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

Appeal No : 311-313/ATVAT/2013-14

Date of Decision : 28/07/2021

M/s. Ram Lal Kamal Raj Jewellers Pvt Ltd.,
Shop No. 3, S.B. Sarafa Market,
1383-85 Chandni Chowk,
Delhi – 110025.

..... Appellant

V

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant : Sh. Sunil Minocha.
Counsel representing the Revenue : Sh. S.B. Jain.

JUDGMENT

1. By way of present three appeals, appellant has challenged orders dated 21/2/2013 passed by learned Addl. Commissioner (Zone X & V) - here-in-after referred to as Objection Hearing Authority (OHA) - whereby assessment regarding tax, interest and penalties imposed by the Assessing Officer – VATO have been affirmed.

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28/7/2021

28/7/21



2. The appellant, a private limited company was registered under DVAT Act, vide Tin NO. 07830105212. It deals in trading of gold and diamond jewellery. Return is filed on monthly basis.
3. The assessment of tax, interest and penalties pertains to July 2011-12, as survey was conducted by Enforcement-I Branch of Trade and Taxes Department, on 12/7/2011, at the premises of the appellant company situated in Khan Market, New Delhi.
4. During survey, stock variation (excess) of Rs. 1,00,79,204/- and cash variation (excess), to the tune of Rs. 96,159/- were found.
5. After survey, the case was referred to special assessment cell of DVAT Act for carrying out re-assessment / default assessment. Notice under section 59(2) of DVAT Act was issued by the Department to the dealer – appellant.
6. Vide assessment order dated 21/2/2012, Assessing Officer – VATO directed the appellant company ^{penalties in addition to} to pay a sum of Rs. 1,14,853/- i.e. Rs. 1,07,147/- towards tax and Rs. 7,706/- towards interest, by observing in the manner as :-

“Perusal of the dealer’s clarification and the documents filed by the dealer during the proceedings of the case reveals that dealer, as stated to have made import of the goods, mostly diamonds amounting to Rs. 1,00,66,116/- vide five purchase invoices dated 24.6.2011, 25.6.2011, 28.6.2011 & 29.6.2011, which the dealer is claiming to have missed to consider while

arriving at the figure of purchases. It is found that dealer has taken the possession of these Diamonds vide Bill of Entries dated 2/7/2011, 30/6/2011, 7/7/2011 and 30/6/2011 respectively and stored the same in its regular stocks as evident from the stock inventory. And taking note of the fact that the survey of the dealer was conducted quite later i.e. on 12.7.2011, there is no reason to believe that even after taking the possession of the goods so earlier, dealer could have missed taking its purchase of not only one or two, but as many as five import consignments, not of the same day but with different dates of purchases and possessions, into consideration in its books of accounts. This reflects the deliberate act of the dealer to avoid taking these purchases into account thereby suppressing purchase which invariably led to unaccounted sales resulting in the evasion of tax.

Therefore, considering the clarification of the dealer the same is not acceptable and as such, the stock variation amounting to Rs. 1,00,79,204/- and cash variation of Rs. 96,159/-, both found excess are summed up and treated as unaccounted purchase/sale leading to evasion of tax thereby causing loss to Government revenue and is therefore taxed @ 1% after adding GP Ratio of 5.30% and penalty imposed under section 86(10) of DVAT Act 2004.

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Penalty of Rs. 50,000/- is also imposed u/s 86 (14) of DVAT Act 2004 for not producing or furnishing copy of Stock Register as asked and as committed by the dealer in its reply."

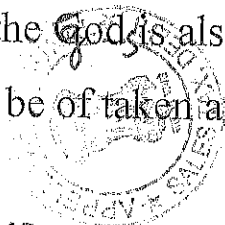
7. Feeling dissatisfied with the above assessment dated 21/2/2012, appellant company filed objections u/s 74(1) of the Act. Vide order dated 21/2/2013, learned Addl. Commissioner – OHA dismissed the objections by observing in the manner as :-

"An opportunity of being heard was provided to the objector in response to which Shri Sunil Minocha, the Advocate has appeared for the objector and while reiterating the grounds taken in the objections, he has requested for acceptance of the objections and setting aside the default assessment orders and also filed written submission."

"I have heard the arguments made by the Advocate for the objector as well as have gone through the default assessment orders and other documents available on record. I am of the opinion that the explanation of the Objector is not acceptable as he admits that he has physically received the goods and the same had not been shown in the books of accounts. This amounts to unvouched purchase to meet subsequent unvouched sale. The same is, therefore, rightly taxed. The explanation of the dealer in respect of the cash in excess that the same has been offering to the God is also not acceptable as the offering does not appear to be of taken amount. It appears a

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well-imagined pretext to keep the extra unaccounted cash. Thus, in all fairness to the facts of the case and in interest of justice, both the orders of assessing authority in respect of tax, interest and penalty are sustained."

