

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Appeal No : 18-19/ATVAT/19-20

Date of Decision : 20/07/2021

M/s. Sanmati Packers,
471, 2nd Floor, Main Road, Gandhi Nagar,
Jheel Khurenja,
Delhi – 110031.

..... Appellant

V

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant :

Sh. A.K. Rai

Counsel representing the Revenue :

Sh. S.B. Jain

JUDGMENT

1. The appellant, a proprietorship concern, having Tin No. 07480286455 (Ward No. 79) has filed present appeals against orders dated 01/05/2019 passed by learned Special Commissioner-III – Objection Hearing Authority (OHA).

2. Vide impugned order, learned OHA disposed of objections filed by the appellant – objector against notice of default assessment of tax and interest issued by Assessing Officer – VATO on 7/10/2014, u/s 32 of DVAT Act (here-in-after referred to as the Act), and also against imposition of penalty to the tune of Rs. 8,17,764/-, u/s 33 of the DVAT Act. Both the orders pertain to 1st quarter of the financial year 2014-15.

3. In the notice of the default assessment of tax and interest, u/s 32 of the Act, AVATO observed in the manner as –



“Survey of M/s Sanmati Packers Tin – 07480286455 was conducted by team of Enforcement-I Branch on 17/9/2014 Sh. Akash Jain, Proprietor of the firm was present at the time of survey and he duly signed statement, trading account and physical stock inventory, total variation of cash and stock during the survey of Rs. 7,07,882/- @ 5%. The tax on the total variation @5% come to Rs. 35,395/-. During the course of survey, it was found that dealer had made purchases and availed ITC of Rs. 40,53,426/- thereof, from non-functioning/suspicious dealer for the period 2013-14 which is incorrect and should be rejected. M/s. Sudershan Enterprises, Rs. 35,54,435/- and M/s. Shri Sai Enterprises, Rs. 4,98,991/-. The dealer has submitted a challan of Rs. 35.00 lacs. The dealer has availed benefits towards voluntary disclosure of tax deficiency u/s 87(7) of the DVAT Act, 2004 as per circular No. 28 of 2013-14 vide f.7(420)VAT/Police/2011/PF/1052-1058 dt. 03/12/2013, which was allowed the tax of Rs. 40,88,821/- penalty of Rs. 8,17,764/- (20% of Rs. 40,88,821).”

4. Accordingly, appellant – dealer was directed to pay a sum of Rs. 5,93,660/- towards additional tax and interest, as regards 1st quarter of 2014-15, u/s 32 of DVAT Act.

5. In view of the above observations, vide order of same date i.e. 7/10/2014, AVATO also imposed penalty to the tune of Rs. 8,17,764/-, u/s 86(10), of the Act, as regards 1st quarter of 2014-15.

6. While disposing of the objections filed by appellant – objector, learned OHA, vide impugned order remanded the matter to the Assessing Officer, with directions in the following manner—

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"Keeping in view the facts and circumstances of the case, I am of the opinion that because the orders in question have been passed without considering the facts of the case claimed to have been put forward by the objector before the Assessing Authority, the matter requires to be heard afresh after giving proper opportunity to the objector to present his case. The cases are remanded with the direction to allow an opportunity of being heard to the objector and pass the assessment orders afresh taking into account the judgment of the Hon'ble High Court in "On Quest Merchandising India Pvt Ltd." Simultaneously, the AA shall also examine as to whether, as held by the Hon'ble High Court in this judgment, the applicability of section 40A of the DVAT Act. It is further directed that the amount of Rs. 35 lac. Deposited by the objector shall be adjusted against the further tax liability. As regards, notice of assessment of penalty issued by the VATO/Ward 79 on 7/10/2014 u/s 33 of the DVAT Act, it is noticed that because the objector had already admitted the tax deficiency at the time of survey as well as deposited an amount of Rs. 35 lac at the time of survey, the necessary relief in penalty u/s 87(6) of DVAT Act has already been granted by the said assessing authority. Therefore, it will be only thereafter making deep inquest in all these factors above that the AA shall frame the orders in the light of the above and the provisions of the DVAT Act, 2004 and the rules framed there under. Accordingly, the objection stands disposed of in the above terms."

7. It may be mentioned here that the appellant – objector also filed review petition before learned OHA, u/s 74B of the Act read with rule



36B of DVAT Rules 2005. The review petition was dismissed by the Learned OHA vide order dated 27/6/2019.

