

S.No - 161

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

Appeal No.74/ATVAT/15

Date of order: 25/01/2022

M/s Vanshika Enterprises,
Flat No. 118, First Floor,
Mansarovar Building, 90
Nehru Place, New Delhi-110019

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : None.
Counsel representing the Revenue : Sh. P. Tara

JUDGMENT

1. Dealer-Appellant- a proprietor concern, has filed this appeal challenging order dated 23.03.15 passed by Ld. OHA-Special Commissioner-II.
2. Vide impugned order, Ld. OHA disposed of objections filed by the Dealer-Appellant against assessment of penalty of Rs.15,66,408/-, framed by the Assessing Authority u/s 86(10) of DVAT Act.

3. The matter pertains to the assessment year 2011-2012.
4. Vide notice of assessment of penalty dated 14.10.2013, the Assessing Authority levied penalty on the dealer to the tune of Rs.15,66,408/- due to the following reasons:-

“The above dealer was selected by the Competent Authority for audit of business affairs u/s 58 of DVAT Act 2004 read with rule 46 of DVAT Rule 2005. Accordingly DVAT-37(Notice) was issued to dealer on 07/06/2013 to appear on 25/06/2013 and its subsequent reminder used dated 23/07/2013 to appear on 01/08/2013. A notice has also issued to dealer through system on his login ID vide Ref. No.2755. A Show Cause Notice dt 04/09/2013 and the same notice was served to the dealer on 04.09.2013 through ward VATI. However, despite several opportunities given, but the dealer has failed to produce the book of A/C. In absence of book of A/C, the default assessment is done as per provision of the Act as under. As per record available in the system, the dealer has ITC claimed of Rs. 15,66,408/- is disallowed on account of non production of tax invoices to be recovered with interest @15% P.A. Penalty is imposed u/s 33 read with section 86(10) of DVAT Act 2004, for tax deficiency. Penalty u/s 86(14) of DVAT Act is also imposed for non production of book A/C.”

5. Feeling aggrieved by the levy of assessment of penalty, the Dealer-Appellant filed objections u/s 74 of DVAT Act, on 18.11.2013. The Ld. OHA rejected the objections in view of

section 74(4)(a) of DVAT Act, while observing in the manner as:

"Perusal of the assessment order enclosed with objection shows that a certified copy of the penalty order has been received on 11.12.2014 on the face of it the objection appears to have been filed on time. However, it may be noted that the same VATO had assessed the same dealer on 14.10.2013 creating additional tax demand of Rs.15,66,408/- and interest demand of Rs. 3,43,108/- vide order reference No.150009548700 and penalty demand of Rs. 50,000/- vide order reference No.150010189890 dated 14.10.2013. It is evident that the order creating the aforesaid tax interest and penalty demand is of the same date as the order creating the penalty demand is of Rs. 15,66,408/-. Hence, it is evident that all the orders must have been received by the objector on the same date.

In fact, an objection had been filed on 18.11.2013 by the objector against the tax and interest & penalty demand of Rs. 15,66,408/-, Rs, 3,43,108/- and Rs. 50,000/- respectively created by VATO as mentioned in previous para. The then OHA had passed an order No. F./SCTT-II/T&T/Obj./2013-14/132-136 dated 10.10.2014 in which the aforesaid demands pertaining to tax interest and penalty had been sent back to the Assessing Authority with the direction to provide an opportunity of being heard and to produce the books of account and other relevant records and thereafter to carry out the VAT audit of its business affairs and pass the assessment etc. orders afresh. In the same order the then OHA had stated

that since the objector had not contested nor objected to the notice/order of assessment of penalty issued by VATO Ward-90 on 14.10.2013 u/s 74(1) of the Act levying penalty u/s 33 read with Section 86(10) of the DVAT Act to the tune of Rs. 15,66,408/- the same is held to be intact and undisturbed. Infact, in Para (6) of the order it is clearly stated by the then OHA that

"In the order of default assessment of tax and interest issued by the VATO of the Ward on 14.10.2013 u/s 32 of the DVAT Act subject matter of objection here before the undersigned, a clear mention about levying penalty for the tax deficiency u/s 86(10) of the DVAT Act, has been mentioned yet, the objector has not so far filed any objection against it along with the above said objections filed by him as above."

6. Learned OHA further observed in the present impugned order:

"In fact the objector had filed a copy of the order Reference No. 150010189890 dated 14.10.2013 creating penalty demand of Rs. 15,66,408/- with his earlier appeal filed on 18.11.2013. It is therefore evident that the order of penalty objected to in this objection was already available with the objector long before he obtained the present certified copy enclosed with the present objection. Accordingly it is evident that the present appeal is filed after a delay of more than 14 months after receiving the order of the VATO as established from the aforementioned facts.