8. Feeling aggrieved due to rejection of the objections, appellant has filed present three appeals.

9. Arguments heard. File perused.

Whether any permission was granted to the survey team in DVAT-50?

10. First argument advanced by learned counsel for the appellant is that this is a case where no authority in DVAT -50 appears to have been given to the Enforcement Team-I and because of this illegality, no reliance could be placed on the survey report, to make assessment dated 21/2/2012. In respect of this contention, learned counsel has relied on **Capri Bathaid Pvt. Ltd. vs. Commissioner of Trade & Taxes**, (2014) 52 DSTC 617, decided by our own Hon'ble High Court.

11. In Capri's case (supra), disputed demands/assessment of tax, interest and imposition of penalty were challenged before the Hon'ble High Court by way of writ petitions. In other words, the question as to whether AVATO Enf-I who undertook the survey, search and seizure operation and later passed the default assessment orders of tax, interest and penalty, was duly empowered to do so in

28/7

terms of the DVAT Act, was for the first time and straightway raised before the Hon'ble High Court. In that case, no objections under section 74 of the Act were filed before the Objection Hearing Authority.

12. In Capri's case (supra), Hon'ble High Court observed that in none of those cases the Revenue Department had been able to produce the proper order authorizing AC/AVATO/VATI to carry out survey, search and seizure operations.

13. Those matters pertained to survey conducted during assessment year 2014-15. Therein, one order dated 12.11.2013 issued under section 68 DVAT Act was produced, pertaining to delegation of powers to officers for various officers specified in column No.2 of the table available in para 26 of the judgment. **Therein, the delegation did not pertain to delegation of powers under section 58 of the Act.**

14. In Capri's case (supra), the other writ petition i.e. W.P. (C) 8913 of 2104 on the date of the survey conducted in the premises of CPBL on 4th September 2014, there was no authorisation in the form of DVAT-50. The one that was produced there was of subsequent date i.e. 15th October 2014. Clearly therefore, that survey was held to have been conducted without the authority of law.

15. Here, in this matter, the first opportunity available to the dealer to ask for production of DVAT 50 was at the time of survey itself, as

provided under Rule 65 of the Rules, 2005. But, the representative of the dealer-appellant did not ask the survey team, who visited the site, for production of DVAT 50. Rather, he participated in the survey proceedings and signed the declaration about correctness of the inventory.

16. ~~Neither~~ In the declaration, the representative ^{did not} /lodged any protest that he had asked for production of DVAT 50 and that the team had not produced the same.

17. Even after the survey, the representative of the appellant never retracted from the declaration prepared at the site. Had DVAT 50 not been produced at the site on demand, the appellant would have lodged protest with the Assessing Officer during the assessment proceedings that the Enforcement team had not shown to him permission in the form of DVAT 50. Admittedly, no such protest was lodged before the Assessing Officer challenging the survey on this ground, when reasonable opportunity of hearing was granted by the said Revenue Authority to the appellant, while making assessment. No justification has been put forth before us on behalf of the appellant as to why this point was not raised before the Assessing Officer.

18. Admittedly, the appellant did not raise this very ground before Learned OHA while filing objections or during hearing on objections, when reasonable opportunity of hearing was granted by the said Revenue Authorities to the appellant, before affirming the

same. No justification has been put forth before us on behalf of the appellant as to why this point was not raised before the Learned OHA. Therefore, this point has been raised as an afterthought and without any basis.

19. In Capri's case, in the other petition titled as M/s. Nutek Establishments (Petitioner in W.P. (C) No. 3069 of 2015), no authorization under Section 68 (2) of the DVAT Act read with Rule 65 (1) of the DVAT Rules was produced before Hon'ble High Court. Significantly, the Form DVAT-50 issued by the Special Commissioner on 15th October 2014 did not authorize the JC (E-I) to carry out any of the functions in respect of search and seizure. Consequently, it was held that the JC in turn could not have issued any form DVAT-50 authorizing the AC/AVATO/VATI to carry out search and seizure operations.

20. Here, as noticed above, no such point was raised before the Assessing Officer or before the Learned OHA, when reasonable opportunity of hearing was granted by the said Revenue Authorities to the appellant, while making assessment and while affirming the same, respectively. No justification has been put forth before us on behalf of the appellant as to why this point was not raised before the Assessing Officer and also before Learned OHA.

