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

Appeal No. 971-992/ATVAT/2017

Date of Order: 01/10/2021

M/s. Horizon Technologies,
704, Meghdoot Building,
94, Nehru Place,
New Delhi – 19.

.... Appellant –Applicant

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Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Applicant : Sh. A.K. Babbar
Counsel representing the Revenue : Sh. S.B. Jain.

ORDER

1. This common order is to dispose of 22 applications filed by the Dealer – Appellant – Applicant u/s 76(4) of Delhi Value Added Tax Act 2004 (here-in-after referred to as the Act) with the prayer that the above captioned 22 appeals nos. 971-992/ATVAT/11 be entertained waiving of the condition of pre-deposit towards impugned demand.
2. It may be mentioned here that earlier vide order dated 1/5/2013, this Appellate Tribunal disposed of this very application,

Narinder Kumar
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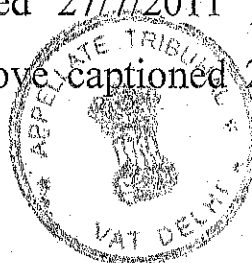
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directing the appellant – applicant to deposit 20% of the disputed demand, as condition precedent for entertaining of the appeals.

3. The dealer – appellant filed ST appeal no.45-2014 before the Hon'ble High Court challenging order dated 1/5/2013. Vide order dated 22/8/14, the Hon'ble High Court deemed it appropriate to direct the Appellate Tribunal to hear the application for waiver of pre-deposit, afresh.
4. As per case of the applicant, audit of its business affairs was carried out by the Revenue, in respect of assessment year 2008-09. On the basis of the audit, notices of default assessment of tax, interest and that of penalty u/s 32-33 of DVAT Act, were issued by the Assessing Authority creating demand of tax, interest and penalty.
5. Feeling dissatisfied with the notices of default assessment of tax, interest and penalty, dealer – appellant filed objections before learned Objection Hearing Authority (OHA) – Additional Commissioner (Special Zone). The objections came to be disposed of vide order dated 27/7/2011 vide which the disputed demands, tax, interest and penalty were upheld.
6. Feeling aggrieved by the order dated 27/7/2011 passed by learned OHA, the dealer filed the above-captioned 22 appeals



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accompanied by applications u/s 76 of DVAT Act, which are being disposed of by this common order.

7. As per notice of default assessment framed by Assessing Authority, observed that the dealer – applicant had failed to produce proof of movement of goods pertaining to C-forms and sales in transit, and that accordingly, he was treating both these sales as local sales. With these observations, the Assessing Authority levied tax on these sales @ 12.5%.
8. As regards, claim of the dealer regarding ITC, the Assessing Authority observed that the dealer had failed to produce proof of movement of goods pertaining to Inter-State sales and transit sales. Accordingly, the Assessing Authority, while treating the same as local sales, levied tax @ 12.5% and directed the dealer to pay amount towards tax & interest. The Assessing Authority also levied penalty on the dealer.
- It may be mentioned that -*
9. In the notice of default assessment of tax and interest, as regards the turnover for all the eleven months, the Assessing Authority observed that the dealer had failed to produce the proof of movement of goods pertaining to C-Form sales and goods relating to inter-state and transit sales, hence both these sales were treated as local sales and taxed @ 12.5%, and accordingly,



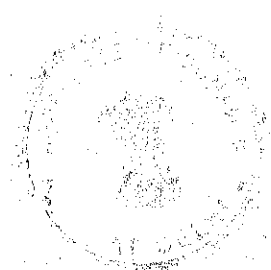
dealer was directed to pay tax & interest.