8. As is available from the record, on 17/9/2014, a survey was conducted at the premises of the appellant-proprietor, by the team of Enforcement-I Branch, in presence of Sh. Akash Jain, Proprietor. In the course of survey, trading account and physical stock inventory were prepared in addition to recording of statement of the Proprietor of the appellant. Variation in cash and stock were found to the tune of Rs.7,07,882/-. AVATO assessed taxed @ 5%, on this total valuation.

9. AVATO – Enforcement-I Branch team also observed that benefit of input tax credit (ITC) to the tune of Rs. 40,53,426/-as regards purchases, said to have been made by the appellant dealer, same were found to have been made from non functioning dealer/ suspicious dealer, and as such, said credit for the period 2013-14 was rejected.

10. At the time of survey, the dealer submitted to the Enforcement team cheque to the tune of Rs. 35.00 lac. Accordingly, the dealer was directed to pay only a sum of Rs. 5,93,660/- i.e. Rs. 5,88,820/- towards additional tax and Rs. 4,840/- towards interest, under section 32 and also to pay penalty of Rs. 817764/-.

Grounds of objection in these appeals

Illegality in considering turnover of previous year

11. One of the contentions raised by learned counsel for appellant is that the input tax credit for Rs. 40,53,426/- pertained to the financial year 2013-14, but it was illegally disallowed on the basis of survey conducted in the first quarter of the financial year 2014-15.



In support of his contentions, Ld. Counsel has referred to decision in **Capri Bathaid Private Limited Vs Commissioner of Trade & Taxes**, W.P. (C) 8913/2014 decided on 2.3.2016 by our own Hon'ble High Court. In this regard, reference has also been made to decision in **Bhavesh Trading Co. Vs State of Gujarat** in (2014) 73 VST 166 (Guj), decided on June 12 2014 by Hon'ble High Court of Gujarat.

In the course of arguments, learned counsel for the Revenue Department is also in agreement that this legal point ought to have been decided by the learned OHA.

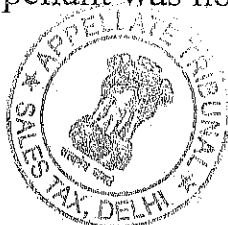
The objection on the point of jurisdiction is a legal objection. Suchlike legal objection can be easily decided by the Learned OHA. In this matter, the legal objection requires to be decided by the Learned OHA.

No reference to Case law cited during objections

12. Learned counsel for the Appellant has contended that many decisions were cited by him before learned OHA but those were not considered or discussed. In the course of arguments, learned counsel has submitted copy of the list of decisions cited before learned OHA.

Herein, the impugned order reveals that case law was cited before Learned OHA during hearing on objections. But, no such decision finds mention in the order, except citing of case **On Quest Merchandising India Pvt. Ltd. v. Govt. of NCT of Delhi & Ors**, what to say of any discussion thereon, or any reason as to why the case law cited by learned counsel for the appellant was not discussed.

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In M/s Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle & Ors, Civil Appeal decided by Hon'ble Apex Court on July 10, 2008, Hon'ble Court observed that various important questions of law were raised but unfortunately they were not dealt by the First Appellate Authority. This was one of the grounds for remand of the matter with direction to dispose of the appeal by a reasoned order dealing with all the points of challenge highlighted by the appellant.

Therefore, taking a cue from the decision in M/s Steel Authority of India Ltd.'s case (supra), in our opinion, the matter deserves to be remanded to the Objection Hearing Authority.

Objection on the point of Stock variation and difference in Cash

13. With regard to report filed by the Survey Team that there was difference in Cash to the tune of Rs. 8,272/- and stock variation of Rs. 6,99,610/-, Learned counsel for appellant has submitted that survey team wrongly alleged that there was difference or variation in cash and stock respectively.

Case of appellant is that an amount of Rs. 8,000/- was with the employee of the firm, who visits the market and incurs expenses on behalf of the firm, on day to day basis, and a sum of Rs. 272/- was not counted at the time of survey, being in the form of small coins and currency notes.

With regard to difference in Stock for Rs. 6,99,610/-, case of appellant is that survey team omitted to count the stock lying in the godown of the firm at Karawal Nagar, Delhi; that the Survey Team did not consider the fact that partly damaged stock was also lying with the firm.

