S.No - 171

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

Appeals No.87-92/ATVAT/2011
Date of Judgment: 07/02/2022

M/s Prestige Cable Industries
M-15, Phase1, Badli Industrial Area,
Badli Delhi-110042,

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. M.K. Gandhi
Counsel representing the Revenue : Sh. S.B. Jain

## JUDGMENT

1. By way of present set of appeals, the dealer registered with Department of Trade & Taxes, Ward 67, Delhi, has challenged order dated 24.03.2011 passed by Ld. Additional Commissioner (Special Zone) – learned OHA, whereby, the objections filed by the dealer against default assessment of tax, interest and penalty framed/levied u/s 32 of DVAT Act, by the Assessing Authority on 26.04.2010, came to be rejected. Ld. OHA observed that the orders passed by the Assessing Authority did not require any interference and that the tax, interest and penalty have been rightly imposed.

Narinder Kumar 7/2/2022

2. Notices of default assessment of tax and interest were issued by the Assessing Authority u/s 32 of DVAT Act and penalty was imposed u/s 33 read with section 86(12) of the Act, thereby raising following demands, for the following tax period:-

| Period | Tax (Rs.) | Interest (Rs.) | Penalty (Rs.) |
|---|---|---|---|
| 2007-08 (1st Qtr.) | 17,681/- | Rs.7,164/- | |
| 2007-08 (2nd Qtr.) | 38,678/- | Rs.14,242/- | |
| 2007-08 (3rd Qtr.) | 43,837/- | Rs.14,520/- | |
| 2007-08 (4th Qtr.) | 65,381/- | Rs.19,238/- | |
| 2007-08 (3rd Qtr.) | | | Rs.50,412/- |
| 2007-08 (4th Qtr.) | | | Rs.1,16,688/- |

3. Feeling dissatisfied with the rejection of the objections against the default assessment of tax, interest and levy of penalty, the dealer has filed present appeals.

4. Case of the Revenue is that Audit of the Dealer-Appellant was conducted by the Audit Branch as regards tax period 2007-08. During Audit, it was observed that during the financial year 2007-08, the Dealer-Appellant had purchased lubricating oil and it claimed an ITC on the basis of said purchases.

Assessing Authority, while framing Assessments observed that item (Lubricating oil) is neither a raw material for process nor the same was traded goods/resold in an unmodified form to qualify for claim of ITC, accordingly, ITC claimed by the dealer in the said year 2007-08 was disallowed. The Assessing

Authority further observed that the said amount was to be recovered with interest.

The dealer is also alleged to have claimed ITC on purchase of Telephone cable vide invoice dated 28.04.2007. The Assessing Authority disallowed ITC, while observing that the Telephone cable is not a commodity which the dealer can be said to have been dealing into. The dealer could not explain the disposal of the Telephone cable. Accordingly, the Assessing Authority disallowed said credit.

Assessing Authority also disallowed concessional rate of tax to the dealer on the Central Sales said to have been made against 'C' Forms, on the ground that the dealer could not produce GR's in proof of the central sales.

Further, the Assessing Authority disallowed credit to the Dealer-Appellant on purchase of packing material.

5. As is available from record, before Ld. OHA, the dealer objector presented objections against the default assessment of tax, interest and penalty on the following grounds:

a) The impugned notice of assessment of tax, interest & penalty issued by VATO (Audit)is bad in law and on facts of the case.

b) The impugned notices of assessment of tax, interest & penalty are liable to be annulled as the same has been passed without following the principle of natural justice, therefore, the same is bad in law and deserve to be annulled.

c) The charging interest and imposing penalty for any technical default/error under kind of bonafide belief is contrary to the principle of natural justice and judicial system.

d) VATO has grossly erred in charging interest and imposing penalty treating the demand as tax deficiency.

e) VATO (Audit) imposed penalty for the reason he failed to conduct true and correct enquiry to the fullest extent and charged tax, interest and consequentially imposed penalty.

f) VATO (Audit) failed to exercise his power conferred u/s 59 of the DVAT Act specially when all the information relating to the sales under the central act were available on record. Opting not to exercise power does not mean the objector to bear the cost of it in the shape of tax, interest and penalty.

