

Sl. No 137

PS

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

Appeal No : 251-253/ATVAT/2021

Date of Decision : 20/12/2021

M/s Shri Sai Traders,
345/1 Village Pitampura,
Shivaji Market,
New Delhi-1100 34.

.....Appellant

V

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant : Sh. R.K. Aggarwal.

Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. By way of present three appeals, captioned above, dealer has challenged common order dated 03/09/21 passed by Ld. OHA-Joint. Commissioner, vide which its three objections, pertaining to the tax period 3rd quarter 2010-11, 3rd quarter 2011-12 and 4th quarter 2011-12 have been rejected.
2. A notice u/s 32 of DVAT Act were issued by Assessing Authority on the ground that the dealer had failed to appear on

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29/06/12 or to furnish requisite information regarding refund, for the relevant tax periods, despite issuance of notice dated 04/06/12, u/s. 59 of DVAT Act. The Assessing Authority accordingly rejected the claim of the dealer for refund for the said tax period(s).

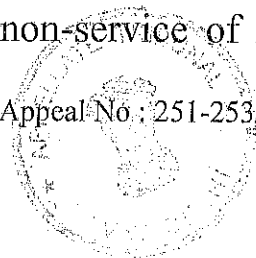
The objections were filed by the dealer against three notices of Default Assessment of tax and interest issued on 27.07.2012, by the Assessing Authority (VATO – Ward-64) for the aforesaid tax periods u/s. 32 of DVAT Act.

3. When the objections were filed by the dealer against the above-mentioned three Notices of Default Assessment, issued, Ld. OHA, provided an opportunity to the dealer of being heard and then disposed of the same.
4. In the course of hearing on the objections, Ld. Counsel representing the objector – dealer submitted that the Assessing Authority had erred in rejecting the refund claim, without appreciating all the relevant documents/records, which were available with the dealer.

Another submission put forth by the Ld. Counsel for the objector before the Ld. OHA was that no notice u/s. 59(2) of DVAT Act was ever served upon the dealer.

5. As regards the objection regarding non-service of notice, Ld.

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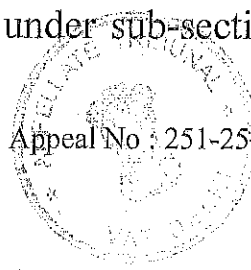


OHA observed that notice u/s. 59(2) of DVAT Act was issued to the dealer for personal hearing but he failed to appear or produce relevant documents on the given date. Ld. OHA further observed that in view of decision in **Sales Tax Bar Association (Registered) v. GNCTD**, WP (C) 4236/12, the objector – dealer was given due opportunity to present his claim before him (Ld. OHA), with all the supporting documents, but still he failed to produce the relevant documents which showed sheer negligence on the part of the dealer, and created doubt regarding genuineness of the transactions.

Accordingly, the Ld. OHA rejected the contentions of Ld. Counsel for the objector regarding non-service of notice u/s. 59(2) of DVAT Act.

6. On merits, Ld. OHA observed that there was no error or infirmity in the impugned notice issued by the Assessing Authority.
7. Hence, these appeals.
8. Learned counsel for the dealer has referred to section 11(2)(b) of DVAT Act which provides that where the tax of a dealer calculated under sub-section (1) of section 11 amounts to be negative value, the dealer shall be entitled to carry forward the amount remaining after application under sub-section (2)(a) to

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next calendar month or tax period, as the case may be, or to claim a refund of the amount remaining after application under sub-section (2)(a) at the end of a tax period and the Commissioner shall deal with the refund claim in the manner described in section 38 and section 39 of this Act. The contention is that the Assessing Authority could not pass an order for rejection of the refund and rather he could carry forward the amount as provided u/s 11 (2)(b), as per election of the dealer.

9. Undisputedly, word 'rejection' of refund does not find mentioned in section (11)(2). It provides for adjustment or for carry forward or for claim of refund. However, where a dealer is held not entitled to refund, after following procedure prescribed under the law, it cannot be said that the claim for refund cannot be rejected or disallowed by the Revenue.

Section 38(4) of DVAT Act provides that where the Commissioner has issued a notice to the person u/s 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken (or sought additional information u/s 59 of this Act), the amount shall be carried forward to the next tax period as a tax credit in that period.

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10. Learned counsel for the appellant had submitted that claim for refund is to be decided expeditiously within the prescribed period. In this regard learned counsel has relied on decision in **Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax**, by our own Hon'ble High Court on 3/6/2010 and decision in **M/s. Vijay Trade Impex v. Commissioner, Trade & Taxes**, by this Tribunal, in appeal No. 36/ATVAT/13-14 on 15/1/2015.

