Sl.No. 133

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

Appeal No : 688-689/ATVAT/2013
Date of Decision :December 15, 2021

M/s. Playwell Impex Pvt. Ltd.,
160, Chitra Vihar,
Vikas Marg,
Delhi – 110092 ..... Appellant

V

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

Counsel representing the Appellant : Sh.Rajesh Jain.
Counsel representing the Revenue : Sh. S.B. Jain

JUDGMENT

1. Both the above captioned appeals came to be presented by the dealer challenging order dated 3.9.2013 passed by Learned OHA-Additional Commissioner (Zone-III & V).

2. Vide impugned order, LD. OHA confirmed notice of default assessment of Tax & Interest issued on 20.5.2013, u/s 32 of Delhi Value Added Tax Act, (hereinafter called DVAT Act), as well as the other assessment of penalty u/s 33 read with section 86 (15) of DVAT Act.

The notices issued by the Assessing Officer and up-held by the Ld. OHA pertain to 2nd Quarter of 2012-2013.

Narinder Kumar
15/12/21

Said two notices came to be issued by the Assessing Authority after a survey was conducted on 28.8.2012 by the Officers of Enforcement-I branch, at the business premises of the dealer-appellant.

During survey, it was found to be a case of stock variation worth Rs. 37,68,269/- (in excess); variation in cash worth Rs. 55,4234/- (short); and seizure of incrimination documents worth Rs. 60 lakhs (Approx).

3. As regards variation in stock, the dealer is said to have taken up plea before the Assessing Authority,that goods worth Rs. 12,76,331/- were imported by the dealer vide invoice dated 25.7.2012, and that even though the goods were imported from Netherlands by the clearing and forwarding agent, import invoice was received by the dealer much later on i.e. 3.9.2012, which led to non- making of entry of goods in the books of accounts.

The Assessing Authority is stated to have allowed claim of the dealer in this regard only to the aforesaid sum of Rs. 12,76,331/- and custom clearing charges to the tune of Rs. 6,38,166/-, but he levied tax on the differential amount of Rs. 18,63,772/-.

As regards variation in cash, since the dealer could not submit any explanation, Assessing Authority levied tax in respect thereof.

So far as the documents seized from the premises of the dealer at the time of survey, are concerned, the Assessing Authority levied tax on the un-accounted for sales, worth Rs. 14,31,079/-

Penalty u/s 86 (15) of DVAT Act was also accordingly imposed because the accounts prepared by the dealer were found to

be false, mis-leading and also to have been prepared in deceptive manner.

Hence, these appeals, challenging imposition of penalty u/s 86 (15) of the Act as well.

4. Learned counsel for the appellant opened his arguments with the contention that the Assessing Authority – Sh. Bijendra Kumar, VATO had no jurisdiction to make assessment of the dealer – appellant.

Raising of objection as regards jurisdiction for the first time before this Tribunal

5. One of the objections raised by the dealer against the default assessments is that the same has been framed without jurisdiction, and as such is illegal.

We have gone through the notices of default assessment, the objections filed by the dealer before learned OHA and the impugned orders. We find that no such point was raised on behalf of the dealer before the Assessing Authority or before learned OHA. However, this point has been raised by the dealer as ground No. 1 of the Grounds of Appeals in appeal against assessment of tax interest.

In **Commissioner of Sales Tax, UP v. Sarju Prasad Ram Kumar**, Civil Appeal No. 2114 of 1969, decided by Hon'ble Supreme Court on 4/10/1972, one of the objections on behalf of the Revenue was that the assessee having not taken any objection as to

the jurisdiction before the assessing authority he was precluded from raising that objection at a later stage.

While rejecting this contention, Hon'ble Apex Court observed that they were concerned with the question of jurisdiction and that unless there was some provision either in the Act or in the Rules framed which precluded the assessee from raising any objection as to jurisdiction, if the same was not raised before the assessing authority, the assessee could not be precluded from raising that objection at a later stage. Hon'ble Court further observed that an objection as to jurisdiction goes to the root of the case.

Herein, learned counsel for the Revenue has not brought to our notice any provision in DVAT Act or in the rules framed there under which preclude an assessee from raising an objection on the point of jurisdiction, when the same was not raised before the Assessing Authority or before the learned OHA.

Therefore, we proceed to adjudicate on the point of jurisdiction of Sh. Bijendra Kumar, VATO, to frame assessment in this case.

Discussion on the point of jurisdiction of Sh. Bijendra Kumar to frame assessment

6. As submitted by learned counsel, the assessment should have been made by the Assessing Authority having jurisdiction in respect of (ward-81), where the business premises of the appellant was situated, but Sh. Bijendra Kumar, VATO was not posted during

those days, in ward-81, and as such he had no jurisdiction to make assessment as regards the dealer, under the Act.

On behalf of the appellant, reference has been made to circular dated 11/4/2016 issued by Commissioner (VAT). Vide this circular, instructions were issued to all officers appointed as VAT authorities in the Department of Trade & Taxes and exercising powers under Chapter-X of the Act, 2004, viz., Audit Survey/ Inspection or Stopping & Detention of Goods vehicles to prepare reports based on the information & records in their possession and duly examined by them, and thereafter, to forward the reports along with the information & records mandatorily to the concerned Ward/ Branch officer having jurisdiction over the dealer for assessment of tax and penalty, in accordance with the laid down procedure.

As regards this circular, suffice it to say that same being of 11.4.2016 is of no help to the appellant in this case, which pertains to the previous tax period.