10. Vide separate notices of assessment, Assessing Authority imposed penalty on the dealer, in respect of each month.
11. The following tables would depict levy of tax, interest and imposition of penalty on the dealer month-wise :

Ref. No.	PERIOD	TAX (in Rs.)	INTEREST (in Rs.)	PENALTY (in Rs.)	TOTAL
040239501011	May 08-09	631125/-	194525/-	-	825650
040240391011	June 08-09	818163/-	242087/-	-	1060250
040242221011	Aug. 08-09	460299/-	124848/-	-	585147
040239461011	April 08-09	612813/-	196436/-	-	809249
040242261011	Sep. 08-09	768975/-	199091/-	-	968066
040242891011	Oct. 08-09	303510/-	74838/-	-	378348
040242991011	Nov. 08-09	408941/-	95793/-	-	504734
040243041011	Dec. 08-09	378770/-	84056/-	-	462826
040243081011	Jan. 08-09	259035/-	54291/-	-	313326
040243141011	Feb. 08-09	92944/-	18334/-	-	111278
0402432501011	Mar. 08-09	159393/-	29477/-	-	188870

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Ref. No.	PERIOD	Penalty (in Rs.)	INTEREST (in Rs.)	PENALTY (in Rs.)	TOTAL
040243591011	May 08-09	631125/-	-	-	631125
040243611011	June 08-09	818163/-	-	-	818163
040243641011	Aug. 08-09	460299/-	-	-	460299
040243551011	April 08-09	612813/-	-	-	612813
040243651011	Sep. 08-09	768975/-	-	-	768975
040243671011	Oct. 08-09	303510/-	-	-	303510
040243681011	Nov. 08-09	408941/-	-	-	408941
040243691011	Dec. 08-09	378770/-	-	-	378770
040243711011	Jan. 08-09	259035/-	-	-	259035
040243741011	Feb. 08-09	92944/-	-	-	92944
040243771011	Mar. 08-09	159393/-	-	-	159393

12. These notices of default assessment of tax & interest and levy of penalty, were challenged before learned OHA by way of objections. As noticed above the objections were dismissed by the learned OHA. Hence these appeals accompanied by the applications with prayer for waiving of condition of pre-deposit, for the purpose of entertainment of appeals.

13. Arguments heard on the applications. File perused.

14. Sub-section (4) of section 76 of the Act provides that no appeal

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against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person.

As per First proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

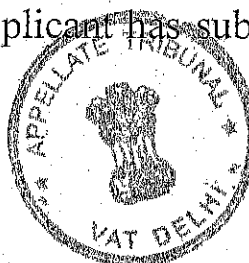
15. Learned counsel for the appellant – applicant has submitted that this is a case where two separate returns were being filed i.e. one under DVAT Act and the other under CST Act, but the Assessing Authority has levied tax & interest under DVAT Act, without explaining in the order as to whom the local sales can be said to have been impliedly made, when the dealer has been held not entitled to ITC claim under CST Act. *Reference made to decision in R.H. Enterprises v. Commr., 1991 RLR 34.*

In this regard, learned counsel for the Revenue has submitted that no such ground was taken by the dealer before learned OHA.

Thereupon, learned counsel for the applicant has submitted that

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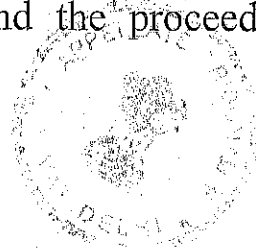
this is a legal ground which can be agitated in appeals.

In the given situation, when as per the objections raised by the appellant before learned OHA, no such ground was raised in the objections, it shall be determined at the time of final arguments if any such ground can be raised, when the OHA had no opportunity to consider and decide the same.

16. Another point raised by learned counsel for the applicant is that the Assessing Authority could himself see on the portal of the Department record pertaining to sales, even if the dealer ~~have~~ failed to produce certain records, in proof of the sales and movement of goods.

In this regard, at the time of final arguments, applicant shall have to refer to the relevant record if any available on the portal, at the time the assessment were made, and also to satisfy as to why the dealer failed to ^{provide} proof movement of goods as finds mentioned in the notices of default assessment.

17. Learned counsel for the applicant has submitted that as per record, counsel for the dealer had appeared before the Assessing Authority lost of all on 4/6/2010 and the proceedings were



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adjourned to 8/6/2010 but it remains unexplained as to why the Assessing Authority waited for issuance of the notice of the default assessment of tax and interest, for more than one month.

