PS

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

R. No. 240/ATVAT/2021
Date of Decision : 11/11/2021

M/s. R.K. Overseas,
190, 3rd Floor, Jor Bagh,
New Delhi – 110030. ..... Applicant

V

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

Counsel representing the Appellant : Sh. Varun Nischal.
Counsel representing the Revenue : Sh. P. Tara.

ORDER

1. Present application has been filed by the dealer for review of judgment dated 26/7/2021, passed by this Tribunal in appeals No. 144 to 157/ATVAT/2018 filed by the petitioner – applicant. Vide said judgment, the appeals were dismissed thereby upholding impugned orders dated 19/1/2018 passed by learned Objection Hearing Authority - Special Commissioner-II. It may be mentioned here that in the review application, date of judgment has been mentioned as 28/7/2021 in place of

26/7/2021.

2. The appeals pertained to the tax period 2009-10 i.e. 2nd qtr. of 2009; and the months of Oct., 2009 to March, 2010.

3. Appellant-applicant is engaged in the trade of auto parts, accessories, lubricants and tyres etc. It was registered vide Tin No. 07480362988, under DVAT Act.

4. Audit of the appellant is stated to have been conducted in respect of the financial year 2009-10. On the basis of audit, seven notices of default assessments were issued to the appellant, which led to levy of tax, interest and penalty.

5. Dealer had filed objections before Learned OHA u/s 74 of Delhi Value Added Tax Act (here-in-after referred to as the Act), against notices of default assessment of tax, interest and penalty framed by the Assessing Officer, in respect of following seven quarters:

S.No.	Tax Period	Amount (in Rs.) under DVAT Act	
		Tax & Interest	Penalty
1.	2nd Qtr. 2009-10	54,43,098/-	44,12,996/-
2.	Oct., 2009	18,13,646/-	14,85,761/-
3.	Nov., 2009	27,08,414/-	22,41,704/-
4.	Dec., 2009	19,70,434/-	16,48,649/-
5.	Jan., 2010	52,567/-	46,040/-

6.	Feb., 2010	10,85,920/-	9,27,351/-
7.	March, 2010	14,93,591/-	12,89,101/-

6. At the time of final arguments on appeal, only the following argument was advanced by learned counsel for the appellant:

> "That this is a case where no permission in the form of DVAT-50 was issued by the Commissioner, to the Audit Officer to make assessment as regards tax, interest on the basis of audit, and since the impugned assessment is without any jurisdiction, the impugned orders passed by the learned OHA affirming the assessment of tax, interest and imposition of penalty deserve to be set-aside."

7. In the appeals, to support his above contention, learned counsel had placed reliance on decision in **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.

While dealing with the above sole contention advanced by learned counsel for the appellant, in para no. 9 of the judgment, we observed in the manner as:

> "It may be mentioned here that on merits, learned counsel for the appellant has not advanced any argument. In other words, in the course of arguments, the facts which led to assessment as regards tax, interest and penalty vide impugned orders have not been

challenged before us".

It was further observed:

"As regards DVAT -50, only for ready reference it is pertinent to mention here that same is a document in proof of grant of authority to the person specified therein to exercise powers under Chapter X of the Act.

It may be mentioned here that appellant has not argued before us that the Officer, who conducted the Audit, had no power to conduct audit or to investigate under Chapter X. Therefore, we need not go into the question, if the authorization letter in form DVAT 50 is required to be carried for the purposes of audit at the office premises of the dealer or at the office premises of the department also.

On the point of jurisdiction to make assessment, by the Officer, who conducted the audit, learned counsel for the Revenue has submitted that the concerned Officer being a Value Added Tax Officer, had the jurisdiction to make assessment, and as such the assessments as regards tax, interest and imposition of penalty have been rightly upheld by the Learned OHA.

