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

Appeal No. 1250/ATVAT/13
Date of Decision : 27/8/2021

M/s. Haryana Traders Pvt. Ltd.,
4035, Chawri Bazar,
Delhi – 110006. ..... Appellant

V.

Commissioner of Trade & Taxes, Delhi ..... Respondent

Counsel representing the Appellant : Sh. A.K. Rai.
Counsel representing the Revenue : Sh. M.L. Garg.

JUDGMENT

1. Initially, two appeals No. 1249 & 1250 were filed by the appellant against impugned order dated 21/1/2014 passed by Addl. Commissioner (zone-III & V) - Learned Objection Hearing Authority (here-in-after referred to as OHA), while disposing of objections filed under section 74 of Delhi Value Added Tax Act 2004 (here-in-after referred to as the Act).

2. Earlier the Tribunal delivered judgment dated 25/2/2015. However, the appellant filed review application No. 3 and thereupon appeal no. 1250 was restored to its original number,

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vide order dated 13/8/2021, for adjudication as regards challenge to the order of penalty passed by learned OHA.

3. Vide order 12/7/2013, Assessing Officer – VATO imposed penalty upon the dealer-appellant u/s 86(10) of the Act.

4. The learned OHA upheld the order vide impugned order dated 21/1/2014.

5. The matter pertains to the tax period for the month of March, 2013.

6. On the point of penalty, learned counsel for the appellant has submitted that the impugned order passed by VATO is illegal and against facts and circumstances of the case as he did not express his satisfaction that the return furnished by the appellant was false, misleading or deceptive whereas the impugned order passed by learned OHA is a non-speaking order. It has also been submitted that the appellant – dealer had furnished the return properly and correctly.

7. Further it has been submitted that no notice was issued by VATO to the dealer before imposing penalty and as such the impugned orders imposing penalty and upholding the same, deserve to be set-aside. In support of his contentions, learned counsel has relied on decision **in Bansal Dye Chem v. Commissioner of VAT**, ST. Appeal 29 of 2015, decided on

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24.9.2015 by our own Hon'ble High Court and **Hindustan Steel Ltd. Vs State of Orissa, AIR** 1970 SC 253; 1970 SCR(1) 753.

8. Here, as noticed above, Assessing Authority decided to impose penalty under this provision of law after recording his satisfaction for the reasons specified in the order dated 12/7/2013. The reasons, as available in the said order, read as under -

> "An enforcement survey of M/s Haryana Traders (P) Ltd. was conducted on 29/3/2013. The firm was functioning at 4035 Haryana Building, Chawri Bazar Delhi. The dealer is engaged in trading of Paper Stationery & Note Book, plastic stationery @ 5% & 12.5% VAT. The statement of the dealer was recorded alongwith relevant documents. Notice was issued and present Sh. Netra Singh Accountant with POA and submitted the relevant documents and could not file reply of total variation of Rs. 56,57,635/-. Therefore, it is taxed @ 5% i.e. 2,82,882/- with interest. Penalty u/s 86(10) equal to tax is levied separately."

9. The learned OHA, vide impugned order, upheld the order of imposition of penalty and rejected the objections filed by the dealer, by observing in the manner as -

> "Therefore, in these facts and circumstances of the case and detailed narration made above, having been found without any merit and substance, the objections of the objector are rejected and orders of default assessments of tax, interest and penalty issued by the VATO of the Spl. Cell on 11/7/2013 are hereby upheld and confirmed.

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However, credit/adjustment of tax etc. amounts deposited by the objector as above will be given to him after proper verification thereof from the Ward Scroll".

10. Undisputedly, survey was conducted at the business premises of the dealer – appellant on 29/3/2013, by the Enforcement Branch of Revenue Department. Thereupon, notice was issued by the VATO - Assessing Authority to the dealer – appellant and the representative of the dealer – appellant submitted certain documents. Assessing Authority found that it was a case of total variation of Rs. 56,57,635/-. Thereupon, penalty, equal to tax i.e. RS. 2,82,882/- was imposed.

11. Learned counsel for the appellant has contended that it was not a case of any variation and that in this regard the appellant had produced before learned OHA certain documents, but the learned OHA even then rejected the objections filed by the dealer – appellant.

