

109

Appeal No.171-176/ATVAT/2018-19

Date of Order: 29-10-2021

M/s Industrial Importers
44, DDA Commercial Complex,
Kailash Colony, Extension Zamrud Pur
Delhi-110048

.....Appellant

V.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. Vineet Bhatia
Counsel representing the Revenue : Sh. P. Tara

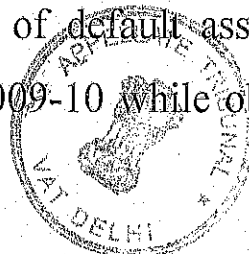
JUDGMENT

1. Appellant is a dealer registered with Department of Trade and Taxes, vide TIN NO, 07560222294. The dealer has challenged order dated 07/06/18 passed by Ld. OHA. Vide impugned order Ld. OHA upheld the notices of default assessment of tax, interest and penalty issued by the Assessing Authority on 05/07/12.

2. Assessing Authority issued notices of default assessment in respect of tax period April, May & June 2009-10 while observing in the manner as:-

Narinder Kumar
29/10/21

Rakesh Bali
29/10



"April 2009-10:- During the course of audit, books of accounts of the dealer for the period 2009-10 were checked and it has been observed that the company has made purchases of DEBP Licence amounting to Rs.13,06,936/- and has claimed input tax credit of Rs.52,277/- vide invoices No. 303 dt. 08.04.09, 624 dt.10.04.09 and 632 dt. 22.04.09 on the purchases of DEPB Licences.

May 2009-10:- During the course of audit, books of accounts of the dealer for the period May 2009-10 were checked and it has been observed that the company has made purchases of DEBP Licence amounting to Rs.8,61,710/- and has claimed input tax credit of Rs.34,468/- vide invoices No. 471 dt. 19.05.09, 325 dt.21.05.09 and 26 dt. 21.05.09 on the purchases of DEPB Licences.

June 2009-10 :- During the course of audit, books of accounts of the dealer for the period June 2009-10 were checked and it has been observed that the company has made purchases of DEBP Licence amounting to Rs.10,87,386/- and has claimed input tax credit of Rs.43,495/- vide invoices No. 332 dt. 05.06.09 on the purchases of DEPB Licences."

However, as per the details given by the dealer, the DEPB Licences were used in Delhi by the dealer for paying custom duty. As per section 9(1) of DVAT Act 2004, the dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of the purchases occurring during the tax period in the course of activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making-

- a) Sales which are liable to tax u/s 3 of this Act; or
- b) Sales which are not liable to tax under section 7 of this Act. The phraseology directly or indirectly ref to two situations, first is that the goods are sold as such without any change in their properties,

or shape or form. That would be pure trading in those goods. In the second situation, goods are used as raw material in the manufacture of goods. Here the word indirectly also refers to the Capital Goods because they are used in making of the goods and therefore, are indirectly used for manufacturing and sale. The word indirectly can not be given a wide connotation because it will defeat the very purpose of allowing tax credit on every purchase made by the dealer for official and personal use because indirectly every purchase would be used for sale. Moreover, DEPB Licences by no stretch of imagination can be termed as capital goods and therefore, can not be taken to have been used indirectly. The dealer did not purchase DEPB Licences for making direct or indirect sale, but only with the intention to use it to pay custom duty."

3. Accordingly, the dealer was held not entitled to claim Input Tax Credit on purchase of DEPB Licences and therefore, input tax credit of RS. 52,277/-, Rs.34,468/- & Rs. 43,495/- for the months of April, May & June 2009 respectively were disallowed. Resultant tax deficiency attracted interest 15% p.a u/s 42 of DVAT Act, 2004".

The dealer was directed to pay the following amount and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 06-09-2012 for the following tax period.

Tax Period	Amount (Rs)		
	Tax	Interest	Total
April,2009-10	52277	24277	76554
May-200910	34468	15581	50049

June-2009-10	43495	19126	62621
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4. It may be mentioned here that the Assessing Authority also imposed penalty u/s 86(12) read with section 33 of DVAT Act, in respect of these three quarters.

Feeling aggrieved by the notices of default assessment, the dealer filed objections before Ld. OHA u/s 74(1) of DVAT Act. Ld. OHA disallowed the objections by observing in the manner as:

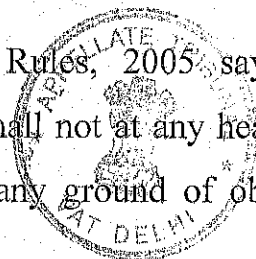
“The main ground of objection of the dealer is that the VATO Audit has no jurisdiction under the provisions of the DVAT Act to frame the notice of default assessment of tax, interest and penalty and only the VATO of the concerned ward could frame the notice of default assessment of tax interest and penalty.