There is no dispute that there is time limit for disposal of such like claims. This is not a case where claims of the dealer have not yet been disposed of. The claims of the dealer in this case were disposed of, even though after the prescribed period, and the Assessing Authority found that the dealer had failed to provide requisite information.

11. Learned counsel for the dealer then referred to section 31 of DVAT Act to submit that the return furnished by the dealer u/s 26 is taken to have been made by the Commissioner, as an assessment of tax payable of the amount specified in the return, and as such where the dealer claims refund, no further assessment shall be of any significance, and that accordingly, the claimed deserved to be allowed.


12. In the course of arguments, it has been enquired from learned

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counsel for the dealer if assessment was made under CST Act, as regards, the concerned turnover shown by the dealer in the return, after taking into consideration statutory forms. There upon learned counsel has submitted that the assessment under CST Act must have been made after the passing of the order dated 27/7/2012.

13. No copy of the said assessment under CST Act has been placed on record by the dealer. Admittedly, copy of the said assessment under CST Act was also not made available by the dealer to the learned OHA. Had the same been made available to the learned OHA, he would have taken into consideration the same, so as to process the claim of the dealer for refund. But the fact remains that no copy of such notice of default assessment under CST Act was made available to the learned OHA. In this situation, documents were required to be produced to process the refund applications.

As per instructions/ guidelines issued by the Revenue, for processing of refund applications vide circular No. 2 of 2008-2009, circular No. 2, 3 & 8 of 2009-2010, and revised vide circular No. 07 of 2010-11 dated 14/7/2010, after receiving refund applications, notice u/s 59 of DVAT Act, 2004 may be issued for seeking information viz., sale/purchase detail, custom clearance certificate, shipping bill / airway bill etc. sale/



purchase registers maintained in form DVAT -30/31.

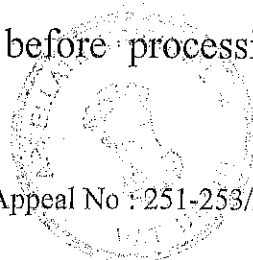
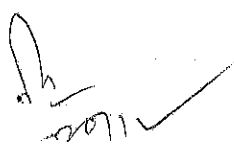
As per said instructions, while analyzing ITC claimed by refund claimant, Assessing Authorities may come across cases in which the selling dealer/supplier may also have made local purchases and adjusted most of his output tax with his ITC. In such cases, AAs should analyze his purchase registers for the ITC claimed mainly to find out, "who has paid tax", for which the refund claiming dealer has claimed refund;

Information about non-functioning dealers may be sent to the concerned ward for initiating necessary action;

As far as possible, documents necessary for processing refund applications may be called for in one go;

Security may be prescribed wherever required in accordance with the provisions of section 38 of DVAT Act;

In cases where refund is generated on account of interstate sale/stock transfer against 'C'/ 'F' forms, submission of statutory forms may be ensured invariably. Security, preferably in the form of Bank Guarantee may be prescribed for non-availability of complete forms. For the tax periods, for which date of submission of such forms has already expired, demand may be created for missing forms before processing refund applications;



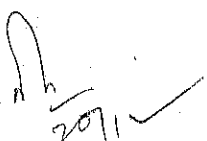
Security can also be prescribed in cases wherein it has been found that dealer is building up stock in every tax period and sale is always less than purchases;

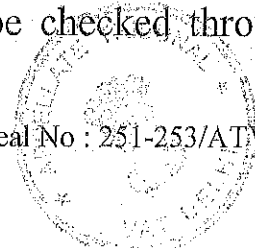
The receipt of Credit Notes may be examined carefully and it must be ensured that ITC is reduced proportionately resulting in corresponding reduction of refund claim. Similar treatment may be given to cash discount, quantity discount etc. The variation in purchase/sale turnover shown in balance sheet with that shown in periodical returns must be followed by corresponding variation in tax credit / output tax as the case may be. Provisions of section 2(1)(zd), section 10 & 51 of DVAT Act, 2004 & rule 45 of DVAT Rules, 2005 may be kept in mind while examining such refund application;

Attachment of pink or yellow slip on the returns with refund claim will continue to be in operation in the usual manner for identification of refund cases;

Refund applications / returns with refund for any tax period can also be checked from reports in Refund Processing System (RPS) Module for initiating necessary action;

TDS Certificates issued by contractees may be checked carefully. Payments made by contractee for which the refund claimant is available credit may also be checked through tax





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Findings of Audit / Enforcement Branch may also be kept in view while processing refund applications for a tax period.