As regards DVAT-50, same is required to be issued by the Commissioner, to the Audit Officer to exercise powers under Chapter X. This Chapter contains provisions pertaining to audit, investigation and enforcement. Sub-section (4) of Section 58 empowers the Commissioner either to -

a. confirm the assessment under review; or

b. to issue a notice of assessment or re-assessment of the amount of tax, interest and penalty pursuant to sections 32 and 33 of the Act, where the Commissioner has considered the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him.

In H.G. International's case (supra), following question of law was framed by Hon'ble High Court: -

"The only question of law framed by the order dated 4th August, 2016 is "whether the VATO (Audit) can pass an assessment order in terms of the Delhi Value Added Tax Act, 2004?"

(In that case, at no stage of proceedings before the VATO, the OHA, or the Appellate Tribunal, the Appellant raised the issue regarding the jurisdiction of the VATO (Audit) to pass the default assessment order. However, Hon'ble Court permitted the Appellant to raise this question since it went to the root of the matter.)

The question framed therein was answered in the affirmative, i.e. in favour of the Department and against the Assessee.

The Appellant therein was engaged in the business of trading in auto parts, tyres and the lubricant oil. The Appellant's claim of input tax credit was rejected issued by the Value Added Tax Officer (VATO), who also happened to be the VATO (Audit), for the aforementioned 2nd, 3rd and 4th quarters for the year 2008-09,

resulting in creation of demand and imposition of penalty. After the OHA upheld the orders of default assessment and interest and penalty. The Appellant approached the Appellate Tribunal, which, by the impugned order, dismissed the appeal. The thrust of the arguments of the Appellant therein was that the person who conducted the audit could not himself make the assessment. In that case, Hon'ble High Court observed as under:

> "Section 58 (4) states that the Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of audit, if any, or any information otherwise available to him, either confirm the assessment under review or serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty pursuant to Sections 32 and 33 of the DVAT Act.
>
> Therefore, Section 58 (4) itself contemplates the auditor carrying out an assessment or re-assessment as the case may be, in terms of Sections 32 and 33 of the DVAT Act.
>
> The powers under Section 58 can be delegated by the Commissioner to named officers in terms of Section 66 (1) read with Section 68 of the DVAT Act.
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> In that case, at the relevant time, when the audit of the Appellant took place, there was an order dated 31st October 2005 issued by the Commissioner, VAT under Section 68 of the DVAT Act read with Rule 48 of the Delhi Value Added Tax Rules, 2005 (DVAT

Rules) delegating his powers under various provisions of the DVAT Act to an officer of a particular designation. Therein, Hon'ble High Court observed that said order dated 31st October 2005 issued by the Commissioner, VAT under Section 68 of the DVAT Act read with Rule 48 of the Delhi Value Added Tax Rules, 2005 ('DVAT Rules') was an order validly issued and was not subject matter of challenge in those proceedings".

In view of the above order dated 31st October 2005. Hon'ble High Court further observed that the impugned orders of default assessment of tax, interest and penalty issued by the VATO (Audit) were validly issued and within his powers and jurisdiction in terms of Section 58 (1) read with Section 58 (4), and Section 66 read with Section 68 of the DVAT Act."

8. Present case pertains to assessment for the year 2009-2010. Here, in the course of arguments in the appeals, learned counsel for the appellant did not dispute that the aforesaid order dated 31st October 2005 was applicable at the time audit was conducted and reassessment was made by VATO (Audit) on the basis of evidence collected during audit. Learned counsel for appellant did not submit at the time of arguments in appeals that any order subsequently passed by the Commissioner was applicable during the period VATO (Audit) conducted the audit and then made reassessment.

9. In view of the decision in H.G. International's case, which

upheld the validity of order dated 31st October 2005, in force at the relevant time, we did not find any merit in the contention of learned counsel for the appellant that in the year 2009-10, VATO (Audit) had no power to make re-assessment or to act as Assessing Officer under DVAT Act.