6. While disposing of the objections, Ld. OHA took into consideration the following observations of the Audit team :–

"I. The dealer has claimed a huge input tax credit in his returns on the grounds purchased is local, however, he has not maintained the stock records/register for the year 2007-08 in respect of these purchased goods. He is only maintaining the stock register as per excise records for finished cable, as also given in his statement to the visiting audit

team. Non-maintenance of stock register/records is a violation of provision contained u/s Sec 48 of DVAT Act 2004 read with rule 42 of DVAT Rules 2005. Therefore, a penalty u/s 86(13) is imposed upon the dealer for this default.

II. During the year 2007-08, the dealer purchased lubricating oil amounting to Rs.4,57,235/- and claimed ITC of Rs.91,447/- on these purchases. The item lubricating oil is neither a raw material for processing or manufacturing of wires and cables nor has been a traded good/resold in an unmodified form to qualify for claim of ITC on these goods. Therefore, the ITC of Rs.91,447/- claimed by the dealer in 2007-08 is disallowed to the dealer and is to be recovered along with interest. Also a penalty u/s 86(12) is imposed upon the dealer for this default. The dealer has claimed an ITC of Rs.2,540/- on the purchase of telephone cable vide Inv. No. 008 dated 28-04-2007, a commodity that the dealer is not found to have been dealing into. The could not explain the disposal of the same, hence, the ITC of Rs.2,540/- claiming wrongly is disallowed to the dealer and is recovered along with tax and interest.

III. During the course of audit of the firm, the dealer could not produce the proof of movement of goods sold in the course of interstate sale against 'C' form with 3% CST amounting to a total of Rs.22,69,699/- in the year 2007-08. The details of such missing GRs are given in the annexure "A" enclosed. All the sales of Rs.22,69,699/- made in the year 2007-08 are treated as local and taxed accordingly @ 4% with due interest and penalty u/s 86(12) is imposed for the tax deficiency."

7. Ld. OHA also took into consideration the following observations made by the audit team:

"As per the audit report, the modus operandi of the firm is that the it purchased most of its traded goods locally in Delhi after paying VAT @4%, 12.5% & 20%; A few Central purchases were also made by the firm against C forms after paying applicable CST; in respect of sales, most of the sales of the firm were Central against C form after with due CST."

8. In the memorandum of appeal, the Dealer-Appellant has admitted that Audit of the affairs/business of the dealer was conducted by VATO in respect of the period from 01.04.2007 to 31.03.2008.

9. Case of the Dealer-Appellant is that it claimed all the credit as per DVAT Act except on capital goods but the VATO arbitrarily disallowed the credit of the lubricant without going into the depth of the case and presumed that the lubricant is not raw material. Case of the Dealer-Appellant is that lubricant is one of the basic raw materials of the product being manufactured by the dealer.

As regards the observations made by the Ld. OHA, on the point of assessment of the Central Sale as Local sale, case of the Dealer-Appellant is that it is in possession of all the relevant documents to prove the movement of the goods sold.

10. On this point, Ld. OHA has observed in the impugned order as under:

> "The dealer has argued that the lubricating oil is a raw material for the product being manufactured by the dealer. However, the dealer neither specifically disclosed the particular item in process of which the lubricating oil is required nor he was able to justify to this court about the manner in which lubricating oil is being used for preparation of that particular product. Unless the dealer proves that the lubricating oil is an essential raw material for the product manufactured by him, the lubricating oil cannot be considered for the purpose of ITC u/s 9(1) of the DVAT Act, 2004."

i. Ld. Counsel for the Dealer-Appellant has submitted that the lubricating oil is a raw material and used by the Dealer-Appellant for the product manufactured by the said dealer.

ii. In the course of arguments when we have inquired from Ld. Counsel for the dealer as to which is the particular item/product, to manufacture which the lubricating oil is required, but Ld. Counsel has not been able to point out any such product.

iii. As regards our next query as to the manner in which lubricating oil is used for preparation of any of its products, Ld. Counsel for the Dealer-Appellant as once again ~~has~~ not been able to point out any such product or the manner of use of lubricating oil.

iv. There is nothing on record to suggest that any material was placed before Ld. OHA to explain aforesaid two points/queries. Even before

this Appellate Tribunal, no material has been produced or proof to answer the said two points/queries.

v. As a result, we find that Ld. OHA has rightly held that the lubricating oil cannot be considered for the purposes of input tax credit, under the provision of section 9 (1) of DVAT Act.

vi. Ld. OHA also declined ITC to the Dealer-Appellant on purchase of Telephone cables while observing that same is not an item of its dealing".