In support of his contention on the point of jurisdiction, reference was made by counsel for the appellant, to provisions of section 66 of the Act to point out the manner in which Government appoints Commissioner of Value Added Tax and also Special Commissioner of Value Added Tax, VATO and such other persons with such designations, to assist the Commissioner in the administration of this Act. It has been submitted that the officers, who are so appointed to assist the Commissioner, are to exercise powers as conferred by the Act even though the Commissioner,

VAT is empowered to exercise all powers under the Act, in respect of entire Delhi.

Then, reference has been made to sub-section (1) of section 68 of the Act, which empowers the Commissioner to delegate his powers under the Act to any VATO. As further submitted, under Rule 48 of DVAT Rules, 2005 (here-in-after referred to as the Rules), the Commissioner may delegate any of his powers to any person not below the rank of AVATO, but he may delegate his powers under sub-section (1)&(2) of section 60 to a person not below the rank of VATO.

Chapter-X of DVAT Act pertains to Audit, Investigation and Enforcement.

As per order dated 14/5/1994, placed on record on behalf of the appellant, in the course of final arguments regarding boundaries of wards, ward No. 81 covered the area in north, east, south and west, as described therein.

An order dated 31/10/2005 was issued by Commissioner, Department of Trade & Taxes, delegating his powers specified in column No. 2 & 3 to the officers specified in column 4 of the table appended below and directing that the said officers will exercise the powers within their respective jurisdiction, w.e.f. 1/4/2005 i.e. the date when DVAT Act 2004 came into force. This order has also been placed on record on behalf of the appellant in the course of final arguments.

As per serial no. 45 of another circular No. F.III/59/CST/2005/Estt/2071-78 dated 1/4/2005, ward No. 81 fell in

Zone-VIII. This circular has also been placed on record on behalf of the appellant in the course of final arguments.

As per order dated 31/3/2013 passed by VATO – Head of Office, Sh. Ram Phool, VATO was proposed to be transferred from ward No. 81 to Ward – 74, whereas, Sh. Babu Lal, AVATO was proposed to be transferred from ward No. 84 to No. 81. This order has also been placed on record on behalf of the appellant in the course of final arguments.

As per this order, Sh. Bijendra Kumar, Assessing Authority herein, as on 1/4/2013, was proposed to be transferred from Law and Justice to Law and Justice with additional charge of VATO (Audit).

7. Reference has also been made to order dated 19/9/2016, passed by Commissioner, VAT, by way of example of an order of authorization, and to point out that Commissioner, VAT thereby issued directions to Asstt. Commissioner (Audit) to exercise jurisdiction over a particular dealer, named therein for the purpose of conducting audit u/s 58 of DVAT Act 2004 and assessment for the financial years 2012-13, 2013-14, 2014-15 and 2015-16, but no such order was passed by the Commissioner, in respect of the present dealer – appellant, so as to empower Sh. Bijendra Kumar, VATO to exercise jurisdiction for making of assessment, and as such no reliance can be placed on the office note vide which approval was granted for assignment of the case to the special cell. In this regard, Learned counsel for the appellant has placed reliance on decision in **CapriBathaid Private Limited v.**

Commissioner Of Trade & Taxes, decided by our own Hon'ble High Court on 2 March, 2016.

Reference has been made on behalf of appellant to decisions in **Prakash Trading Co. v. CTT, Delhi (T),** appeal No. 53054/ATVAT/18-19 decided by this Tribunal and decision in **M/s. ITD-ITD CEM JV Vs. Commissioner of Trade & Taxes** in WP 6335/2014 decided on 3/10/2016 by our own Hon'ble High Court, to point out that reliance was placed therein on the decision in Capri Bathaid's case.

Learned counsel for the appellant has referred to decision in **ChellaramJethanandMadhrani and another v. Maruti Raghunath Kadam** and Ors., WP No. 5675 of 2004, decided on 15/12/2005 (Bombay), and submitted thattherein Hon'ble High Court observed that once High Court has declared the law regarding the jurisdiction of the trial Court in relation to a particular subject, such a declaration would be effective right from the inception and not merely from the date of declaration.

8. On the other hand, Learned counsel for the Revenue has referred to provisions of section 68 of DVAT Act to submit that the Commissioner may delegate any of his power under DVAT Act to any Value Added tax authorities and that in this case, the Commissioner delegated his powers vide order dated 28/9/2012,and as such it cannot be said that the VATO had no jurisdiction to frame assessment.

9. Having going through Capri Bathaid's case (supra), we find that therein, following common issues had arisen for consideration in the four petitions:-

> "(i) Whether the AVATO Enf-I who undertook the survey, search and seizure operation and later passed the default assessment orders of tax, interest and penalty, as duly empowered to do so in terms of the DVAT Act?
>
> (ii) Whether the AVATO Enf-I could have proceeded to reverse the ITC claimed during an earlier period and could such reversal take place in the order of default assessment for a different period?"

Therein, order in Form DVAT-50 issued by the Special Commissioner on October 15, 2014 did not permit the Enforcement Officer to carry out any assessment and therefore, orders of default assessment of tax, interest and penalty passed by the AVATO Enf-I under sections 32 and 33 of the DVAT Act were held to be without the authority of law.

It is significant to note that the case at hand is not a case where default assessment came to be framed by the Officer, who had conducted survey, search and seizure. Here, survey and seizure was conducted by one team, whereas default assessment was made by some other Officer.