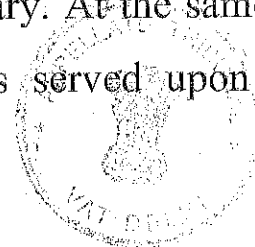
Besides notice was issued for appearance on 26.02.2015, 02.03.2015 and finally on 18.03.2015 where none appeared nor

any intimation was received. In fact, the notice for appearance on 26.02.2015 has been sent by Speed Post and the notice for 02.03.2015 had been received by the objector and the notice for 18.03.2015 had been received by the objector as well as the counsel. Accordingly, the objection is refused in view of Section 74(4)(a) of the DVAT Act. Accordingly, the penalty demand of Rs. 15,66,408/- created vide AA order vide reference No. 150010189890 dated 14.10.2013 by VATO Ward-90 stands and need not be interfered with."

7. As per the case of the Dealer-Appellant, notices issued by the Assessing Authority, were sent at the old address of the dealer, whereas, the department had already been informed vide DP-I regarding change of business premises to Nehru Place, New Delhi.

Dealer-Appellant denies to have received the copy of assessment of penalty dated 14.10.2013. Further, it is the case of the dealer that the copy of the order of penalty u/s 86(10) of DVAT Act was received by the dealer on 11.12.2014 and thereupon, it filed objections before Ld. OHA on 19.01.2015.

It is also the case of the dealer that non appearance of the counsel before Ld. OHA on 16.03.2015, was due to bona-fide cause, as he noted wrong date in his diary. At the same time, dealer has alleged that no notice was served upon it for 18.03.2015.



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8. As noticed above Dealer-Appellant is feeling aggrieved by order dated 23-03-2015 passed by Ld. OHA-Special Commissioner-II whereby objections filed by the Dealer-Appellant against imposition of penalty of Rs. 15,66,408/-, imposed by the Assessing Authority under section 86(10) of the Act, vide order dated 14-10-2013, in respect of tax period annual-2011 has been upheld.

The objections have been rejected on the ground that the same were filed more than fourteen months after the order dated 14-10-2013 i.e. the order imposing penalty u/s 86(10).

It may be mentioned here that despite repeated opportunities, no arguments have been advanced on behalf of the Dealer-Appellant in this appeal. Only Ld. Counsel for the revenue has advanced arguments while supporting the impugned order dated 23-03-2015. Ld. counsel for the revenue has submitted that since the objection filed by the Dealer-Appellant before Ld. OHA were barred by limitation, the same have been rightly rejected on this ground.

9. Admittedly, Dealer-Appellant had filed separate objections no. SCTT/775 dated 18-11-2013 challenging the assessment of Rs. 19,09,516/- framed u/s 32 of DVAT Act on 14-10-2013 while this allowing ITC claimed by the dealer due to the

reason that the dealer had failed to produce tax invoices. On the same day, penalty u/s 33 read with section 86(10) of the DVAT Act was imposed upon the dealer on the ground of tax deficiency. Still under another provision i.e. section 86(14) of DVAT Act, penalty was imposed on the dealer due to the reason that it had failed to produce books of accounts.

10. Admittedly, while challenging the imposition of tax interest u/s 32 and penalty u/s 86(14) read with section 33 of DVAT Act, the dealer did not challenge the other penalty u/s 86(10) of DVAT Act, imposed due to non production of books of accounts, and he challenged the same separately by filing objections which have given rise to present appeal.
11. Since the dealer did not file any objection against the penalty u/s 86(10) read with section 33 of DVAT Act, while disposing off the other objections SCTT/775 dated 18-11-2013, Ld. OHA upheld the same.

In this regard, we find that when no objection was filed against the said penalty order, while filing objections against the levy of tax, interest under section 32 and other penalty under section 86(14) of the Act, Learned OHA deciding the objections SCTT/775 could not record any findings as regards the penalty under section 86(10) of the Act.

12. In the given situation, when as per case of the dealer, the objections were filed on the basis of certified copy of order dated 11-12-2014, an application seeking condonation of delay in filing the objections was required to be filed, as per proviso available under sub section (4) of section 74 of the Act. It is not the case of the Dealer-objector that any application seeking condonation of delay in filing of the objection was filed before learned OHA. What to say of leading any evidence before learned OHA to prove sufficient cause for condonation of delay.

It is true that notices were issued by the learned OHA to the Dealer-Objector for 26-02-2015, 02-03-2015 and 18-03-2015 for appearance in the said objections but even then none appeared on behalf of the dealer. As observed in the impugned order, notice for appearance issued on 26-02-2015 was sent by speed post whereas other notice issued for 02-03-2015 was received by the objector. The third notice issued for 18-03-2015 was also received by the objector and its counsel. The fact remains that none appeared before the Ld. OHA to pursue the objections, due service of notices. In this appeal, none has appeared on behalf of the dealer – appellant to make any submission in support of the grounds of appeal, including that counsel for the dealer could not appear before learned OHA on 16/3/2015 and that no notice was received from

learned OHA for 18/3/2015. No affidavit of the dealer or of its counsel has been filed in support of the said ground of appeal.

