

Sl. No. 166

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

Appeal Nos. : 241, 242, 243 & 244/ATVAT/2021

Date of decision: 01/02/2022

M/s. New India Sales,
1267, Bara Bazar,
Kashmere Gate, Delhi-110006.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. Rohit Gautam
Counsel representing the Revenue : Sh. M. L. Garg

JUDGMENT

1. Present four appeals have been filed by the proprietorship-concern-a dealer registered with the Department of Trade & Taxes vide Tin No. 07370128066 (Ward No. 73). Dealer has challenged order dated 08/07/2021 whereby its objections against assessments framed by the Assessing Authority – AVATO, under DVAT Act, on 22/5/2012, concerning tax period – 1st quarter, 3rd quarter and 4th quarter of 2009-2010 and 1st quarter of 2010-2011 have been dismissed, being barred by limitation.

Narinder Kumar
1/2/2022

Rakesh Bali

2. Vide notices of default assessments dated 22/05/2012, framed by the Assessing Authority u/s 32 of the DVAT Act, in respect of the aforesaid three quarters (1st quarter, 3rd quarter and 4th quarter of 2009-2010) and the notice of default assessment dated 28/9/2012, claim framed by the Assessing Authority u/s 32 of the DVAT Act, in respect of the aforesaid quarter (1st quarter of 2010-11) claims for refund filed by the dealer for the said tax periods were rejected on the ground that the dealer neither appeared nor filed any document for verification of its claim, despite issuance of notice.
3. Feeling aggrieved by this said assessments, the dealer filed objections before learned OHA on 28/9/2020 in respect of all the above mentioned tax periods.
4. Learned OHA dismissed the objections while observing that the dealer filed the said objections after expiry of the prescribed period of two months and did not file any application seeking condonation of delay. Learned OHA further observed that only in the affidavit, the dealer furnished reasons for late filing of objections i.e. after more than 8 years of the framing of the default assessment of tax and interest, but the same were found to be not acceptable for condonation of said delay, and there was no sufficient and reasonable justification for condonation of delay.
5. In these appeals, learned counsel for the dealer – appellant has contended that the impugned order passed by the learned OHA

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is illegal and void, being contrary to the provisions of Sections 74(7), 74(8) and 74(9) of DVAT Act, as it was passed beyond statutory period of 15 days. In this regard, reference has been made to decision in **Combined Traders v. Commissioner of Trade & Taxes**, (2019) 57 DSTC 343 and **S. Gurcharan Singh & sons v. Commissioner of Trade & Taxes and Ors.**, 2019VIIIAD(Delhi) 168.

6. Learned counsel for the Revenue has opposed the contention raised by learned counsel for the dealer – appellant, while submitting that the impugned order is dated 8/7/2021 and not 9/7/2021 and that the same having been passed within the prescribed period, it cannot be said that the impugned order is illegal or the same has been passed beyond the prescribed period of 15 days, when counted from 23/6/2021 i.e. the date DVAT 41 was received in the office of learned OHA.
7. File reveals that on 22/6/2021, Sh. Rohit Gautam, Advocate counsel for the dealer presented an application addressed to the Commissioner of VAT, Department of Trade and Taxes, New Delhi. It was alleged in the application that all the four objections dated 28/9/2020, were pending before SCTT-I, but nothing had been done till then. Further, it was alleged that the dealer approached SCTT-I for filing of notice of delay in deciding the objections within the time prescribed in section 74(7) of DVAT Act and form DVAT -41, but the office of the SCTT-I refused to acknowledge the same, and as the dealer had

no objection to file DVAT-41 with copies of DVAT-38 and orders/notices.

8. Form DVAT-41 pertains to request for consideration of the objections and communication of decision within a period of 15 days from the date of receipt of the said notice.

In the impugned order, learned OHA has observed that counsel for the objector appeared before him on 7/7/2021 and submitted an affidavit dated 6/10/2020 with additional submissions, and further that the counsel was directed to appear on 9/7/2021. Learned OHA further observed in the impugned order that since the dealer had filed DVAT-41, which requires disposal of the objections in a time bound manner, he had no option but to decide the objections.

From the said observations, it appears that after having heard counsel for the objector, even though the objections were listed for 9/7/2021 for orders, in view of the time prescribed in DVAT-41, the same were disposed of on 8/7/2021. This is clear from the date i.e. 8/7/2021 put by learned OHA under his signatures.

In the impugned order, learned OHA has mentioned that the DVAT-41 was received in his office on 23/6/2021. Learned counsel for the dealer – appellant submit, that DVAT-41 having been submitted on 22/6/2021, the objections were required to be disposed of within 15 days, but the same were disposed of on

16th day, and as such the impugned orders deserves to be set-aside.