Survey was conducted on 28.8.2012 by the Officers of Enforcement-I branch, at the business premises of the dealer-appellant. In Capri Bathaid's case, order issued under Section 68 of DVAT Act was dated 12th November 2013. Present case is not covered by the said order of 12.11.2013. Prior thereto, order dated 31st October 2005 had been 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'). In **H.G. International v. The Commissioner of Trade and Taxes, Delhi,** ST.APPL. No. 63/2014 decided on 16/8/2017 by our own Hon'ble High Court, order dated 31.10.2005 was held to have been validly issued. It was followed by order dated 12.10.2011 whereby the Commissioner, VAT exercising powers under section 68 of DVAT Act, delegated to the officers appointed under section 66(2), not below the rank of AVATO, all powers to audit the business affairs of dealer/ any person for confirming the assessment under the review or to serve a notice of assessment or re-assessment of the amount of tax, interest and penalty under section 58 of the Act.

So, the order dated 12.10.2011 issued by the Commissioner, VAT was the relevant order in force at the relevant time of survey dated 28.8.2012 delegating powers to audit the business affairs, for confirming assessment or serving notice of assessment or reassessment.

As regards DVAT 50, there is nothing to suggest that any such permission was asked by the dealer to be produced by the team at the time of survey, or that any protest was lodged by the dealer soon after the survey on the point of non production of DVAT 50, which the team members are to carry for being shown to the dealer, on demand.

The question involved herein is as to whether jurisdiction to frame the assessments was conferred on Shri Bijendra Kumar, VATO, by following due process of law, on the basis of note

recorded by head of the survey conducting team and the approval accorded thereon?

In **Commissioner of Sales Tax, UP v. Sarju Prasad Ram Kumar** 1976 (37) STC 533 (SC),an order of assessment passed by the Assistant Sales Tax Officer (ASTO), Sector II, Lucknow was challenged as being without jurisdiction on the ground that only the ASTO, Sector III could exercise jurisdiction over the Assessee's circle. Hon'ble Supreme Court held that since it was not shown that the ASTO, Sector II, had also been conferred with jurisdiction to assess the dealers in Sector III by the Commissioner, the only possible conclusion was that the ASTO, Sector II, had no jurisdiction to assess the dealers in Sector III.

In **K. Packirisamy v. Deputy CTO (Enforcement-I)** 2006 (147) STC 368 (Mad),the challenge by way of a writ petition was to an order of the Deputy Commercial Tax Officer of the Enforcement Wing, on the ground that the Enforcement Wing was not vested with any jurisdiction to levy tax, was accepted, while referring to provisions of Section 41(3) of the Tamil Nadu General Sales Tax Act, 1959. Hon'ble Madras High Court held that the levy and collection of the said tax by the Enforcement officer was without jurisdiction.

In **Commissioner of Customs v. Syed Ali**, 2011 7 GSTR 338 (SC),when the question arose as to delegation of the powers of the Commissioner of Customs to a 'proper officer', Hon'ble Supreme Court observed that from a conjoint reading of Sections 2 (34) and 28 of the Act, it was manifest that only such a customs officer who

had been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned had been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act was competent to issue notice under Section 28 of the Act, and further thatit is only the officers of customs, who are assigned the functions of assessment, which of course, would include reassessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

10. Here, a perusal of notices of assessment regarding tax, interest and penalty (both dated 20/5/2013) would reveal that these were issued by Sh. Bijendra Kumar, VATO. The assessments were framed on the basis of survey of the dealer at its business premises No. 160, Chitra Vihar, Vikas Marg, New Delhi – 92. The survey was conducted on 28/8/2012 by the team consisting of Sh. Vikram Bisht (VATO); Sh. Ajay Chaturvedi (AVATO) & Sh. Subhash (AVATO).

As per the survey report, the period for which reassessment was to be done on the basis of the survey was of Aug. 2012. In the last column of the survey report, the members of the team observed as under :–

"The dealer has not furnished the requisite information till date in spite of an undertaking given by him on the date of survey that he would submit the

requisite documents by 29/8/2012. The Assessing authority may consider this fact while framing default assessment."

11. From the above remarks made by the members of the team in the last paragraph of the survey report, it appears that the assessment/ reassessment was to be made by the Assessing Authority.

12. Consequently, admittedly, the survey report and the documents annexed thereto were forwarded to VATO, Special Assessment Cell, for framing of default assessment. These were so forwarded in terms of note dated 26/9/2012 prepared by Sh. Vikram Bisht, VATO (Enf.-I) who was one of the members of the team which conducted survey. Admittedly, this note was put up before the higher authorities during the period from 26/9/2012 onwards.

13. It may be mentioned here that during pendency of this appeal, while submitting written submissions learned counsel for the appellant submitted before the Tribunal on 12/1/2017, certain decisions by the Hon'ble Courts, with information dated 2/3/2016 collected by the appellant under RTI Act. Subsequently on 3/9/2021, during arguments, learned counsel for the appellant submitted copies of certain orders/circulars to support his arguments.

14. It has been pointed out that the dealer – appellant sought the above information under RTI Act from the Special Commissioner-II, Department of Trade & Taxes, New Delhi, and thereupon reply was received from the said office. The photocopy available at page

22 is copy of note dated 26/8/2012 issued by VATO (Enf.-I), by way of reply to the information sought. The note reads as under –

> "The dealer has not furnished the requisite information till date in spite of an undertaking given by him on the date of survey that he would submit the requisite documents by 29/8/2012. The AssessingAuthority may consider this fact while framing default assessment.
>
> The survey report alongwith documents forwarded to VATO, Assessment Cell, for default assessment"

As rightly pointed out by learned counsel for the parties, the Commissioner, VAT approved the said note as proposed.