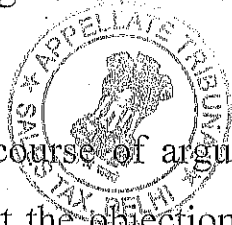


14. With regard to ITC-Input Tax Credit claimed in respect of purchases made from M/s Sudershan Enterprises for Rs. 35,54,435/- and input Tax Credit claimed for Rs. 4,98,991/- against purchases made from M/s. Shri Sai Enterprises, this benefit was disallowed to the appellant, on the allegation that the said two firms were non-functional/suspicious dealers.

Case of the appellant is that the purchases from these two firms were made in the year 2013-14, against tax invoices, in the regular course of business, while said payments were made through banking channel; and that these two firms were very much functional in the year 2013-14.

This objection as to rejection of ITC already availed of by the appellant was specifically raised in the objections filed before Learned OHA. It stands recorded in the impugned order that in support of his contentions/objections, learned counsel for ^{dealer} ~~OHA~~ had submitted various documents with copies of 2A and 2B reports and stock registers. Learned OHA also went through the mismatch reports. Only thereafter, Learned OHA was of the opinion that the orders in question were passed by the Assessing Officer without considering the facts of the case claimed to have been put forward by the Objector. However, the impugned order does not specify as to which fact(s) of the case stated to have been put forward by the Objector was or were not considered by the Assessing Officer, which necessitated for order of remand. There is nothing in the impugned order to suggest as to which material was not considered by the Assessing Officer while making the assessment and imposing penalty.

15. In the course of arguments, learned counsel for the Revenue has submitted that the objections raised by the appellant – objector on legal



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points and on the point of suspicious transaction if any, could be adjudicated by the learned OHA, without passing any order for remand of the matter to the Assessing Officer.

In the given facts and circumstances, when the material was available before the Learned OHA, the objections filed by the dealer, and pressed during hearing, could be, and ought to have been, decided by the Learned OHA. In other words, this was not a fit case for order of remand.

Direction to look into applicability of Section 40A of DVAT Act

16. Another contention raised by learned counsel for the appellant is that the Ld Objection Hearing Authority while remanding the case has given directions to the Assessing Authority to look into the applicability of section 40A of the Act. In this regard, Learned OHA referred to decision in **On Quest Merchandising India Pvt. Ltd. v. Govt. of NCT of Delhi & Ors**, (2017) 245 DLT 615.

17. Learned counsel for the appellant has contended that question of applicability of section 40A did not arise, and as such said direction was not warranted in the facts and circumstances of the case. Further, it has been submitted that Ld. OHA could ^{not} travel beyond the scope of the objection filed by the appellant. In this regard, reference has been made to decision in **Lotus Kaleen (p) Ltd. Vs Commissioner of Trade & Taxes** (52 DSTC J-111).

In the course of arguments, learned counsel for the Revenue is in agreement that in this case the learned OHA exceeded the scope of the

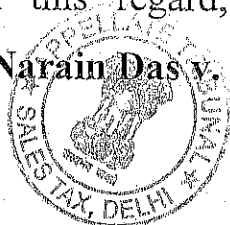


objections by issuing the said direction as regards applicability of section 40A.

18. A perusal of provision of Section 40A of DVAT Act would reveal that it empowers the Commissioner to declare by order any arrangement between two or more persons or dealers to defeat the application or purposes of this Act or any provisions of this Act, to be null and void. Such an order can be passed when the Commissioner is satisfied about existence of above circumstances in a given case. Assessing Officer, delegated with these powers, is also empowered to record such satisfaction before passing of such an order.

In the above cited case, Hon'ble High Court while parting with the judgment observed that where, however, the Department was able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department could proceed under Section 40A of the DVAT Act.

An order remanding the case to the Assessing Officer has the effect of reopening the proceeding, and in such proceedings which are reopened, the Assessing Officer gets reinvested with jurisdiction and powers available under the Act and the rules there under. However, the limits on exercise of such jurisdiction may be controlled by the directions contained in the order of remand. In other words, where in the Order of remand, a direction has been issued specifying the area(s) to which the fresh assessment shall remain confined, the Assessing Officer shall have to exercise jurisdiction for fresh assessment while complying with such direction. In this regard, reference may be made to decision in **Chittarmal Narain Das v. CST**, (1969) 24 STC 451 (All).