In Combined Traders case (supra), it was contended on behalf of Revenue that the dealer had not complied with section 74(8) of DVAT Act since the notice under DVAT-41 was not served in person on the OHA but on the Commissioner and as such provisions of section 74(8) could not be invoked. While dealing with the said contention, the Hon'ble High Court observed that as per copy of DVAT-41 form served on the Commissioner by the dealer, there was an acknowledgement stamp of the Central Resources Unit, DT & T. It was observed that in office services of notice upon public officials are usually done at one desk, where the offices are located and there is a clerk who usually receives notices and gives acknowledgement. Accordingly, the Hon'ble High Court did not accept the contention raised on behalf of the Revenue that there was non compliance with section 74(8) of DVAT Act read with Rules 56 of DVAT Rules.

In **S Gurucharan Singh's case (supra)**, it was observed by the Hon'ble High Court that the dealer supplied well attested copies of form DVAT 38 by letter dated 14/5/2018 and on 14/6/2018, the dealer again served notices under DVAT-41 but the respondents – revenue opted not to act upon the repeated request of the petitioner. In the given situation, the objections filed by

the dealer were declared as deemed to have been allowed u/s 74(8) read with section 74(9) of DVAT Act.

In view of the fact that DVAT-41 were received at the unit of DT&T on 22/6/2021, the period of 15 days is to be counted from 23/6/2021, and when so calculated, the 15 days period came to an end on 7/7/2021 and not 8/7/2021.

9. However, the question involved here is if provisions of section 74(8) of the Act, would be applicable in such-like case where preliminary question regarding condonation of delay is yet to be considered, before the objections on merit are required to be so decided within the stipulated period.
10. A perusal of the impugned order passed by learned OHA would reveal that he has dealt with only one point i.e. delay in filing of the objections. In other words, no other point raised in the objections has been dealt with by the learned OHA and this goes to show that the objections on merit were to be decided, had the same been found to have been filed within the prescribed of limitation.

As per Rule 52(3), where an objection is made after the time limit prescribed under sub-section (4) of section 74, it shall be accompanied by a statement in form DVAT 39, showing the reason for delay in making the said objection.

It is not the case of the dealer – appellant that he filed any statement in form DVAT-39. The dealer – appellant was legally

required to submit form DVAT-39. On filing thereof, learned OHA was required to firstly deal with the submissions / grounds put forth in form DVAT-39, and in case the learned OHA was satisfied that there was sufficient cause for non-filing of the objections within the prescribed period of limitation, only then learned OHA was required to deal with the objections on merits. So we find that in such like case, where the point of condonation of delay as contained in DVAT -39 is to be decided, provisions of section 74(8) would not apply. In other words, the provisions of section 74(8) would apply only to the objections in DVAT-38 and not to the proceedings pertaining to disposal of DVAT-39.

11. Here, since learned OHA was firstly seized of the point of condonation of delay and sufficiency of cause for the said delay, provisions of section 74(8) of DVAT Act were not applicable. In other words, DVAT-41 was not maintainable at the time the said proceedings being dealt with by learned OHA firstly pertained to the limited point of condonation of delay.
12. The prayer in the objections filed before learned OHA was that refunds rejected by the Assessing Authority vide notices of default assessment u/s 32 of the Act be allowed with interest as per section 42 of DVAT Act. The main objection raised by the objector before learned OHA was that the notices of default assessment were system generated without application of mind did not bear the name, signature and the jurisdiction of the competent officer alleged to have framed the same. In this

regard, reference was made to provisions of section 100 A of DVAT Act, another objection challenge^{by} the notices of default assessment was that the same were never served on the objector form. In this regard, reliance was placed on decision in Bhumika Enterprises v. Commissioner, Value Added Tax and Ors., (2015)85VST367(Delhi).

Further, reference was also made to provision of section 42 which entitled^a to dealer^{b-}/received^{c-} interest on late payment of refund.