15. As provided under Regulation 20 of Delhi Vat (Appellate Tribunal) Regulations, 2005, the parties to the appeal shall not be entitled to produce additional evidence, either oral or documentary, before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed, to enable it, to pass orders or for any other substantial cause, or if any of the authorities below has decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by him or not specified by him, the Tribunal may allow such documents to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced, subject to the condition that the Commissioner shall be entitled in that case to lead rebuttal evidence.

Herein, no application was filed by the dealer – appellant seeking permission to place on record the information obtained

under RTI Act. The dealer – applicant should have sought permission from the Tribunal, and then placed on record this document, when permitted to do so.

16. Even in view of provisions of section 57A (8) of DVAT Rules, every appeal where fresh evidence is sought to be produced, shall be accompanied by a memorandum of evidence sought to be produced, stating clearly the reasons why such evidence was not adduced before the authority against whose order the appeal is being preferred.

17. Keeping in view the provisions of the Regulation 20 of the Regulations and Rule 57A(8) of the Rules, we were not inclined to place any reliance on this document i.e. the information obtained under RTI Act, after the disposal of the objections, and submitted here during pendency of appeal, but keeping in view that no objection has been raised on behalf of the Revenue, even when it was referred to in the course of arguments on behalf of the appellant,and even the authenticity of the document has not been challenged by the Revenue, and rather learned counsel for the Revenue has also referred to this documents in the course of arguments, to justify the transfer of the case from one jurisdiction to the other jurisdiction, we are inclined to take this document into consideration in the peculiar situation of this matter.

Assignment of matter for assessment after the survey

18. When as per the remarks made by the members of the team in the last paragraph of the survey report, the assessment/ reassessment was to be made by the Assessing Authority, and sh. Vikram Bisht prepared the aforesaid note dated 26/9/2012, it appears as if the said VATO was himself exercising powers so as to forward the survey report with the documents to VATO, Special Assessment Cell, for default assessment, instead of simply putting up a note for approval and or issuance of powers by the Commissioner(VATO) for default assessment on the basis of survey report and documents. In other words, the note appended by Sh. Vikaram Bisht, VATO (Enf.-I) does not amount to be only a note. The said officer did not seek any approval on this note, and rather appended the note as if it was a decision being taken by him, which was put up before the higher officers, and not merely a proposal.

19. The contention raised by learned counsel for the appellant, while referring to the authenticity of approval accorded byCommissioner, VAT is that in view of decision in **M/s. Larsen & Toubro Ltd.v. Govt. of NCT of Delhi & Ors.**in WP(C)1820-22/2013, decided by our own Hon'ble High Court on 15/3/2016, such approval by the Commissioner, VAT, cannot be said to be the specific and proper order to exercise powers for making of assessment. In this regard, on behalf of appellant, reference has been made to decision in **M/s. R.C. India v. State of Karnataka,** (2010) 29 VST 494 (Karn).

While challenging the assessment made by the Assessing Authority regarding the dealer – appellant herein, learned counsel for the appellant has pointed out that there is no reference therein that Sh. Bijendra Kumar, VATO was exercising powers while serving with special Assessment Cell, in-terms of the note approved by the Commissioner, VAT, and that actually he was serving in Law & Justice and having additional charge of VATO (Audit).

20. Challenging the validity of said order of assignment to Shri Bijendra Kumar, in the eye of law, on behalf of the appellant, reference has been made to decision in **Bachhittar Singh v. State of Punjab and Another,** 1962 Supp (3) SCR 713, wherein Hon'ble Apex Court observed that merely writing something on the file does not amount to an order.

The question for determination in **Bachhittar Singh's case** was: "As to whether the order could be recorded as the order of the said Government which alone, as admitted by the appellant, was competent to hear and decide an appeal from the order of the Revenue Secretary."

Hon'ble Apex Court observed that no formal order modifying the decision of the Revenue Secretary was ever made and that until such an order was drawn up, the State Government could not be regarded as bound by what was stated in the file.

It is pertinent to note that in the said decision, Hon'ble Apex Court assumed for the purpose of the said case that the said note was an order.

On behalf of appellant, reliance has been placed on decision in **NareshbhaiBhagubhai and Others vs. Union of India and Others,** (2019) 15 SCC 1, as regards file notings and lack of communication, Hon'ble Apex Court observed that it is settled law that a valid order must be a reasoned order, which is duly communicated to the parties. The file noting contained in an internal office file, or in the report submitted by the Competent Authority to the Central Government, would not constitute a valid order in the eyes of law.

Reference has also been made to decision in **State of Bihar and Ors. v. Kripalu Shankar and Ors.**, (1987) 3 SCC 34, wherein on the point of notings in a notes file, Hon'ble Apex Court observed that notings in a notes file, not only of officers but even that of a Minister will not constitute an order to affect others unless it is donein accordance with Article 166(1) and (2) and communicated to the person concerned. The notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2).

21. From the record made available by the appellant during this appeal, it cannot be said that Sh. Bijendra Kumar was VATO, Special Assessment Cell. It was for the Revenue to bring on record

material to suggest that Sh. Bijendra Kumar was VATO, Spl. Assessment Cell so as to connect the proposed approval granted after 26/9/2012, with Sh. Bijendra Kumar was VATO, Spl. Assessment Cell, in order to prove that the Commissioner had transferred the case to the said VATO for the purpose of default assessment.