12. In the impugned order, while rejecting the objections of the appellant, learned OHA has observed in the manner as –

"Although in support of his this contention, the counsels for the objector have filed details of stock available as per the books of accounts on 29/3/2013 together with that of stock inventory of goods prepared by the surveying officers on that day, yet, in the absence of details of specific stock left out un-accounted for together with proper reasons there for, the same cannot be accepted at this much later stage. Besides, as per certificate appended by the

objector company's Director some Mr. Ram Avtar Gupta at the end of the stock inventory dated 29/3/2013, it has been stated and confirmed in un-equivocal terms that stock inventory of goods was prepared before him/his representative and no stock has been counted twice or left un-counted. Therefore, in case, the counting was done by the survey team in a hurry or that any part of stock was not counted by the team, the objector was required to get the same too counted and included in the inventory of goods prepared by the team as above and if the objector has knowing failed to do all that, it is none else but the objector himself who is to be blamed and suffer for the same. As such, the objections of the objector on this count fails and are accordingly rejected.

On the point of variation/shortage of Rs. 1,44,851/- in the cash too, the explanation given by the objector that out of it, an amount of Rs. 1,44,000/- was taken by Mr. Pritam Kumar Gupta, a Director of the objector company to his home and that on the date of survey he was not present at the business premises of the company to tell about the same to the survey team while the balance amount of Rs. 851/- was lying in the cash box itself in the form of small notes and coins, appears to be hardly of any credence and avail to him. Virtually, in case, such an heavy amount of Rs. 1,44,000/- of case was taken by the said Director to his home, again the objector company's other director who was present on the date of survey and making the statement before the team, was required to tell about the same and in case, he failed in doing that, he cannot be allowed to take benefit of his own lapse or say omission committed by him in this regard, now. Resultantly, on this score too, the objections of the objector miserably fail and are accordingly rejected."

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13. In the course of arguments, learned counsel for the appellant admits that statement of the Director of the appellant made before the survey team bears signatures of the said Director. However, learned counsel submits that the said statement was in the form of a format and as such no reliance can be placed thereon.

In this regard, learned counsel for the Revenue has rightly pointed that the statement made before the survey team was signed by Sh. Ram Avtar Gupta, Director of the Appellant and that the Director did not raise any objection at the time of signing of this statement. As rightly observed by learned OHA, the said **director admitted that no stock was counted twice or left unaccounted.** He further stated that the visiting team prepared a detail of stock inventory of goods lying at the registered office as well as the godown of the appellant in his presence and that the same was correct and signed by him. The statement was signed by the Director without lodging any protest on any aspect. Even otherwise, when we have enquired from learned counsel for the appellant if any complaint was submitted by the said Director or the dealer to the concerned Ward or any senior officer, soon after the survey, lodging protest about any aspect of the survey, learned counsel has candidly submitted that no such complaint was submitted.

14. Learned counsel for the appellant has submitted that no

copy of the inventory prepared by the enforcement Team was supplied to the Director of the appellant and as such the dealer could not make any complaint to the ward regarding the manner in which the survey was conducted.

However, there is nothing on record to suggest that copy of the inventory prepared at the spot was never supplied to the Director of the appellant. Even otherwise, the appellant could complain to the concerned ward or the senior officers, in case the appellant was aggrieved by the process or the manner in which the survey was conducted. However, admittedly, no such complaint was submitted by the appellant. The fact remains that the statement made by the Director before the Enforcement team was never retracted. Therefore, there is no reason to disbelieve what stands recorded in the said statement signed by the Director, after having accepted the same to be correct.

15. As regards, the contention raised by learned counsel for the appellant that no notice was issued by the Assessing Authority to the appellant before imposition of penalty u/s 33 or 86(10) of the Act, and the two decisions cited by learned counsel for the appellant, it is pertinent to mention here that in view of decision in Sales Tax Bar Association (Regd.) Vs. GNCTD, WP (C) No. 4236/2012, by our own Hon'ble High Court, also relied on by learned counsel for the Revenue, no notice was required to be issued to the appellant before passing orders of penalty.

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16. In Bansal Dye's case (supra), our own Hon'ble Court observed that penalty order u/s 86(10) of the Act was passed by the Assessing Officer, without service of prior notice of penalty on the Assessee and also without affording the Assessee an opportunity of being heard on the point of imposition of penalty, and as a result, set aside the impugned order holding that the said order was unsustainable in law. Therein, it was also observed that the very nature of the proceedings under section 33 of the DVAT Act read with Rule 36(2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order; that This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the assessee an opportunity of being heard prior to passing the penalty order, and further that the imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case.

In that case, the premises of the Assessee were surveyed and it was found that there was variation in cash and stock, and as a result, the Assessing Officer enhanced the gross profit and levied tax, interest and also penalty. In that case, the Assessee had paid tax, interest and penalty, and it questioned the penalty order, inter alia, on the ground that no opportunity of hearing was afforded on the point of penalty before the passing of the order.

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17. In Sales Tax Bar Association's case (supra), our own Hon'ble High Court clearly observed that the scheme of the statute (DVAT Act) itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. As further held, with such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal.

