

Appeal No. : 206 & 208/ATVAT/21-22

Date of Judgment: 30-11-2021

M/s. Shiv Singh Construction Co.
F-264, Phase IV, Street No. 10,
Shiv Vihar, New Delhi-110094.

Appellant

v.

Commissioner of Trade & Taxes, Delhi

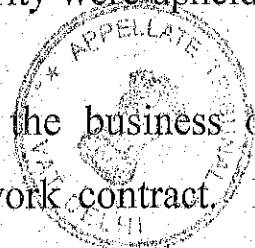
Respondent

Counsel representing the Appellant : Sh. M.K. Gandhi.

Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. This common judgment is to dispose of Appeals Nos. 206 and 208 of 2021 filed by the dealer, feeling aggrieved by the orders dated 04-03-2021 passed by Learned OHA.
2. Vide order dated 04-03-2021, notice of default assessment of Tax and Interest u/s 32 of Delhi Value Added Tax Act, 2004 (herein after referred as DVAT Act) and another notice of assessment of Penalty u/s 33 of the Act, issued by Assessing Authority were upheld.
3. Appellant-Dealer Company is engaged in the business of execution of Govt. contracts for construction i.e. work contract. It



Narinder Kumar
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stands registered with department of Trade and Taxes vide TIN No. 07872011628.

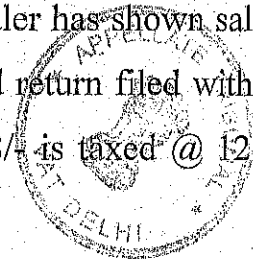
4. The matter pertains to tax period i.e. second half year of 2007 and annual 2007-08.

5. Vide notice of default assessment u/s 32 of DVAT Act, the Assessing Authority levied tax to the tune of Rs. 4,24,566/- and interest to the tune of Rs. 2,12,690/-, while observing in the manner as:-

“On scrutiny of the audited balance sheet and returns filed by the dealer following discrepancies relating to suppression of sales by the dealer have come to the notice. As per the audited balance sheet the G.P ratio of the dealer for the assessment year 2007-08 is 8.58%. The opening stock (WIP) as on 01-04-2007 is Rs. 213445/- after deducting maximum 25% labour, the value of the opening stock (material) works out to Rs. 1707561/-. Further the dealer has made purchases of Rs. 13614361/- plus cartage of Rs. 62318/- after adding all the above mentioned figures, the total of material value works out to Rs. 15384240/- out of which the dealer was having closing stock (WIP) of Rs. 1895620/- after deducting maximum 25% labour, the value of closing stock (material) works out to Rs. 1421715/-. After reducing the value of closing stock from the total of material value worked out above, the value of material works out to Rs. 13962525/- and after adding the G.P ratio of 8.58% the total value of the goods sold works out to Rs. 15160510/- but the dealer has shown sale of Rs. 11763972/- in his audited books of account and return filed with the year 2007-08. As such the amount of Rs. 3396538/- is taxed @ 12.5% interest is also charged @15% p.a.”

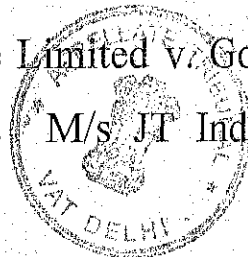
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6. Vide separate notice, the Assessing Authority imposed penalty to the tune of Rs. 7,30,253/- u/s 86(12) of the Act keeping in view that the dealer had suppressed sale of Rs. 33,96,538/-, which had not been recorded in its books of accounts, during the year 2007-08.
7. Feeling aggrieved by the two assessments, the dealer filed objections before Ld. OHA, which came to be rejected vide impugned order. Hence, these appeals.
8. Arguments heard. File perused.
9. Ld. Counsel for the Appellant-Dealer has submitted that books of accounts of the dealer were audited and that since audited financials were presented before the Assessing Authority, same should not have been rejected. Ld. Counsel has further submitted that Assessing Authority has rejected the Books Of Accounts/Audited Financial only on whims and fancies to observe that the dealer suppressed sale of Rs. 33,96,538/-.