Herein, by the impugned order, Learned OHA remanded the matter to the Assessing Officer for fresh assessment, after affording reasonable opportunity to the assessee-dealer. While reassessing a dealer, as observed in CST v. H.M. Esufali, (1973) 32 STC 77(SC), the Assessing Officer does not merely assess the dealer on the escaped turnover, but assesses him on his total estimated turnover. So, the Assessing Officer shall have to follow the due process of law prescribed under the law for making of assessment. Section 40A is part of Chapter VI of DVAT Act, which pertains to assessment and payment of tax, interest and penalties and making refunds. It is one thing that under section 40A, a dealer, affected by such an arrangement, may even get advantage, in case it is found on fresh assessment that he is entitled to decrease in the amount of tax payable. But, the other thing to be taken note of is that reassessment cannot be made simply on the ground of change of opinion and that too on the basis of material already considered at the time of original assessment, and in absence of any fresh material.

Assessment was made on the basis of survey conducted by Enforcement Branch of the department. The Assessing Officer took into consideration the survey report and material collected by the Enforcement Branch, and then made assessment of tax and interest. There is also nothing in the impugned order to suggest that any material came to the notice of Learned OHA, on being pointed out from the side of Department or suo-moto, which suggested that it was a case of arrangement between the appellant and the other two dealers. In absence thereof, there was no justification for the learned OHA to issue direction to the Assessing Officer as regards application of section 40A. In the impugned order, Learned OHA nowhere observed that the Assessing



Officer had failed to take note of such an arrangement between the appellant-dealer and the other two dealers.

In view of the above discussion, this direction issued by Learned OHA to the Assessing Officer deserves to be set aside.

Direction as to carry forward of Rs. 35 lacs

19. Vide impugned order, another direction was given by the Ld. Objection Hearing Authority that amount of Rs. 35 Lac deposited by the objector shall be adjusted against further tax liability.

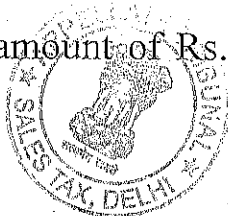
Learned counsel for appellant has contended that this direction is illegal, being against the provisions of law, as Ld. OHA has exceeded the jurisdiction vested under the Act and the Rules framed there under in the given facts and the circumstances.

Learned counsel for the Revenue is in agreement that no such direction could be issued by the learned OHA while passing order of remand and that she exceeded the scope of the objections.

Sections 38 of DVAT Act is the relevant provisions pertaining to carry forward. The purpose of this provision is to deny unjust enrichment to selling dealer and also to protect the interest of Revenue. While making assessment, the Assessing Officer observed that the dealer had availed of benefits towards voluntary disclosure of tax deficiency u/s 87(7) of the DVAT Act, 2004.

In the impugned order, Learned OHA noticed that the objector had already admitted the tax deficiency at the time of survey as well as deposited an amount of Rs. 35 lac at the time of survey, the necessary

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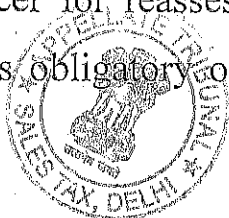
relief in penalty u/s 87(6) of DVAT Act had already been granted by the said assessing authority.

In this regard, suffice it to say that when the Learned OHA directed the Assessing Officer for reassessment after providing opportunity to the appellant-objector, and the point of tax deficiency was yet to be decided, no such direction for carrying forward the said amount could be issued by the Learned OHA.

Imposition of Penalty

20. While challenging imposition of penalty, learned counsel for appellant has contended that Ld. AVATO has imposed this penalty U/s 86 (10) of the Act, without issuing any notice to the appellant, and as such the impugned penalty is liable to be quashed. In support of this contention, learned counsel has relied on decision in Bansal Dye Chem v. Commissioner of VAT, ST. Appeal 29 of 2015, decided on 24.9.2015 by our own Hon'ble High Court.

During hearing on objections, when this ground was pressed on behalf of the Objector-appellant, it was for the Learned OHA to discuss the same and then either accept or reject the objection, giving reasons. In the impugned order, Learned OHA nowhere discussed the ground put forth by the appellant in the objection. In other words, in the impugned order there is no discussion if any notice is or is not required to be issued to the dealer before imposing penalty under Section 86(10) of the Act. As noticed above, direction was issued by the Learned OHA to the Assessing Officer for reassessment as regards tax and interest. In this situation, it was obligatory on the Learned OHA to pass orders on the



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objection as to legality or illegality due to non issuance of any notice by the Assessing Officer before imposition of penalty.

Here, it is difficult to make out from the impugned order as to what was the final outcome or operative part or ultimate decision arrived at by the Learned OHA on the point of imposition of penalty.