21. In Larsen and Toubro Ltd. & Anr. V. Govt. of NCT of Delhi and Ors. W.P. (C) 1820/2013 decided on 03/02/2016 by our own Hon'ble High Court of Delhi, it finds mentioned that there was no

indication as to what prompted the extreme step of sealing of the three premises. The order in that behalf had been passed not by the Commissioner but by the VATO. There was nothing to indicate that the VATO was authorized to do so by an order issued in form DVAT 50 as on 15/3/2013.

22. Herein, admittedly, order dated 31/10/2005 passed by Commissioner, VAT was in force, vide which powers u/s 58 of DVAT Act were specifically delegated to the officers specified therein.

23. In case titled as **H.G. International vs. The Commissioner of Trade and Taxes, Delhi**, ST.APPL. No. 63/2014 decided on 16/8/2017 by our own Hon'ble High Court, provisions of Section 58 of DVAT Act, 2004 and Rule 65 (3) of DVAT Rules, 2005 particularly in para-11, it finds mentioned that at the relevant time i.e. 2008-09 (in that case), there was an order dated 31/10/2005 issued by the Commissioner, VAT.

24. As per entry at sl. No. 15 of the said order dated 31/10/2015, issued by the Commissioner VAT, all powers to audit the business affairs of the dealer / any person for (a) confirming the assessment under the review or (b) serve a notice of the assessment or re-assessment of the amount of tax interest and penalty (as provided u/s 58 of the Act) were delegated to all the officers upon the under sub-section (2) of section 66 of DVAT Act, not below the rank of VATO.

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The relevant portion reads as under –

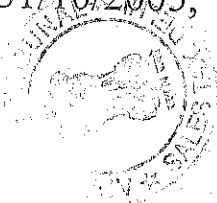
Serial No.	Section	Powers delegated	Officer to whom delegated
15	58	All powers to audit the business affairs of the dealer / any person for (a) confirming the assessment under the review or (b) serve a notice of the assessment or re-assessment of the amount of tax interest and penalty.	All Officers appointed under sub section (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Value Added Tax Officer.

25. Section 68 of DVAT Act empowers the Commissioner ^{to} may delegate any of his powers under this Act to any Value Added Tax authorities. Sub-section (2) of section 68 provides that where the Commissioner delegates his powers under Chapter X, the delegatee shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers. Chapter X begins with section 58. This section pertains to Audit, Inspection and Enforcement. In HG International's case, validity of said order dated 13th October, 2005 was upheld.

26. When we have drawn attention of learned counsel for the appellant to the said order dated 31/10/2005, extract where of has

22/7

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been produced in para -11 of the said judgment, learned counsel for the appellant has not disputed issuance of the said order.

27. It is true that authority in DVAT Form-50 is required to be issued for the purpose of audit, inspection and enforcement. Learned counsel for the appellant has submitted that in the year 2016 he sought information by way of RTI query if any such permission was granted to the Enforcement-I Branch team to conduct the survey at the premises of the appellant company, where upon the response was that no such survey was conducted at the premises of the appellant company on 12/7/2011.

28. As regards, the information sought by the appellant under RTI Act, it is significant to note that this information regarding existence of DVAT form-50 was sought by the appellant for the first time on 10/5/2016 i.e. during pendency of this appeal. Admittedly, the appellant did not seek any such information from the Department while the Assessing Officer was seized of the matter, making assessment or after the assessment order or during objections before learned OHA. Admittedly, the appellant did not raise any specific objection before learned OHA that the department had never authorized the Enforcement-I Branch team to conduct the said survey.

29. In the course of arguments, we have enquired from learned counsel for the appellant if the representative of the appellant company, in whose presence the survey was conducted by

Enforcement -I Branch, ever asked the said team to produce permission to conduct survey i.e. in the form of DVAT Form-50.

30. Learned counsel for the appellant submits that since the owner of the company is no more in this world, he is unable to reply to this query.

31. Then, we have enquired from learned counsel for the appellant if the survey report contains any note that DVAT form-50 was demanded by the representative of the company from the Enforcement Team or that the same was not shown by the team to the representative on demand.

32. Learned counsel for the appellant has gone through survey report and candidly admitted that the survey report does not depict that any such demand was made by the representative of the appellant company for production of DVAT-50.

33. The objective of grant of authority in form-50, as per Rule 65 of Rules, 2005 is that the same is to be carried by the team and produced before the concerned person, whose premises are subjected to survey, only on demand. When it is not ^{the} case of the appellant that its representative had asked for production of DVAT-50 at the time of inspection and that the same was not shown to him, non supply of copy thereof to the appellant and that too in the year 2016 i.e. only during pendency of the present appeal, does not come to the aid of the appellant to say that no authority in DVAT-50 was issued by the concerned officer to the Enforcement Team for the

purpose of said survey at the premises of the appellant, particularly when during those days order dated 31/10/2005 issued by the commissioner VAT u/s 68 of DVAT Act delegating his powers u/s 58 of the Act was in force.