10. In the course of arguments in the appeals, when we drew attention of learned counsel for the appellant to the question of law framed in H.G. International case (supra)-which was cited by him- and that the said question was answered by the Hon'ble High Court in affirmative i.e. in favour of the department and against the assessee, only at that moment learned counsel for the appellant candidly admitted that the question framed therein was decided against the assessee, and further that HG International's case did not support the contention raised by him.

11. In view of the above discussion and findings that during the relevant period i.e. year 2009-2010, VATO (Audit) had the jurisdiction even to make reassessment as regards tax, interest and exercise powers in this regard and for imposition of penalty, we observed that all the 14 appeals deserved to be dismissed. The impugned orders passed by Learned Objection Hearing Authority affirming the orders passed by VATO were accordingly upheld and all the 14 appeals were dismissed.

11. Regulation 24 of Delhi VAT (Appellate Tribunal) Regulations, 2005, which pertains to review of order, reads as under –

(i) Subject to the provisions contained in sub-section (2) of section 76 of the Act and the rules made there under, any person considering himself aggrieved by an order of the Tribunal and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for a review of the order within sixty days from the date of service of the order:

Provided that the Tribunal may at any time, review the order passed by it suo motu also for reasons to be recorded by it in writing.

(ii) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.

(iii) Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:

PROVIDED that-

(iv) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the order, a review of which is applied for; and

(v) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the order was made, without strict proof of such allegation.

12. In this review-application, learned counsel for the applicant has submitted that recently the applicant sought information from the Revenue under Right to Information Act, and reply received has disclosed the name of VATO of Ward No. 41 during the relevant period, in which the business premises of the applicant is situated. The contention is that VATO (Audit) had no jurisdiction to make assessment.

When we have enquired from counsel for applicant as to when this information was sought by the dealer under RTI Act, the answer is that it was sought recently i.e. vide application dated 2/8/2021. Counsel for the applicant admits that this information was sought subsequent to the disposal of the appeals by this Tribunal.

In view of this fact, counsel for the Revenue has referred to Regulation 24 of Delhi VAT (Appellate Tribunal) Regulations, 2005 and rightly contended that such information could be sought by the dealer-applicant even earlier at the time of filing of objections before learned OHA, but no justification has been put forth by the dealer-applicant as to why the dealer did not

seek any such information earlier for its production for consideration by Learned OHA, during pendency of objections, and then before the Tribunal during pendency of appeals. Consequently, learned counsel for Revenue has rightly submitted that dealer-applicant cannot rely on this document collected by the dealer after disposal of the appeals.

13. As regards powers of VATO (Audit) to make assessment, learned counsel for the revenue has referred to provisions of section 58 of DVAT Act and submitted that section 58 is a Code in itself, which empowers the VATO to conduct audit and frame assessment or re-assessment as well; that Commissioner has already delegated powers under section 68 of the Act, and further that the judgment delivered by this Tribunal does not suffer from any mistake or error apparent on record in this regard.

Having regard to the order dated 31st of October, 2005 issued by the Commissioner, which was admittedly in force at the relevant time, when we found no merit in the contention on behalf of the appellants that in the year 2009-10, VATO (Audit) had no power to make re-assessment or to act as Assessing Officer under DVAT Act, we do not find that our judgment in this regard suffers from any mistake or error apparent on record.

14. Learned counsel for the applicant has submitted that observations made by us in para 11 of the judgment delivered while disposing of appeals is diametrically contradictory to observations made by us in para 6 of the judgment.

On the other hand, learned counsel for Revenue has rightly submitted that the observations made by the Tribunal in the said two paragraphs are not diametrically contradictory to each other.

When in para 11 we observed that it was not argued before us on behalf of the appellant that the Officer, who conducted the Audit had no power to conduct audit or to investigate, this observation was only as regards AUDIT OR INVESTIGATION parts of the Chapter X of the Act, whereas in para 6 we specified that the only argument advanced pertained to ASSESSMENT part of said Chapter X. So, there is no merit in the contention raised by the counsel for the applicant.