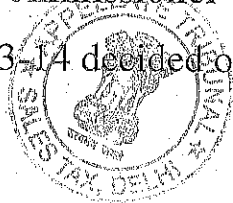
Assessment of Turnover of 1st qtr. in the 3rd qtr.

21. As regards, the contention raised by the learned counsel for the appellant on this point, even though learned counsel for the Revenue has submitted that the assessment made by the Assessing Officer cannot be ~~set~~ ^{said} to be against the procedure prescribed under the law, but further submitted that even this point raised by the appellant – objector could be decided by learned OHA.

In the given facts and circumstances, it can safely be said that this objection raised by the appellant – objector ought to have been decided by the learned OHA, instead of remanding the matter to the Assessing Officer.

Assessing Officer having no jurisdiction to make assessment

22. Ld. Counsel for appellant contended that Ld. OHA had no authority to remand the case and rather, he should have decided the objections and passed appropriate orders in view of the provisions of Section 74 (7) of the Act. Ld. Counsel has submitted that section 74 (7) of the Act does not provide for remand of the matter. In support of this submission Ld. Counsel has referred to decision in **M/s Lotus Kaleen Pvt. Ltd. Vs Commissioner of Trade & Taxes, Delhi**, Appeal Nos 550-551/ATVAT/13-14 decided on 23.3.2015 by this Tribunal.



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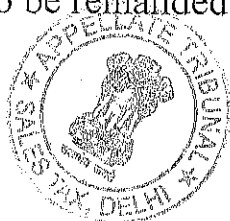
While challenging the impugned order passed by Ld. OHA, Ld. Counsel for the appellant has submitted that without any authority/delegation of powers by the Commissioner, the default assessment of tax and interest could not be made by AVATO (Enforcement Branch), and further that for the same reasons, even no notice of assessment of penalty could be issued by AVATO (Enforcement Branch).

Ld. Counsel has submitted that jurisdiction to make assessment and issue notice of penalty was with the Officer of Ward-79, and therefore, the default assessment and the notice of assessment of penalty deserve to be set aside.

On the other hand, learned counsel for the Revenue has referred to the provisions of section 80 of DVAT Act and decisions in Capri Bath Aid (P) Ltd. V. Commissioner of Trade & Taxes, Delhi (2014) 52 DSTC 617, H.G. International v. Commissioner of Trade and Taxes Delhi, St. APPL No. 63/2014 and ICE Mobile Network Systems (P) Ltd. v. Commissioner of Trade and Taxes, Delhi, decided on 03/5/2018 by this Tribunal.

In the given facts and circumstances, we find that even this objection raised by the appellant – objector could be decided by the learned OHA. In the course of arguments, learned counsel for the Revenue is in agreement that this very objection could be decided by the learned OHA. Since learned OHA has not decided this objection, the matter needs to be remanded for decision by learned OHA.

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Assessment for the year 2013-14

23. Learned counsel for the appellant submits that the ITC claimed for the year 2013-14 has been ultimately allowed by the Assessing Officer and even refund has been allowed to the appellant, but the Learned OHA did not take into consideration this point raised in the objections.

When this objection was also raised by the appellant-Objector, it was duty of the Learned OHA to decide the same in view of the material said to have been produced. Even on this ground, matter needs to be remanded ^{to Ld. OHA} for decision.

Conclusion

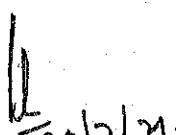
24. In view of the above discussion, the appeals ^{are} ~~is~~ disposed of and while setting aside the impugned orders passed by learned OHA, the matter is remanded to the learned OHA for decision afresh on all the points raised in the objections filed by the appellant – objector, in accordance with law and after affording reasonable opportunity to the appellant. Appellant is directed to appear before learned OHA on 09/8/2021.

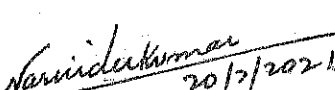
25. File be consigned to the record room. Copy of the order be sent to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 20/07/2021




(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)

Appeal No. 18-19/ATVAT/19-20/513-572

Dated:22/07/2021

Copy to:-

- (1) Commissioner, T&T
- (2) Addl. Commissioner
- (3) VATO (Ward-)
- (4) Dealer
- (5) Second case file
- (6) Guard File
- (7) Govt. Counsel
- (8) VATO (L&J)
- (9) Secretary (Sales Tax Bar Association)
- (10) PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.



Ray
PS/ PA to Member (A)