34. As regards, the reply by the Enforcement Branch of the Department in reply to the RTI query, that no such survey was conducted, the same appears to have been sent by the Enforcement Branch in a casual manner without looking into the records. Even otherwise, the appellant had not been disputed that the survey was conducted at his premises on 12/7/2011. Therefore, the said reply to the RTI query also does not help the appellant.

Conclusion

35. In the given facts and circumstances, it cannot be said that the team was not carrying requisite permission in DVAT 50 or that the survey team conducted survey without any such permission. When decision in Capri's case on the point of DVAT 50 is distinguishable for the reasons recorded above, same does not come to the aid of the appellant, and as there is no merit in the contention raised by learned counsel for the appellant that without proof regarding existence of permission in the form of DVAT 50, the survey – admittedly conducted at the site of the appellant on the given date-was illegally conducted.

Whether it was a case of Stock and cash variation?

22/7

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36. The only other contention raised by the learned counsel of the appellant is that his survey it was observed to be a case of stock variation and cash variation, but in view of the survey report, it cannot be said to be a case of any stock variation or cash variation.

37. Learned counsel has submitted that certain invoices regarding imported goods were yet to be received from the selling dealers and due to inadvertence the appellant failed to consider those bills and that is why those bills could not be added in the total purchases, vis-à-vis stock figures, as appearing in the trading account.

38. Admittedly, at the time survey was conducted, the representative of the appellant admitted the stock inventory prepared by the survey team. There is no mention in the survey report that representative of the appellant submitted that certain invoices regarding imported goods were yet to be received from the selling dealers and due to inadvertence the appellant failed to consider those bills and that is why those bills could not be added in the total purchases.

39. Had it been the case of the appellant, the representative would have put forth this version before the survey team. Admittedly, survey report does not reveal that any such submission was made by the representative of the appellant company to the team to explain the stock variation. What stands recorded in the survey report^u that the representative of the appellant company admitted that the physical stock inventory of the goods lying at his business premises

was made in his presence and was correct; that the computerized stock inventory list was provided by him to the team and then cross checked by the said team; that he agreed with the cross checking so made, by the visiting team. He then specifically mentioned that all this be read as part of a statement.

40. As regards, cash variation, before the Assessing Officer, it was submitted on behalf of the appellant – dealer that the survey team happened to count cash ~~lying~~ in one case box which was meant for Pooja.

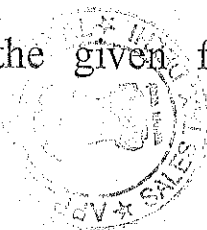
41. It is not believable that in a box meant for donations lying at the premises of the Company, such a huge sum of Rs. 96,159/- would be found lying. Furthermore, no such plea was put forth ~~for~~ by the representative of the appellant company before survey team at the time of survey.

42. In **Supreme Motors v. State of Orissa** (1980) 46 STC 452 (ORI) decided on 27/8/1980, which finds mention in the list of cases filed on behalf of appellant, Hon'ble High Court observed that u/s 16(2) of the Orissa Sales Tax Act, 1947, the inspecting officer of the Commercial Taxes Department, during an inspection of the assessee's place of business, had no jurisdiction to verify the cash position with reference to the cash available in the cash box of the assessee.

43. But, here, no such argument has been advanced that the survey team had no jurisdiction to do so. In the given facts and

20/7

26/7



circumstances, decision in Supreme Motors' case (supra) does not come to the aid of the appellant.

44. It may be mentioned here that in the list of cases filed by Learned counsel for the appellant, no other case has been cited or relied upon in the course of arguments.

45. In view of the above discussion, there is no merit in the contention raised by learned counsel of the appellant that this is a case of no stock or cash variation. Rather, from the material available on record, we find that the learned OHA has rightly upheld the assessment made by the Assessing Officer u/s 32 of the Act as regards tax and interest.

Whether imposition of penalty was justified?

46. Learned counsel for the appellant has submitted that this is not a case where penalty should have been imposed either u/s 86(10) or 86(14) of DVAT Act. In the list of cases submitted by learned counsel for the appellant, on the point of penalty, decisions in Leeladhar Biyani and Sons v. Commercial Taxes Officer, Anti-Evasion, (2001) 124 STC 294 (RTT) and San Construction Company Pvt. Ltd. v. State of Tamil Nadu (2012) 53 VST 130 (Mad) find mentioned.

47. As regards, imposition of penalty of Rs. 1,07,147/-, the assessment order dated 21/2/2012 would reveal that the same has been imposed keeping in view unaccounted purchase/sale leading to