Physical verification / information of suppliers registered in any ward wherever necessary will continue to be undertaken in the usual manner as circulated vide Circular No. 8 of 2009-10; ~~Even~~ subsequent thereto, more instructions have been issued from time to time as regards processing of refund application, which are required to be strictly followed by the dealer and also by the Revenue.

14. As noticed above, in the impugned order, learned OHA observed that the dealer – objector failed to submit supporting documents despite due opportunities.

Learned counsel for the dealer submits that the learned OHA never asked the dealer to produce any supporting documents, and that the dealer would have produced the same, had the learned OHA asked him to do so.

In the memorandum of appeal, as rightly pointed out by learned counsel for the Revenue, the dealer has taken the ground that the objector is having all documents in its possession and may be produced on demand. But the fact remains that there is nothing on record to suggest as to which of the supporting

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documents were directed to be produced before the Assessing Authority or before the learned OHA. In absence thereof, it remains unexplained as to how the dealer could produce any documents in support of its claims.

15. At this stage, it may be mentioned here that the Assessing Authority observed in all the 3 notices of default assessment u/s 32 of the Act that the dealer had failed to furnish requisite information regarding refund, on 29/6/2012 in compliance with notice dated 14/6/2012, which was issued u/s 59 of DVAT Act.
16. Learned counsel for the dealer has submitted that no notice u/s 59(2) of the Act was actually served upon the dealer and as such he could not produce the requisite information.

No copy of notice u/s 59 of DVAT Act is available on record or has been made available by any of the parties. Available at page 47 of the memorandum of appeal, is the sheet, filed by the dealer, which contains information downloaded from the website of DVAT, as regard, issuance of notices u/s 59(2) of DVAT Act, to the dealer. At serial no. 5 of this statement, there is mention of issuance of a notice by Department of Trade and Taxes to the dealer on 23/9/2014, for the purpose of assessment, for the tax period 1/4/2010 to 31/3/2012.

However, there is nothing on record to suggest that any notice

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u/s 59(2) of the Act was issued by the Department of Trade & Taxes to the dealer for the relevant tax period i.e. 3rd quarter, 2010, 3rd quarter, 2011 and 4th quarter, 2011, prior to the said notice dated 23/9/2014, which was issued for the purpose of assessment.

In the given situation, when the Assessing Authority referred to notice dated 14/6/2012, its service upon the dealer was also required to be established, as per rules. However, there is nothing in the notices/^{of assessment} dated 27/7/2012 to suggest as to in which manner the said notices are said to have been dispatched to or served upon the dealer.

In absence of proof of service of the said notice, and in view of the specific objection raised by the dealer that no such notice was issued to it, learned OHA fell in error in recording the finding in the impugned order that issuance of notice u/s 59(2) was an admitted fact and not disputed one.

17. Learned counsel for the dealer – objector had submitted that even at this stage the dealer is ready to produce the relevant documents before the Revenue for the purpose of consideration of ^{its} ~~his~~ claim for refund.

18. In the given circumstances, the matter needs to be remanded to learned OHA so as to provide an opportunity to the dealer to

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produce the relevant documents required for the purposes of claim of refund.

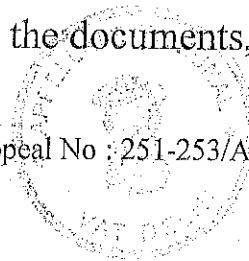
Learned counsel for the dealer submits that matter be remanded to learned VATO - Assessing Authority and not to the learned OHA.

On the other hand, learned counsel of the Revenue submits that since the dealer has challenged order passed by learned OHA, the matter deserves to be remanded only to the learned OHA.

Undisputedly, the order challenged by way of this appeal is the order vide which objections filed by the dealer against rejection of claim for refund, have been dismissed for want of production of supporting documents. *and providing service of notice u/s 59(2).* In the given situation, it is deemed appropriate to provide reasonable opportunity to the dealer for the purpose of consideration of its claim regarding refund, the documents are required to be produced only before the learned OHA.

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19. Consequently ~~this appeal is~~ disposed of and matter is remanded to learned OHA with the directions for providing a reasonable opportunity to the dealer, of being heard, including to submit relevant and specific supporting documents before him, for decision of the objections of the dealer afresh in accordance with law after taking into consideration the documents, if any so

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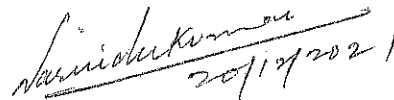
produced by the dealer, within the given time.

20. Parties to appear before learned OHA on 03/01/2022.

21. 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 : 20/12/2021

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(Narinder Kumar)
Member (J)

Appeal No. 251-253/17 VAT/21/1680-87

Dated: 21/12/21

Copy to:-

- (1) VATO (Ward-64)
- (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)




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