Revenue has also not brought on record any general order passed by the Commissioner, during the relevant period, to suggest that VATO(s), Special Assessment Cell, was/were delegated all the powers by the Commissioner, u/s 68(1) of the Act, including that of framing of default assessment.

22. It has been submitted on behalf of the appellant that the Revenue cannot be permitted to take a stand different than the principle laid down in the earlier case. In this regard, reference has also been made by learned counsel for the appellant to decision in **JayaswalsNeco Ltd. v. Commissioner of Central Excise,** Nagpur, 2006 (195) E.L.T. 142 (SC), wherein, it was observed that the department having accepted principle laid down in **Hindustan Gas and Industries Ltd. vs. C.C.E., Vadodara** 1996 (88) ELT 413 (T) to the effect that inserts did not require any precision machining or that any such machining was done by the appellant, cannot be permitted to take a stand different than the principle laid down in the earlier case.

In this regard, suffice it to state here that Revenue has not put forth any stand different from any previous stand taken in this matter

before this Tribunal or Assessing Authority or Learned OHA. Even otherwise, each case is decided on its own facts.

Whether it a case covered by provisions of section 80(3) of the Act?

23. Learned counsel for the Revenue has also referred to provisions of section 80 (3) of the Act and submitted that since as per this provision, no assessment made under this Act shall be valid merely on the ground that the action could also have been taken by any other authority under any other provisions of this Act, there is no merit in the contention raised by learned counsel for the appellant on the point of jurisdiction, even if the assessment has been made by VATO (Audit).

To support case of the Revenue, Learned counsel for the Revenue has also referred to the following observations made by the Hon'ble Apex Courtin **Central Potteries Ltd., Nagpur v. State of Maharashtra**, 1966 AIR (SC) 932, while drawing a distinction between want of jurisdiction and irregular assumption of jurisdiction:

> "That there is a fundamental distinction between want jurisdiction and irregular assumption of jurisdiction, and that whereas an order passed by an author with respect to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise they in the mode prescribed by law, is not a nullity."

The contention raised by learned counsel for the Revenue is that herein, in the given facts and circumstances, it cannot be said to be a case of want of jurisdiction or that the jurisdiction exercised regarding assessment is a nullity.

In reply, learned counsel for the appellant has rightly contended that the point involved in the case of Central Potteries (supra) did not directly pertain to the jurisdiction to frame assessment and as such this decision does not come to the aid of the Revenue. Reference has been made to decision in Commissioner of Sales Tax, UP v. Sarju Prasad Ram Kumar, Civil Appeal No. 2114 of 1969, decided by Hon'ble Supreme Court on 4/10/1972.

Therein, the sole point for determination before the Hon'ble Apex Court was "whether the appellant is not liable to pay tax under the provisions of the Central Provinces and Berar Sales Tax Act, 1947 (Act 21 of 1947), on the ground alleged that it had not been validly registered as a dealer under section 8 of the Act.

In that appeal, a number of grounds were put forward in support of the claim, but Hon'ble Apex Court observed that it was necessary to deal with only one of them and that was "if the sales Tax Officer who issued the registration certificate to the appellant July, 21, 1947 was not authorized to do so under the Act and that in consequence all the assessments recoveries of tax were illegal and void."

Hon'ble Apex Court upheld the view of the Hon'ble High Court that the appellant was liable to pay tax under the Act irrespective of whether the registration u/s 8 was or was not valid; the liability was not conditional on the registration of the dealer.

Therein, it was further observed that the appellant had itself, been submitting voluntarily returns on which the assessments had been made and it was not idle for it to contend that the proceedings taken on its own returns were without jurisdiction.

So, we find that in the said decision question for determination was totally a different one, and as such it does not come to the aid of the Revenue on the point of jurisdiction involved in this matter.

24. In **Sarju Prasad Ram Kumar's** case (supra), cited on behalf of the appellant, appeal had arisen from the decision of Hon'ble Allahabad High Court in a reference under section 11 of the U.P. Sales Tax Act.

Therein, assessee-respondent carried on his business in Sector III for which sector there was a Assistant Sales Tax Officer. Lucknow was one of the circles formed under the Act. In that circle, there were several Assistant Sales Tax Officers.

Relevant facts of the case read as under:

"For the assessment year 1959-60, the Assistant Sales Tax Officer, Sector II, issued to the assessee a notice under section 21 of the Act. That notice was served on the assessee on January 17, 1961."

After giving an opportunity to the assessee to put forward his case, the Assistant Sales Tax Officer assessed the assessee on a turnover of Rs. 18, 000/-.

The assessee preferred an appeal against that order to the Assistant Commissioner (Judicial), Sales Tax. Before that officer, he contended that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess him. That contention was upheld by the appellate authority. That authority came to the conclusion that the only Sales Tax Officer who would have assessed the assessee was the Assistant Sales Tax Officer, Sector III. He accordingly set aside the assessment.

Aggrieved by that order, the department went up in appeal to the Judge (Revisions), Sales Tax. The Judge (Revisions), Sales Tax, affirmed the decision of the appellate authority.

