered by Entry 28 of Schedule III. On going through determination order, we find that aluminium foil has been determined as non-ferrous metal. Even then Ld. Commissioner later on vide impugned order dated 27.01.2014 and 30.06.2014 excluded the roll products from the category of Entry 28 Schedule III. We agree with the argument of appellants Ld. Counsel that earlier circular and determination orders passed by the Ld. Commissioner were binding on him.

53. The impugned determination order has also been assailed on the ground that it is against the rule of interpretation of statutes. According to appellants Ld. Counsels in taxing statutes rule of strict interpretation should be followed in taxing statutes. There is no room for addition or deletion of words to understand meaning of a particular entry. Appellants Ld. Counsel tried to impress upon the Tribunal that while interpreting items in Sale Tax Act, resort should not be had to the scientific or the technical meaning of such terms but to their popular meaning or meaning attached to them by those dealing in them. On this basis they further submitted that aluminium sheets, plates, coils and sheets in circle shapes in business community are termed as aluminium so they are covered by Entry 28. In the facts and circumstances of the present case, in our view while the meaning of the entry was clear and unambiguous resort to scientific and technical meaning was wrongly taken by the Ld. Commissioner in the impugned determination order. Crux of the matter is that by applying different processes aluminium in different shapes was moulded for various uses by small scale industries. By this process nature

quality and character of the aluminium has not been changed so they are covered under Entry 28 of Schedule III of DVAT Act.

54. In Entry 28 of III Schedule as aluminium, copper, zinc have been preceded by word 'such as' so this entry should be given wider interpretation and it will include all forms of non-metal, aluminium, copper and zinc such as aluminium foil, sheets, coils and plates.
55. We also agree with the arguments of the appellants Ld. Counsel that burden lies on the revenue to prove that these items do not fall under any entry, in which revenue side has miserably failed. The rule of interpretation that when two views are possible, the one which is beneficial to the assessee is to be applied is also applicable in the present case. In past revenue was taxing these items constantly @ 4% and later on @ 5% and suddenly now they have taken U turn without any basis. There is no change in law on which basis Commissioner had determined in his impugned order that they are taxable @ 12.5%.
56. Lastly the decisions of Hon'ble Supreme Court and different High Courts are binding on all the lower authorities including quasi-judicial authorities as per article 141 of Indian Constitution. The Ld. Commissioner while passing the impugned determination orders brushed aside these cases and passed the impugned orders in a cryptic manner ignoring these rulings. So on this count also these orders are liable to be set aside.
57. The impugned order has also been assailed on the ground that it has been passed without application of mind. This has been assailed on the basis that it was against the law and also against the earlier circular and determination order, so appellants Ld. Counsels argued that due to these

reasons it was passed without application of mind. On perusal of impugned order, we find that it is not a reasoned order. It is against law, earlier circular and determination order.

58. On the basis of aforesaid discussion and in the light of various judgments impugned determination orders dated 27.1.2014 and 30.06.2014 passed by Ld. Commissioner are hereby set aside. The items mentioned in these appeals in our view are covered under entry 28 of Schedule III. Hence they are taxable @ 5%. Appeals are allowed accordingly.

59. Order pronounced in the open court.

60. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

61. File be consigned to record room.

M.S. Wadhwa
M.S. WADHWA
MEMBER(J)

Diwan Chand
DIWAN CHAND
MEMBER(A)

Date : 07.03.2016

No.ATVAT/2016/Order/ 5534 - 5539

Dated: 14/3/16

Copy to:-

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|--|----------------|
| (1) Commissioner, T&T | (2) Dealer |
| (3) Second case file | (4) Guard File |
| (5) Govt. Counsel | |
| (6) VATO (L&J) | |
| (7) Secretary (Sales Tax Bar Association) | |
| (8) Secretary (Tax Tribunal Bar Association) | |

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