Undisputedly, the notices of default assessment rejecting the refund were passed in the year 2012. Learned counsel for the Revenue submits that the notice was served upon the dealer by uploading the same on the portal of Department of Trade & Taxes. Learned counsel for the dealer – appellant took up the plea, even before learned OHA, that it was not a case of due service in the said manner. In this regard, reference has been made to provisions of Rule 62 of DVAT Rules 2005. Having gone through Rule 62, we find that as per sub-rule-I of Rule 62, notices of summons or orders under Act or the Rules may be served by any of the following methods :-

“Without prejudice to the provisions of sections 96 & 97, notices of summons or orders (in this rule called a ‘document’) under the Act or these rules may be served by any of the following methods, namely :-

By delivering or tendering to the addressee or his agent, or to a person regularly employed by him in connection with the business in respect of which he is registered or to any adult member of his family, a copy of the notice, summons or order :

By post:

Provided that if upon an attempt having been made to serve any such notice or summons or order by any of the above mentioned method, the Commissioner is satisfied that the addressee is evading service of notice, summons or orders or that for any other reasons, the notice, summons or order cannot be served by any of the above mentioned methods, the Commissioner shall cause such notice or summons or orders to be served by affixing a copy thereof-

If the addressee is a dealer, upon some conspicuous part of any place of the dealer's business last notified by the dealer or if the said place of business is known not to exist or is not traceable, upon some conspicuous part of the last known place of residence of its proprietor or partner or director or trustee or manager or authorised signatory or any other person authorised to receive notice on behalf of the dealer;

If the addressee is not a dealer, on some conspicuous part of his residence or office or the building in which his residence or office is located;

And such service shall be as effectual as if it has been on the addressee personally:

Provided further that where the Commissioner at whose instance the notice or summons or order is to be served, on inquiry, is

satisfied that the said office, building, place of residence is known not to exist or is not traceable, he may, by order in writing, dispense with the requirement of service of the notice or summons or order under the preceding proviso;

(iii) by sending the document by facsimile;

(iv) by sending the document by electronic mail;

(v) by sending the document by courier; or

(vi) in such other manner as the Commissioner thinks fit."

13. In the course of arguments, learned counsel for the Revenue has submitted that the notices used to be uploaded on the portal w.e.f. 1/10/2011 and as such the dealer cannot say that this notice was never served upon him.

However, no notification or rule has been brought to our notice to suggest that service of notice by uploading the same on portal of the Department of Trade & Taxes, was one of the approved modes of service on notices/orders during said period. Furthermore, the notices of default assessment do not bear signatures of concerned AVATO – Assessing Authority.

14. In view of the above discussion, it can safely be said that it was not a case of due service of notices of default assessment of tax and interest on the dealer, by the Assessing Authority. Decision in Bajrang Fabrics v. Commissioner of VAT and Ors., relied on by learned OHA, in the impugned order is admittedly of the year 2016. In the course of arguments, it has not been disputed on behalf of the Revenue that instructions came to be issued by the

learned Commissioner, VAT regarding service of notices/orders/summons as contained in circular No. F.3(366)/Policy/VAT/2013/1235-1245 dated 17/1/2014. Present case pertains to the tax period 2010-11. At the relevant time, there was no provision/^{or modification} for service of notices upon the dealer simply by uploading the same on the portal of the department.

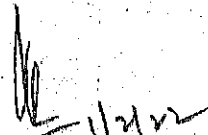
15. Learned OHA did not thoroughly deal with the deposition of the partner of the dealer as contained in his affidavit and rather rejected the same, simply by observing that same were not found to be reasonable. No reason finds mentioned in the impugned order to suggest as to why the deposition contained in the affidavit of the partner was found to be unreasonable.
16. Consequently, while accepting the ground put forth by the dealer that notices were not duly served upon it, it cannot be said that there was any delay in filing of the objections before learned OHA, after obtaining certified copy of the said notices on 28/9/2020.
17. In the given situation, the ground for delay in filing of the objection before learned OHA stood explained and the said sufficient cause deserved to be accepted.
18. Once it has been held that the delay in filing of the objections stood explained, the other objections of the dealer as available in DVAT -38 are required to be decided by the learned OHA, and

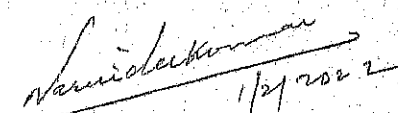
same cannot be deemed to have been allowed u/s 74(9) of the Act.

19. In view of the above discussion, the matter needs to be remanded to learned OHA for decision afresh on the remaining objections raised by the dealer on merits.
20. Consequently, the appeals are disposed of and while setting aside the impugned order passed by learned OHA, the matter is remanded to the learned OHA for decision on the remaining objections i.e. other than the ground of condonation of delay in filing of the objections, and pass ^{ing af} afresh order after providing opportunity of being heard to both the parties. Parties to appear before learned OHA on 2/3/2022.
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 : 01/02/2022


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)

Appeal No. 241, 242, 243, 244 / AT VAT / 21 / 1912 - 19

Dated: 07/02/22

Copy to:-

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|--|----------------|
| (1) VATO (Ward-73) | (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. | |


REGISTRAR