In Bansal Dye's case (supra), it was seen that on the basis of survey, a notice was issued to the Assessee under section 59 of the Act as regards the assessment of tax, but the Assessee did not participate in the assessment proceedings and accordingly, notice of default assessment of Tax and interest was issued by the Assessing Officer. On the same day, the Assessing Officer passed the order of penalty, without service of prior notice on the Assessee.

18. Undisputedly, the decision in Sales Tax Bar Association's case on the relevant point of opportunity of being heard, before assessment of penalty, was not referred to by learned counsel for the petitioner or the respondent in Bansal Dye's case (supra).

Even otherwise, here the appellant filed objections before learned OHA and the learned OHA disposed of the objections

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after providing to the dealer – appellant opportunity of being heard. In this way, we find that this is a case where impugned order came to be passed by Learned OHA, after affording reasonable opportunity of being heard, in terms of decision in Sales Tax Bar Association's case.

19. In the given situation, in view of decision in Sales Tax Bar Association Case, decision in Bansal Dye's case (supra), does not come to the aid of the appellant.

20. **In Hindustan Steel Ltd. case (supra),** Hon'ble Apex Court observed that a penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or it guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or; venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

On this point, learned counsel for the Revenue has rightly pointed out that on the basis of inspection conducted by the survey team of Enforcement Branch, it can safely be said that this is a case of variation in stock and cash, as on 29/3/2013, which the appellant – dealer could not explain, even during hearing on objections, and as such the dealer – appellant was found suppressing the said variations. Therefore, decision **In Hindustan Steel Ltd. case (supra),** does not come to the aid of

the appellant.

21. As noticed above, we have upheld the reasons recorded by the Assessing Authority, for imposing the penalty, and also by the Learned OHA in upholding the penalty. But, still another question remains to be decided. The question is "**Whether the Revenue Department was justified in imposing penalty under section 86(10) of DVAT Act?**

To answer the question, reference is to be made to the relevant provisions of DVAT Act as regards penalty in such a case.

22. Revenue Department has resorted to Section 86(10) of DVAT Act. It provides for imposition of penalty in case any person furnishes a return under this Act which is false, misleading or deceptive in a material particular; or omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular.

Under Chapter XIII of the Act, **Section 86(12)** provides for imposition of penalty in a case of 'tax deficiency'. It reads as under:-

> "Where a tax deficiency arises in relation to a person, the person shall be liable to pay, by way of penalty, a sum equal to one per cent of the tax deficiency per week or a sum equal to rupees one hundred

per week, whichever is higher, for the period of default."

Under the same chapter, another provision, in the form of **Section 86(15)** of the Act provides for imposition of penalty where a person is required to prepare records and accounts under the Act, but he prepares records and accounts in a manner that is false, misleading or deceptive.

23. Learned counsel for the Revenue has pointed out that inspection was conducted on 29.3.2013 and return for the said period was submitted thereafter, but, since the dealer-appellant did not justify the variations observed by the Enforcement Branch during survey, penalty has been rightly imposed under section 86(10) of DVAT Act.

We have enquired from learned counsel for the parties, as to when the requisite return for the month of March, 2013 was filed by the dealer-appellant. It has been stated at the bar that return was filed in April, 2013.

In the given situation, when survey was conducted on 29.3.2013 i.e. even before the filing of the return for the said quarter, how can the Revenue allege that the case pertains to furnishing of a false, misleading or deceptive return as regards the variations observed by the Enforcement Team. The dealer-appellant, who was required to prepare records and accounts, prepared records and accounts in a false, misleading or deceptive manner, actually made itself liable for breach of ~~an offence under~~ Section

86(15) of the Act.

When penalty was to be imposed under section 86(15) of DVAT Act, 2004, but the Revenue Department imposed penalty under section 86(10) of the Act, it can safely be said that the penalty has been wrongly imposed on the dealer. The dealer-appellant had no opportunity to meet the allegation of preparing false, misleading or deceptive records and accounts, when the penalty imposed under different provision of law, which applies in case of filing of a return, was considered and upheld by the Learned OHA. As a result, the order of imposition of penalty by the Assessing Authority as well as the order vide which the Learned OHA upheld the said order, deserve to be set aside.

24. Consequently, this appeal on the point of penalty is allowed and the imposition of penalty on the dealer-appellant is hereby set-aside.

File be consigned to the record room. Copy of the order be supplied 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 : 27/8/2021

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(Rakesh Bali)
Member (A)

Narinder Kumar 27/8/2021

(Narinder Kumar)
Member (J)

Appeal No. 1250/ATVAT/13/878-885 Dated: 2/9/2021

Copy to:-

(1) VATO (Ward- 107)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)

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REGISTRAR