As demanded by the department, the Judge (Revisions), Sales Tax, stated the following question for ascertaining the opinion of the High Court :

"*Whether, under the circumstances of this case, the assessment passed by the Assistant Sales Tax Officer, Sector II, was a valid assessment or a void one without jurisdiction?*"

Hon'ble High Court answered that question in favour of the assessee, while coming to the conclusion that the assessment in question was void as the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess the assessee. The department challenge the said decision.

Hon'ble Apex Court while dealing with the matter, observed in the manner as –

demarcation, the Assistant Sales Tax Officer, Sector II, cannot be held to have had any jurisdiction to assess the respondent.

In the present case, it is not disputed that in the Lucknow Circle there are several Assistant Sales Tax Officers. It is also not disputed before us that Sector III has a separate Assistant Sales Tax Officer. It is not shown that the Assistant Sales Tax Officer, Sector II, had also been conferred with jurisdiction to assess the dealers in Sector III. In these circumstances, the only possible conclusion is that the Assistant Sales Tax Officer, Sector II, had no jurisdiction to assess the dealers in Sector III.

6. In the High Court, the department contended that the assessees case was transferred from the file of the Assistant Sales Tax Officer, Sector III, to the file of the Assistant Sales Tax Officer, Sector II. This contention has been rejected by the High Court as having no basis. In fact, that contention has not been repeated before us. Mr. Karkhanis, appearing for the department, contended that in view of the provisions referred to earlier, we must hold that all the Assistant Sales Tax Officers in Lucknow Circle had jurisdiction to assess all the dealers in Lucknow Circle. This contention is unacceptable. If we accept that contention, sub-rule (3) of rule 3 becomes otiose. Further rule 6(a) also becomes ineffective. It is for obvious reasons the rule-making authority has empowered the Commissioner to allocate separate areas for separate Assistant Sales Tax Officers. When such an allocation is made, the jurisdiction of each officer is confined to the area allotted to him."

In view of the above discussion, we do not find that present case is covered by the provisions of section 80(3) of DVAT Act.

Conclusion

In view of the above discussion, we hold that since Revenue has failed to prove that jurisdiction to frame assessment under section 32, 33 of DVAT Act, in respect of the turnover or business

office of the dealer-appellant was conferred on Shri Bijendra Kumar, VATO by following due process of law, the assessments made by the Assessing Authority-Shri Bijendra Kumar, VATO are held to have been framed without any jurisdiction.

On merits

25. Even though, as discussed above, we have arrived at the aforesaid conclusion on the point of jurisdiction and the impugned orders passed by Learned OHA upholding the assessments framed by the Assessing Authority, deserves to be set aside on this legal ground alone, keeping in view that arguments have also been advanced by learned counsel for both sides, on the point of stock variation and incriminating documents seized from the business premises, in the interest of justice, and for complete and effective adjudication of the matter in dispute, we proceed to deal with the submissions on these points as well.

Stock Variation

On merits, on the point of stock variation found by the Assessing Authority and learned OHA, learned counsel for the appellant has pointed out that one of the submissions before Learned OHA was that clearing and forwarding charges, custom duty, royalty and charges etc. were incurred by the dealer on account of import of goods from out of India during the period from 1/4/2012 to 28/8/2012 i.e. the date of survey, and that the total amount of Rs.

29,08,603/- towards such charges be adjusted towards the stock variation.

The contention is that the learned OHA did not accept the above submission made on behalf of the dealer, and rather observed that the said expenses, even if incurred by the dealer, pertained to the complete import of goods made by it during the aforesaid period, and the same did not pertain entirely to the stock available at the time of survey alone.

Learned counsel has referred to the provisions of section 2 (zd) of DVAT Act, which defines "Sale Price", and includes purchase price, then refer to section 3 & 5 of DVAT Act and also referred to decision in **Ajay Road Lines India Pvt. Ltd. Vs. CTT, Delhi (T),** appeal No. 83/ATVAT/10-11by this Tribunal, wherein it was observed that the imposition of tax was contrary to law.

Learned counsel for the appellant has referred to all these documents, recovered from the premises of the dealer – appellant, in the form of loose sheets, one by one, and contended that many of these documents do not pertain to the concerned period and rather pertain to the previous quarters/period; that no investigation was done in respect of the entries recorded in these documents, by recording statements of the persons whose particulars find mentioned therein.

Learned counsel for the appellant has submitted that in absence of any investigation regarding entries in these documents,

Assessing Authority should not have made any assessment of tax, and as such the impugned order passed by learned OHA upholding the assessment made by the Assessing Authority, deserves to be set-aside.

In support of his contention, learned counsel has referred to decision (1) in the case of M/s. Rochees Watches Ltd. v. CCE 2006 (197) ELT 218 (T); (2) in the case of M/s. Opel Alloys (P) Ltd. v. CCE, reported as 2005 (182) ELT 64 (T); (3) in the case of CCE v. Shree Laxmi Steel Rolling Mills, 2008 (232) ELT 695 (T); (4) in the case of M/s. Pilot Industries v. CCE, 2004 (173) ELT 402 (T); (5) in the case of M/s. Laxmi Engg. v. CCE, 2002 (139) ELT 573 (T).

On the other hand, Learned counsel for the Revenue has referred to the provisions of section 78 and 48 of DVAT Act and rightly submitted that dealer could file application before the Assessing Authority or before the Learned OHA for summoning of any person whose particulars were mentioned in the loose papers, seized from the business premises of the dealer, for the purpose of levy of tax, but no such step was taken, and as such there is no merit in the contention raised by learned counsel for the appellant to ignore from consideration the papers seized from the business premises of the dealer, for the purposes of framing of assessment.