In support of his contentions Ld. Counsel has also referred decisions in The Pr. Commissioner of Income Tax-9 vs. IBILT Technologies Limited, IT Appeal No. 995 of 2018 – 2018 SCC online Del 11539; M/s Samsung India Electronics Private Limited v. Govt. (NCT of Delhi), 2016 SCC Online Del 2231 & M/s JT Indian



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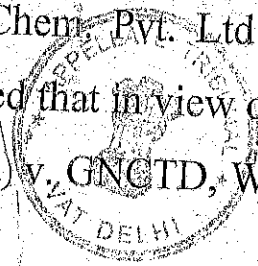
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Exports & Ors. Vs. Union Of India & Ors., 2003 (132) STC 0022.

Reference has also been made to Rule 3.2 of DVAT Rules.

It may be mentioned here that even though on behalf of the appellant a list depicting nine judgments / citations was submitted in the course of arguments, learned counsel for the appellant relied on only the above referred to decisions / citations.

10. As regard imposition of penalty, Ld. Counsel has referred to decision in *M/s Bansal Dye Chem. Pvt. Ltd. v. Commissioner Value Added Tax, ST. APPL 29/2015*, decided by our own Hon'ble High Court on 24/9/2015 and submitted that for want of any prior notice in view of said decision, impugned order passed by Ld. OHA, while upholding the penalty, deserves to be set aside,.
11. On the other hand, Ld. Counsel for the Revenue has referred to Trading and Profit & Loss Account for the year ending 31st March 2008, submitted by the dealer to the Assessing Authority and also before the Ld. OHA. Ld. Counsel has submitted that in view of the figures submitted by the dealer in this statement of account, the Assessing Authority rightly concluded that it was a case of suppression of sale and consequently levied tax, interest and penalty.
12. As regards decision in *M/s Bansal Dye Chem. Pvt. Ltd case (Supra)* Ld. Counsel for the Revenue has submitted that in view of the decision in *Sales Tax Bar Association (Registered) v. GNCTD, WP(c)*



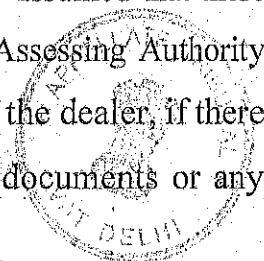
No. 4236/2012, decided by our own Hon'ble High Court, no prior notice is required to be issued for the purpose of framing of assessment, and that there is no merit in the contention raised by the Ld. Counsel for the appellant in this regard.

13. Undisputedly, dealer – appellant is registered as a works contractor. A perusal of record would reveal that the appellant – objector had raised the following grounds before Ld. OHA:-

- a) That the dealer received a writ of demand dated 01.08.2018 in which Ld. Assessing Authority asked the dealer to deposit a sum of Rs. 5,21,792.26 for the second half yearly 2007-08 and Rs. 14,88,915.84 for annual 2007-08. Immediately thereafter dealer approached to the department and applied for the certified copy of the order for the said period. Dealer has never received any demand notice for the said period. Dealer received certified copy of the order on 26.10.2018.
- b) There is no basis of satisfaction being recorded by the A.O. The satisfaction need to be independent and based on reasons. The Assessing Authority in an ex-parte order generate the demand merely on the assumption basis. The dealer filed his audited balance sheet as per requirement of the law. The Assessing Authority arrived at a figure that during the year under consideration there was GP ratio 8.58% and calculate that sale as per GP ratio 8.58% and assumed that there was concealment of sale of Rs. 33,96,538.00 and generate the demand and charged interest thereupon without any reasons. The VATO has simply framed the assessment and has generated the demand by refusal of Audit balance sheet.
- c) That the Assessing Authority failed to appreciate that when he reject the audited balance sheet then he must be given the reasons for rejecting the audited balance sheet and why he is not considering the balance sheet which was audited by Auditor based on books of accounts. The Assessing Authority assumed that there was gross profit 8.58% of the dealer for the said year. The Assessing Authority cannot act as a super Director and decide the loss and profit of the dealer, if there is any doubt then he may ask the dealer to produce the documents or any

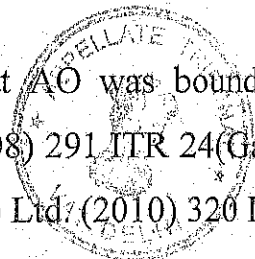
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clarification. But without issuing any show cause or any notice to dealer enhance the sale and generate the demand and further imposed penalty. Claim the first examined by the VATO before levying such a serious allegation of concealment of sale and tax evasion. It is not denied that the objector has made purchases on tax invoices. It is true that the dealer had paid the input and output tax which has already been furnished in the returns and detailed thereof were available in the details furnished along with return and there is no mismatch.