In the context the provisions of section 58 of DVAT Act is relevant which is as under:

- (1) The Commissioner may serve on any person in the prescribed manner a notice informing him that an audit of his business affairs shall be performed and where applicable, that an assessment already concluded under this Act may be reopened.

Since, powers of Commissioner to all the VATOs including VATO Audit. Therefore, in view of the aforesaid provisions the contention of the objector dealer that VATO Audit has no jurisdiction is not correct.

Further, Rule 54(3) of DVAT Rules, 2005 says that the authority deciding the objection shall not at any hearing, allow the objector to argue or present any ground of objection not



28/10

29/10

specified in the objection unless the authority is satisfied that omission of that ground there from was not wilful or unreasonable. Therefore, arguments/ documents which were not specified in the ground of objection were not allowed and considered.

Based on the above, the contention of the objector/dealer cannot be held tenable. Thus, on the basis of facts of the case, the notice of default assessment of tax and interest u/s 32 and notice of default assessment of penalty u/s 33 of the DVAT Act for the tax period April, May & June 2009 dated 05/07/2012 is hereby upheld and objection application is disallowed.”

5. Arguments heard. File perused.

6. In the course of arguments, Ld. Counsel for the dealer-appellant has relied on decisions in Jagriti Plastic Ltd., v. Commissioner of Trade & Taxes (ST APPL 5/2015) decided on 1/10/2015 by our own Hon'ble High Court and submitted that since Hon'ble High Court has held that the credit of input tax paid of DEPB scrips cannot be denied to the assessee, the dealer- appellant was also entitled to ITC, which the revenue wrongly denied vide the impugned assessment and rather went on wrong in levying of penalty on the dealer – appellant for the said tax period. Ld. Counsel for the appellant has submitted that this is a legal ground, which is being put-forth before the Tribunal even though neither ^{was} raised before Ld. OHA nor adjudicated there. The contention is that the notice of default assessment of tax, interest and penalty deserves to be set-aside.



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7. In Jagriti Plastic Ltd.'s case (supra), the question before Hon'ble High Court was as to whether DEPB scrips are goods for the purpose of DVAT Act. There was no serious context by the revenue that DEPB are indeed goods. Hon'ble High Court also referred to well settled law on this point in Vikas Sales Corp. v. CCT(1996) 4 SCC and Yash Overseas v. CST & Ors. (2008) 17 VST 182 (SC), wherein, up to 31st March 2010, Section 9 (1) of DVAT Act read as under:

"9. Tax credit.

(1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making -

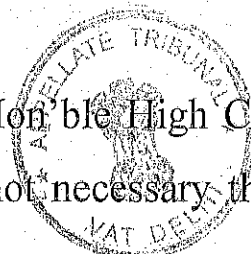
(a) sales which are liable to tax under section 3 of this Act; or

(b) sales which are not liable to tax under section 7 of this Act.

Explanation.- Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries."

8. While referring to the provisions of Section 9(1), and the settled law, Hon'ble High Court observed that ITC can be claimed in respect of the turnover of the purchases arising in the course of activities of the assessee as a dealer.

9. In Jagriti Plastic Ltd. case (supra), Hon'ble High Court further observed that in order to avail ITC it is not necessary that assessee



29/10

have to be dealers in DEPB scrips used in payment of custom duty on the imported goods in which they were dealing. Consequently, the demands created in those matters, were held unsustainable in law.

10. In the course of arguments, Ld. Counsel for the appellant has not disputed that the decision in Jagriti Plastic Ltd.'s case (supra) is applicable in case of purchase of DEPB scrips, which are covered by definition of goods.

11. In view of the decision in Jagriti Plastic Ltd., case, the notices of default assessment of tax, interest and penalty issued by the assessing officer in respect of the tax period April, May & June 2009-10 deserve to be set-aside.


12. Consequently all these appeals are allowed and the notices of default assessment of tax, interest and penalty upheld by the Ld. OHA vide impugned order, are set-aside.

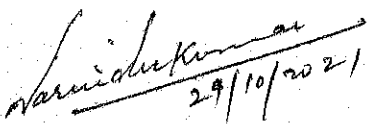
13. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : 29/10/2021




(Rakesh Bali)
Member (A)

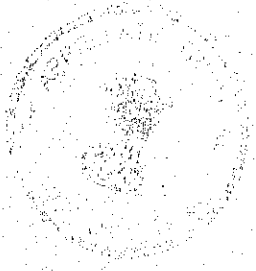

(Narinder Kumar)
Member (J)

Appeal No. 171-170/ATVAT/18-19/1456-63

Dated: 2/11/21

Copy to:-

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| (1) VATO (Ward-88) | (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) | |




REGISTRAR