As per sub-section (6) of section 74, the Commissioner is empowered to pursue and determine the objection in absence of the objector when the objector fails to attend the hearing at the given time. In the given situation, Ld. OHA was justified in proceeding further to determine the objections even in absence of the dealer.

Since the Dealer-Objector had earlier filed objections SCTT/775 dated 18-11-2013 against the order dated 14-10-2013, it can safely be said that the Dealer-Objector was within the know of imposition of penalty u/s 86(10) of DVAT Act even at that time, but the dealer did not challenge the said penalty. In the given situation it was for the Dealer-Objector firstly to take steps at that very time i.e. filing of the previous objections to specify therein that he was not challenging the levy of penalty u/s 86(14) on the ground that no copy of the said order had been supplied to it. However, there is nothing on record to suggest that in the earlier objections he came up with said version and reserved right to challenge the same on receipt of copy of the said order.



13. As noticed above the dealer assessee filed objections SCTT/1015 on 19-01-2015 i.e. subsequent to the disposal of the first mentioned objections SCTT/775 of 18-11-2013, challenging only the other penalty imposed u/s 86(10).

While disposing of the present objections no. SCTT/1015 dated 19-01-2015, Ld. OHA has observed that copy of the order of penalty u/s 86(10) was already available with the objector. On the other hand, the dealer filed objections SCTT/1015 on 19-01-2015 alleging that copy of order of penalty under section 86(10) of the Act was never received by him, and that only after collecting certified copy thereof, he came to know of the said order, and as such the objections were within the period of limitation when calculated from the date of supply of its certified copy i.e. 11-12-14.

It is significant to note that dealer had taken up specific ground in the previous objections that he had not received copy of the impugned orders. Accepting the said previous objections, the Learned OHA specifically mentioned that copy of orders could not be said to have been served, and accordingly remanded the matter to Assessing Authority. In the given situation, even if the dealer did not challenge the order u/s 86(10) of the Act at the time he challenge the other two assessments i.e. u/s 32 and 86(14) read with section 33 of

the Act, learned OHA should have set-aside not only the said two assessments but also the third assessment i.e. u/s 86(10) of the Act, the reason being that the learned OHA had accepted the version of the dealer that no such order was served upon it.

14. In other words, once the learned OHA remanded the matter to the Assessing Authority in respect of two assessments i.e. u/s 32 and 86(14) read with section 33 of the Act, expressing out regarding service of the said notices of the same date, learned OHA should have directed the Assessing Authority to make fresh assessment even as regard levy of penalty u/s 86 (10) of the Act, for the same reasons. Therefore, we find that the impugned order passed by learned OHA dismissing the subsequent objections on the ground that the same were barred by limitation, deserves to be set aside, and matter regarding imposition of penalty u/s 86(10) of the Act is required to be remanded to the learned Assessing Authority for decision afresh after providing opportunity to the dealer of being heard.

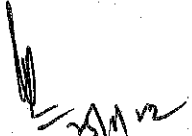
15. In view of the above discussion, this appeal is allowed, the impugned order upholding the imposition of penalty u/s 86 (10) of the Act is set-aside and matter is remanded to Assessing Authority for decision afresh after providing opportunity to the dealer of being heard.

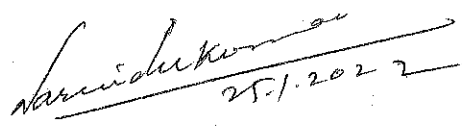
However, keeping in view the conduct of the dealer – appellant in having not appeared before learned OHA, for the purpose of hearing objections, on three dates despite notices ^{having not taken steps} and the conduct of the dealer – appellant as noticed above, the dealer – appellant is burdened with cost of Rs. 20,000/-, to be deposited with the Revenue.

16. Parties to appear before learned Assessing Authority on 09/02/2022.
17. 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 : 25/1/2022


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)



Appeal No. 74/ATVAT/IS/1872-79

Dated: 28/1/22

Copy to:-

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|-----------------------------------------------------------------------------------------------------------|----------------|
| (1) VATO (Ward-90) | (6) Dealer |
| (2) Second case file | (7) Guard File |
| (3) Govt. Counsel | (8) AC(L&J) |
| (4) Secretary (Sales Tax Bar Association) | |
| (5) PS to Member (J) for uploading the judgment on the portal of
DVAT/GST, Delhi - through EDP branch. | |
| (9) Commissioner (T&T) | |




REGISTRAR