- d) That the Assessing Authority failed to appreciate the AO was bound to accept book result in Pyarela Mittal vs. Asstt. CIT(2007) 291 ITR 214(Gau). Further in CIT Vs. Mascot (India) Tools & Forgings (P) Ltd. (2010) 320 ITR (ALL) the Allahabad High Court held that in the absence of any specific instance of mistake in the books of account and other records, the book results cannot be rejected on the basis of any such hypothetical calculations based on erroneous presumptions.
- e) That the VATO has made observations that the objector has concealed the sale and imposed tax in a super director manner without any basis.
- f) The Ld. VATO has enhanced the sale of Rs. 33,96,538.00 and imposed tax of Rs Rs.4,24,566.00 in the order and has charged interest of Rs.2,12,690.00 in the order passed for the assessment year 2007.
- g) Whereas the VATO has erred in law and on facts in enhancing the sale on assumption basis on the ground that there was GP ratio 8.58% without any basis.
- h) Because the AO has failed to appreciate that passing an ex-parte order is no order and further order passed and kept in the file without service to the dealer is totally illegal and bad in law.
- i) That the Assessing authority failed to appreciate that AO was bound to accept book result in Pyarelal Mittal vs. Asstt CIT (2008) 291 ITR 24(Gau). Further in CIT Vs. Mascot (India) Tools & Forgings (P) Ltd. (2010) 320 ITR



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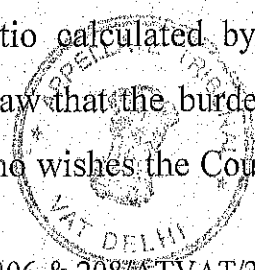
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(ALL) the Allahabad High Court held that in the absence of any specific instance of mistake in the books of account and other records, the book results cannot be rejected on the basis of any such hypothetical calculations based on erroneous presumptions.

- j) That the VATO has made observations that the objector has concealed the sale and imposed tax in a super director manner without any basis further in consequence the default assessment of tax imposed penalty which is highly illegal. The Hon'ble High Court in the case of Bansal Dye Chem Pvt. Ltd. Vs. Commission of VAT in STA No. 29/2015 held that-
- k) "13..... without service of prior notice of penalty on the Assessee and without affording the Assessee an opportunity of being heard on the question of penalty, the said order is held unsustainable in law and is hereby set aside."
- l) The Ld. VATO has enhanced the sale of Rs. 33,96,538/- and imposed tax of Rs. 4,24,566/- in the order and has charged interest of Rs 2,12,690/- in the order passed for the Assessment Year 2007 and in consequence to the said demand imposed penalty u/s 33 of DVAT read with 86(12) of DVAT a sum of Rs. 7,30,253/-."

14. While dealing with the submission put-forth on behalf of the dealer, Ld. OHA observed in Para 8 of the Impugned Order as under:-

✓ "It is relevant to mention here that throughout the present proceedings, objector or Ld. Counsel has nowhere mentioned provided the GP ratio claimed by them in order to counter the GP ratio calculated by the Assessing Authority. Needless to say, it is a trite law that the burden of proof as to any particular fact lies on that person who wishes the Court to



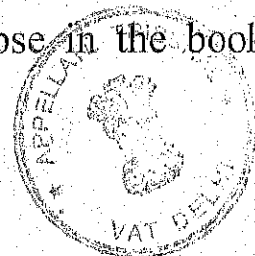
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believe in its existence. During the last hearing, Ld. Counsel was asked to provide copy of audited balance sheet for the year 2007-08 and the same has been placed on record. Since, nothing has been stated by the objector with respect to the GP ratio as per his own calculation or understanding, the audited balance sheet has been examined again by the DR and it has been noticed that GP ratio comes out to be 8.58% which clearly substantiates the findings/observations recorded by the Assessing Authority while issuing impugned notices. In view of the above facts & circumstances, this Court must inevitably accept the observations recorded by the Assessing Authority.”