It is pertinent to mention here that in the course of arguments, recovery of these documents from the business premises of the dealer-appellant was not at all disputed. Even at the time of survey, their recovery was not disputed. Furthermore, soon after the survey,

no complaint was ever lodged by the dealer with the concerned VATO denying seizure of documents or the recoveries. Therefore, the decisions relied upon, wherein recoveries were not established, do not come to the aid of the dealer.

In case of tax liability, even though initial burden to prove search, seizure and enforcement is on the Revenue, but to prove that the dealer has no tax liability, onus shifts to the dealer. Once the factum of search and recoveries at the time of survey have gone unchallenged, the onus shifted to the dealer to prove that the documents recovered, even though in the form of loose sheets/slips, were not sufficient enough or convincing to hold the dealer liable for tax.

It is a different matter that under the law, assessment/re-assessment is required to be made by the competent person, in view of the provisions of Chapter X of DVAT Act, within a maximum period of 6 years. But, there is no merit in the contention raised on behalf of the dealer that it was for the Revenue to call persons for investigation, after gathering their particulars from the seized documents or loose slips.

In case of recovery of incriminating material, from the business premises of a dealer, it is for the dealer to explain as to under circumstances said documents were found lying at the business premises. In other words, on recovery of suchlike incriminating documents, from the business premises of a dealer, the Revenue cannot be expected to prove each entry or transaction by

summoning the persons whose particulars are ascertainable from such documents. Rather, the onus to explain the entries recorded in suchlike documents is on the dealer, and for adducing evidence, the dealer may have assistance of the Revenue authorities in securing presence of the concerned persons or witnesses, to prove its claim of no tax liability on the basis of such documents recovered from its business premises.

We do not find any merit in the contention of learned counsel for the appellant that issuance of summons is one of the judicial functions, as per provisions of Rule 40 of the DVAT Rules, but no such judicial function was exercised by the Assessing Authority, the reason being that it was for the dealer to apply for any such step, but it did not do so. Authorities follow a pattern of action which is considered judicial.

In **Rochees Watches Ltd v. Commissioner of Central Excise, Jaipur,** 2006 (197) E.L.T. 218 (Tri. - Del.) cited on behalf of the appellant proceedings against all the appellants were initiated on the strength of a common show cause notice dated 21-5-2003 under which the duty demand based on the shortage of inputs/finished goods and clandestine removal of the same was raised and penalties were also proposed to be imposed on them. The adjudicating authority had confirmed the duty demand and imposed penalties as detailed in the impugned order against all the appellants.

Therein, the shortage of 96017 pieces of watch cases and 7548 pieces of quartz movements on physical stock verification taken by the officers in the factory premises of the appellants-company allegedly was detected as detailed in the show cause notice involving duty of Rs. 36,87,053/- and Rs. 61,410/- respectively. But this shortage had been duly explained by the appellant-company.

There, according to the company, it had stock of very old watch cases/quartz movements which were not usable/saleable and as such those were, re-melted, resulting in the shortage of the watch cases and this explanation could not be out rightly rejected by the adjudicating authority, for want of any evidence to prove the clandestine clearance of the same by the company in the market to various buyers.

It was observed that in the absence of any tangible evidence regarding removal and sale of short found watch cases and quartz movement, the duty in respect thereof could not be placed on the company by drawing assumptions and presumptions in that regard. There was no tangible evidence to establish that these goods were cleared by the company in the market. No oral or documentary evidence in this regard had been collected. Therefore, the duty demand of Rs. 36,87,053/- and Rs. 61,450/- against the company in respect of these goods, was set aside.

All this shows that the case is distinguishable on facts.

At this stage, it is pertinent to refer to the following significant observations made by Hon'ble Apex Court in **Padma Sundara Rao v. State of Tamil Nadu (2002) 3 SCC 533** aptly explaining perspective of the matter about applicability of decisions or precedents as follows:—

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [1972] 2 WLR 537 : Sub nom British

Railways Board v. Herrington, (1972) 1 All ER 749]. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

In **Opel Alloys (P) Ltd v. Commissioner of Central Excise, Ghaziabad,** 2005 (182) E.L.T. 64 (Tri. - Del.), cited on behalf of the appellant, emphasises was the fact that in respect of all documents recovered from Devika Chambers, the Department had not identified the person or persons who maintained those records, nor any statement from any employee of the Appellants' factory seemed to have been recorded by the Department. These averments were found to have not been rebutted by Revenue.

Accordingly, it was observed that in absence of any statement or enquiry, it was not understood as to how the Adjudicating Authority came to the conclusion that the loose papers recovered from the office premises showed the cash payments to scrap traders, contractors and truck owners, etc.

Therein, no statement of any of the scrap traders, contractors and truck owners has been brought on record by Revenue nor had been relied upon in the show cause notice. The stamp mark on a few of the loose papers did not establish the fact that Devika Chambers was the office premises of the Appellants in absence of any positive evidence. The Revenue had not succeeded in establishing that 301, Devika Chambers was used by the Appellants as their office. Accordingly it was held that the duty could not be demanded from the Appellants on the basis of the documents recovered there from.

Said decision is also distinguishable on facts. Furthermore, here, recovery of the documents at the time of survey is not in dispute, rubber stamp of the dealer was affixed on each document at the time of recovery, and the Revenue has hotly opposed the claim of the dealer.