15. While referring to observations made by us in para 20 of the judgment, learned counsel for applicant has submitted that decisions are binding even when given subsequent to a decision, and that the said observations made by the Tribunal is wrong.

As regards decision in M/s Prakash Trading Co., case (supra), learned counsel for the Revenue has contended that a previous

decision by the Tribunal is not binding on the same Tribunal.

Case M/s Prakash Trading Co. (supra), pertained to tax period March 2011-12 and there it was found that DVAT 50 was issued by the department only after 23.9.2014, whereas the assessment was framed by VATO (Audit) on 31.12.2013.

Herein, audit was conducted in respect of financial year 2009-10, when order dated 31.10.2005 issued by Commissioner, VAT under section 68 of the Act read with Rule 48 of DVAT Rules, 2005 was admittedly in force.

Furthermore decision by the Hon'ble High Court in H.G. International case, is binding on this Tribunal in the given facts and circumstances, as the same upheld validity of order dt. 31.10.2005 issued by the Commissioner and the impugned orders of assessment of tax, interest and penalty issued by VATO (Audit) were also held to have been validly issued, and within his powers and jurisdiction in terms of section 58 (1) read with Section 58(4), and section 66 read with Section 68 of the Act.

As regards decision in Capri Bathaid's case (supra), learned counsel for Revenue has rightly contended that therein provisions of section 58 of DVAT Act were not under consideration, whereas in the case at hand, provisions of section

58 of the Act were considered by us while dealing with the only argument advanced on behalf of the appellant.

Even otherwise, as per the contention raised by the learned counsel for the applicant, this Tribunal has recorded a wrong finding while referring to the decisions in M/s Prakash Trading & Capri Bathaid cases. In this regard, it may be mentioned here that no review application lies on the ground that findings recorded by Tribunal are wrong.

In the course of arguments, learned counsel for applicant admits that there was neither any reference to the provisions of section 58 of the Act nor the said provision was under consideration in the decision in Capri's case.

In reply, however, learned counsel for applicant submits that the chart available in Capri's case (supra) is not complete chart.

Having regard to the chart as available in para 26 of decision in Capri's case, it cannot be said that any error in this regard occurred in adjudication of the matter in view of provisions of section 58 of the Act and decision in H.G. International's case, while considering the argument advanced before us on behalf of the appellant.

16. Last of all, Learned counsel for the applicant has contended that

even if only one argument was advanced on behalf of the appellants in the appeal, the Tribunal should have, of its own considered the grounds put forth in paras 18 to 22 and 23 to 30 of the memorandum of appeal, while deciding the appeals.

It may be mentioned here that the appeals were argued before us, on behalf of the appellant, by Shri Arif Ahmad Khan, Adv. Present review application has been filed and argued by the other counsel. In the course of arguments, initially it was sought to be contended that the counsel for the appellant had put forth another submission during arguments on appeal, but when we asked the present counsel for filing of an affidavit by the concerned counsel in this regard, ultimately counsel representing the applicant, did not put forth submission that any other argument was raised in the appeal. We emphasize that no other ground as available in paras 18 to 30 of the memorandum of appeals was pressed before us at the time of arguments in appeals.

In this regard, learned counsel for the Revenue has rightly submitted that when no other ground was pressed by counsel for the appellant, while addressing arguments, the Tribunal did not fall in error in not considering the same.

17. No other argument has been advanced on this review

application.

18. In view of the above discussion, we find that the review application deserves to be dismissed. Consequently, the same is hereby dismissed.

19. 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 : 11/11/2021

11/11/21

(Rakesh Bali)
Member (A)

Narinder Kumar 11/11/2021

(Narinder Kumar)
Member (J)

Appeal No. R-240/17VAT/21/1536-43 Dated: 29/11/21

Copy to:-

(1) VATO (Ward-41)
(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)
(9) Commissioner (T&T)

REGISTRAR