15. As noticed above, the Assessing Authority, while framing notice of Default Assessment of Tax and Interest, took into consideration only the audited balance sheet and returns filed by the dealer and observed that there were discrepancies relating to suppression of sales by the dealer, which had come to the notice of Revenue and that the dealer had not recorded in his books of accounts the said sale of Rs.33,96,538/-, during the year 2007-08. Consequently, the Assessing Authority levied tax @12.5% on a sum of Rs. 33,96,538/-, in addition to levy of interest @15% p.a.

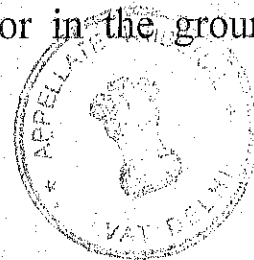
16. On the point of suppression of sale, the Assessing Authority was required to verify and examine the details of purchases made and sale/supplies made, to find out if there was any lapse in the books of accounts.



17. Before recording such observation, the Assessing Authority was required to go through the books of accounts and then record a specific observation/ finding that he was rejecting the books of accounts in respect of such and such entry/transaction, the same being unreliable either on the ground that some transactions were omitted or particulars and vouchers in respect of certain transactions were not forthcoming or there was any hidden lacuna or other defects. In other words, the notice of default assessment does not contain any observation / finding that the books of accounts were incomplete/ incorrect or unreliable.

In the notice of Default Assessment of tax and interest, there is no mention that the Assessing Authority had gone through invoices, relevant record pertaining to transactions and books of accounts of the dealer. In absence of perusal of books of accounts, invoices and other relevant record pertaining to transactions, the Assessing Authority could not record any observation that sale to the tune of Rs. 33,96,538/-, had not been recorded in the books of accounts.

18. As noticed above, several objections were raised by the dealer before learned OHA. However, in para 8 of the impugned order, the Ld. OHA dealt with only point of GP Ratio and did not deal with any other objections / ground raised by the objector in the grounds of appeal/ objections.



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19. As regards the impugned orders passed by learned OHA, one of the objections raised before learned OHA was that the Assessing Authority had not recorded basis of his satisfaction or reasons for rejecting the balance sheet, which was audited balance sheet.
20. While dealing with the objections, Ld. OHA could also call upon the dealer to produce invoices, books of accounts and other related documents to satisfy himself ^{if} that it was really a case of suppression of sale of Rs. 33,96,538/- as observed by the Assessing Authority in the notice of Default Assessment.

However, there is nothing in the impugned order to suggest that dealer was ever called upon to produce any such document i.e. invoices, books of account and other related documents. In para 8 of the impugned order, Ld. OHA observed that Ld. Counsel for the dealer was asked to provide copy of audited balance sheet for the year 2007-08. It is significant to note that the audited balance sheet had already been made available to the Assessing Authority and rejected by him. In the given situation, Ld. OHA was required to record findings if the rejection of the audited balance sheet by the Assessing Authority was justified or not. However, this point was not discussed and no such findings was recorded by the Ld. OHA in the impugned order.

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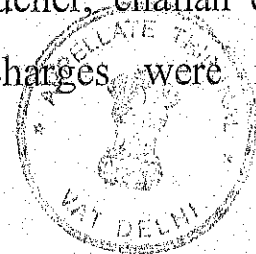
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21. As per Rule 3(1) of DVAT Rules 2005, in the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract and exclude (i) the charges towards labour, services and other like charges; and (ii) the charges towards cost of land, if any, in civil works contracts, subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of above referred charges to the satisfaction of the Commissioner.

Under Rule 3(2) for the purpose of above sub-rule (1) the charges towards labour services and other like charges include seven items described therein. As per proviso to sub Rule 2 of Rule 3, where amount of charges towards labour, services and other like charges are not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated at the percentages specified in the table available under the said rule.