In **Pilot Industries v. Commissioner of Central Excise, Mumbai-V**, 2004 (173) ELT 402 (Tri-Mumbai), on behalf of the appellants it was claimed that the entries figuring in the "Kachha Slips" and Rough Book (Part-II and Part-III) could not be considered to be the entries of clandestine removal. The appellants had explained to the officers that, these entries relate to the trade enquires received from the various buyers. The departmental authorities disbelieved this story and claim that, the said entries actually relate to the sale transactions, not reflected in the sales extracted at Part-I in the preceding paragraph.

Hon'ble Tribunal observed that "the parties were able to corroborate their respective versions. It should have been possible for the appellants to refer to a specific entry in the Part-II and correlate the same with the actual despatches reflected in Part-I, since quite a number of parties were common in both the parts (also in Part-III). The departmental authorities on the other hand had thrown up their hands in despair saying that, for want of full particulars of the party's name and addresses, they were not able to seek confirmation regarding the authenticity of transaction. In the order-in-original the adjudicating authority, however, observes that since the trade proceeds on trust, incorporation of such sketchy details of the customers was sufficient for the appellants and therefore he held that the figures reflected in Part-II & III were actual sales."

In this context, Hon'ble Tribunal observed that " when the two parties were reading a piece of evidence, in diametrically opposite manners, then without an independent corroboration to justify the respective interpretation, it was not possible to support the claim of either the department or the appellants. However, it must be remembered that, a greater burden rests on the department to prove its case in a positive manner with some degree of credible evidence.

Therein, the sole evidence in the form of Kachha Slips in that case was held to be adequate to support the allegation, when the said documents did not conclusively suggest the sale, and the probability of the said record being the record of trade enquiries could not altogether be ruled out.

It was further observed as under -

"As already noted, there are common names in both Part-I as well as Parts-II & III. Therefore the departmental authorities, could have identified the parties named in Part-II from the records in Part-I and conducted further investigations to ascertain as to whether or not, the details recorded in Parts-II & III relate to any corresponding purchases made by them. It is nobody's case that the parties whose names figure in Part-I, with the same sketchy details as reflected in Parts-II & III are not traceable since the sales to the said parties is an admitted fact."

As noticed above, in the case relied upon, the appellants had explained to the officers that, these entries relate to the trade enquires received from the various buyers. Here, when we have enquired from learned counsel for the appellant as to what was the explanation of the dealer about the recoveries, the reply is that it was for the Revenue to conduct investigation before relying upon these documents. In view of the discussion above on this point of onus of proof, we do not find any merit in this contention on behalf of the dealer. The decision relied upon is distinguishable and does not come to the aid of the dealer.

In **Laxmi Engg. Works v. Commissioner of Central Excise, Delhi,**2002 (139) E.L.T. 573 (Tri. - Del.), cited on behalf of the dealer, the allegations as contained in the show cause notice were regarding the receipt of the raw material i.e. sillies/ingots, manufacture of the final product i.e. copper wire rods from that material and then disposal of the same in a clandestine manner without payment of duty during the period 16-7-1995 to 27-11-1995. There, reliance had been placed by the Commissioner mainly on the entries found in 65 slip pads, some loose papers and one register allegedly recovered from the factory premises of the appellants as out of the total slip pads recovered, 30 allegedly pertained to the receipt of raw material i.e. sillies/ingots while the

other 35 related to the manufacture of copper wire rods from that material by them.

Hon'ble Tribunal observed that the said record, as per impugned order were maintained either by Sohan Lal, Supervisor or by Nagendera or by Prem (Raju) who were employees of the appellants; but out of these three employees the statement of only Sohan Lal was recorded during investigation wherein he allegedly admitted the correctness of the entries in the seized record, but, as further observed, his statement could not be in fact legally used as a substantive piece of evidence against the appellants. He did not appear for cross-examination during the adjudication proceedings, although the appellants requested for the same.

Hon'ble Tribunal further observed that from the statement it was not even evident that how many entries in the slip pads, loose papers and register were made by him and by his other two co-employees, namely, Nagendera and Prem (Raju) respectively. There was also nothing on the record to suggest if statements of Nagendera and Raju were also recorded regarding the recovery of 65 slip pads, loose papers and the register from the factory premises of the appellants and the entries recorded therein. Therefore, the uncross examined, uncorroborated and vague statement of Sohan Lal, Supervisor, regarding the entries in the slip pads, loose papers and the register could not be considered as legal and substantive authenticated evidence against the appellants.

Here, in the case before us, recovery of the documents has not been disputed. In view of the discussion above, on the point of onus of proof being on the dealer, which the dealer has failed to discharge, the decision relied upon does not come to the aid of the dealer.

26. No other argument on merits has been advanced before us by learned counsel for the parties.

Result

RESULT

27. In view of the above findings that Revenue has failed to prove that jurisdiction to frame assessment under section 32, 33 of DVAT Act, in respect of the turnover or business office of the dealer-appellant was conferred on Shri Bijendra Kumar, VATO by following due process of law, and the assessments made by the Assessing Authority-Shri Bijendra Kumar, VATO are held to have been framed without any jurisdiction, both the appeals are hereby disposed of, while setting aside the impugned order passed by Learned OHA, whereby the assessments framed by the Assessing Authority, in the manner indicated therein were upheld .

28. 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 : December 15, 2021

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Appeal No. 688-689/ATVAT/2013/1648-55 Dated: 16/12/21

Copy to:-

(1) VATO (Ward-81)
(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