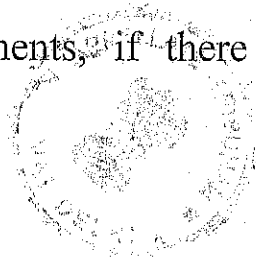
In this regard, it is significant to note that when notice was issued by the Assessing Authority and counsel for the dealer appeared before him, last of all on 8/6/2010, ^{appeal and} ~~applicant~~-applicant shall have to explain at the time of final arguments as to why the requisite documents were not produced before the Assessing Authority, by the counsel for the dealer as per his own promise given to the Assessing Authority in this regard.

18. Learned counsel for the applicant has submitted that this is a case where requirement of DVAT 50 was not complied with while conducting audit at the office premises of the dealer, and also that VATO (Audit), issued notices of default assessment without any jurisdiction, the reason being that VATO (Ward-94) having the jurisdiction to frame such assessment.

In this regard, record reveals that audit was not conducted at the office premises of the dealer and rather the same appears to have been conducted by VATO at his office. In this situation, it is to be seen at the time of final arguments, if there was any

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requirement for compliance with provisions for issuance of DVAT 50.

The point of jurisdiction of VATO (Audit) to make assessments is also an issue to be considered at the time of final arguments.

19. As regards assessments imposing penalty, learned counsel for the applicant has pointed that while levying penalty, the Assessing Authority has not specified as to on which ground the same has been levied and under which sub-section of section 86 of DVAT Act.

Learned counsel for the Revenue has also not been able to point out as to under which provision of section 86, said penalty has been imposed.

20. Last of all, it has been contended that the dealer – appellant is unable to meet with the disputed demand because of financial constraints.

On the other hand learned counsel for the Revenue has submitted that the assessment, pertain to the year 2008-09 and the appeal was filed in the year 2011, and further that no documents has

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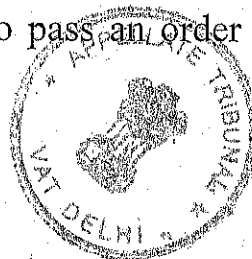


been filed by the applicant in proof of this averment.

In the course of arguments, learned counsel for the applicant has not been able to draw attention of the Tribunal to any document in support of this submission. Therefore, it cannot be said that the dealer is unable to meet with the disputed demand due to financial constraints.

21. On the point of admission of appeal with or without pre-deposit, in Ravi Gupta Vs. Commissioner Sales Tax, 2009(237) E.L.T.3 (S.C.), it was held as under:-

“It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which



cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

~~22.~~ Furthermore, in the case of UOI V Adani Export [2007(218)ELT 164(Supreme Court)], Hon'ble Apex Court has held that following are the three aspects to be focused while dealing with the application for dispensing of pre-deposit:

- (a) prima facie case,
- (b) balance of convenience, and
- (c) irreparable loss.

The discretion of stay has to be exercised judiciously by the Appellate Authority.

22. In the given facts and circumstances, in view of the submissions ~~the submissions~~ put forth by learned counsel for the parties and well settled law, we deem it a fit case to entertain the appeals, subject to deposit of 10% of the disputed demand of tax and interest.

23. Accordingly, the applicant is given 25 days time, from today, to deposit 10% of the disputed amount towards tax and interest by way of pre-deposit for the purpose of entertainment of appeals.





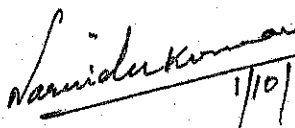
Ld. Counsel for the applicant to apprise Ld. Counsel for the Revenue regarding compliance of this order of pre-deposit, so that on the next date appeals are taken up for final arguments. Otherwise, law shall take its own course.

24. 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 : 01/10/2021


(Rakesh Bali)
Member (A)

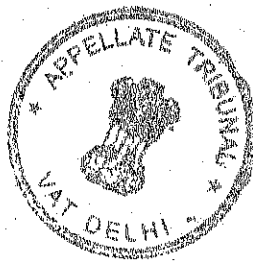


(Narinder Kumar)
Member (J)

Appeal No. 971-992/ATVAT/2017/1256-63

Dated: 4/10/21

Copy to:-

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| (1) VATO (Ward-94) | (6) Dealer |
| (2) Second case file | (7) Guard File |
| (3) Govt. Counsel | (8) AC(L&J) |
| (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. | |
| (9) Commissioner (T&T) | |




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