In view of the above provisions, the Assessing Authority was to exclude charges towards labour, services and other like charges to the extent available in the table i.e. 25% only when the dealer was found maintaining proper records such as invoices, voucher, challan etc. evidencing payment thereof and still such charges were not ascertainable from books of accounts of the dealer.



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Here, in the notice, the Assessing Authority nowhere recorded that the said record was not being properly maintained by the dealer or that the amount of charges towards labour, services and other like charges was not ascertainable from the books of accounts of the dealer.

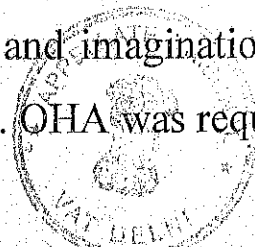
When the Assessing Authority made observations regarding deduction of 25% towards labour, from the opening stock and 25% towards labour from the closing stock, it was for the Ld. OHA to discuss if said deduction from the opening stock and closing stock was or was not in accordance with law i.e. as per Rule 3(2) of DVAT Rules. However, no such exercise appears to have been done by the Ld. OHA.

22. Furthermore, when it was specific objections of the dealer that no notice u/s. 59 of DVAT Act was issued by the Assessing Authority for inspection of records, by virtue of which figures and details of the balance sheet, could have been verified, it was for the Ld. OHA to deal with this objection and record findings if any such notice was or was not required to be issued by the Assessing Authority to the dealer. However, this objection was also not dealt with by the Ld. OHA.

23. The dealer raised another specific objection that the Assessing Authority had created demand on assumption and imagination only, without having any material on record. So, Ld. OHA was required to

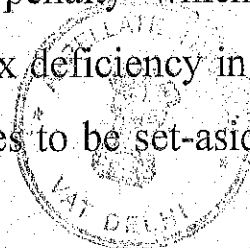
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deal with this objection as well and to record specific findings if the notice of default assessment of tax and interest was or was not based on assumption and imagination or that it was on the basis of record. However, no such finding was recorded by the learned OHA.

24. In the course of arguments, it has been pointed out that in the returns, the dealer – appellant described tax payable on some of the items @ 4% and on other items @ 12.5%, but the Assessing Authority levied tax @ 12.5% in respect of entire sale of Rs. 33,96,538/-. It was for the revenue to frame assessment as per the rate applicable under the law, after perusing the books of accounts and the items involved in the works contract, in accordance with law. However, even the learned OHA has not taken into consideration this aspect, while disposing of the objections.
25. In view of the above discussion, and applying the decision in IBILT Technologies (Supra), we find that the impugned order passed by the Ld. OHA upholding notice of default assessment of tax and interest deserves to be set-aside and the matter needs to be remanded to the Ld.OHA for decision afresh after providing reasonable opportunity of being heard to the parties.
26. Consequently, the notice of assessment of penalty which was passed on the observation that it was a case of tax deficiency in view of the factum of suppression of sale, also deserves to be set-aside for decision afresh by the Ld. OHA.




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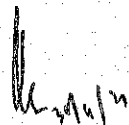
27. Consequently, common impugned order dated 04/03/21 regarding levy of tax, interest and penalty, passed by the learned OHA is hereby set-aside and while disposing of the appeals, the matter is remanded to the Ld.OHA for decision afresh after providing reasonable opportunity of being heard to the parties.

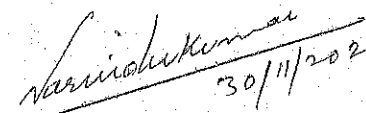
28. Parties to appear before Ld. OHA on 21/12/2021.

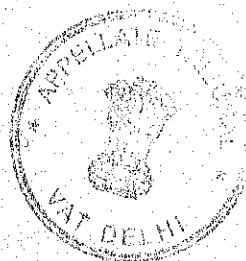
29. File be consigned to the record room. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned web-site.

Announced in open Court.

Date: 30/11/2021


(Rakesh Bali)
Member(A)


(Narinder Kumar)
Member (J)



Appeal No. 2064208/ATVAT/21-22/1552-59

Dated: 6/12/21

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| (1) VATO (Ward-107) | (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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