**Assessments not Challenged by dealer during arguments in these appeals.**

11. It may be mentioned here that in the course of arguments, Ld. Counsel for the Dealer-Appellant has clearly submitted that appeal against rejection of ITC of purchase of Telephone cables is not pressed.

It is also significant to mention that the Assessing Authority also disallowed ITC to the Dealer-Appellant in respect of capital goods. Ld. OHA upheld the findings of the Assessing Authority in this regard. In the course of arguments in appeals, Ld. Counsel for the Dealer-Appellant has clearly submitted that he does not press the appeal against rejection of ITC on purchase of capital goods.

**Inter State Sales against C-Forms**

12. Assessing Authority, while framing assessments of tax and interest observed that as regards goods sold as inter-state sale

against C-form, Annexure-A revealed details of missing GRs (goods receipt) and that the dealer could not produce proof of movement of goods so sold.

On this point, Ld. OHA observed that the dealer had failed to prove movement of goods during assessment proceedings. From para.10 of the impugned order, it transpires that the dealer had produced photocopy of some GRs before Ld. OHA. However, Ld. OHA did not place any reliance on the said GRs, the reason being that said GRs were not available at the time of framing of default assessment and that there were chances of preparation of these GRs afterwards, by way of afterthought. In this regard, Ld. OHA referred to rule of burden of proof as available in section 6A of CST Act 1956, and went on to hold that dealer had failed to discharge the said burden of proof as regards movement of goods.

Ld. Counsel for the Revenue admits that copies of some GRs were produced before Ld. OHA and said copies of GRs are available from page 21-35 of the appeal file of first qtr. of 2007-08. Ld. Counsel for the revenue has candidly admitted that Ld. OHA could verify the genuineness of the GRs copies whereof were filed by the dealer – objector, but no such enquiry was conducted.

13. In the given situation, we find that without conducting any enquiry/investigation as regards genuineness of GRs, Ld. OHA

could not outrightly reject the same while observing that the same were an afterthought, particularly when the said documents pertained to the relevant tax period.

In the given situation, we deem it a fit case to set aside the aforesaid findings of Ld. OHA that these GRs were result of an afterthought, and hold that the matter needs to be enquired into by Ld. OHA for decision afresh on the point of movement of goods and on the point of grant/rejection of ITC to the Dealer-Appellant as regards the sales alleged to have been done by the dealer as interstate sale against C-forms.

**DVAT-50**

14. Learned counsel for the dealer – appellant has submitted that for conducting of an audit, Commissioner is required to authorize the officers by way of DVAT-50, but this is a case where no authorization letter was issued by the Commissioner, and as such the audit conducted by the audit team was without any jurisdiction. In support of his submission, learned counsel has referred to decision in **Teleworld Mobiles (P) Ltd. v. Commissioner of VAT, Delhi,** 2016 SCC Online Del. 4306 and **Yongnam Engineering & Construction (Pvt.) Ltd. v. Commissioner, Delhi Value Added Tax & Ors.,** WP(C) No. 6340/2013 decided on 15/12/2015, by our own Hon'ble High Court.

On the other hand, learned counsel for Revenue has submitted that the documents were requisitioned in the Department i.e. Department of Trade & Taxes, Delhi, after issuance of notice to the dealer – appellant. As regards, DVAT-50, learned counsel for Revenue has submitted that the said document is not traceable with the Department but it could not be said that the audit team was not duly authorized by the Commissioner or that the process of audit was beyond jurisdiction of the Audit team.

15. Learned counsel for the dealer – appellant has referred to copy of notice dated 30/4/2008 issued by VATO/AVATO, Ward 67 & 68, calling upon the dealer – appellant to attend the office of Department of VAT on 29/5/2008 at about 11.30 AM, in respect of tax period 2007-08, with the documents mentioned therein. As per this very notice dated 30/4/2008, survey of the firm was conducted by Enforcement Branch on 21/1/2008.

16. It is case of the dealer that it stands registered with Department of Trade & Taxes, Delhi, Ward -67. In the objections filed before learned OHA, the dealer did not raise any objection that the audit conducted by the team was without any jurisdiction.

Even if this is a legal point raised by the dealer only in the course of arguments, and not raised even as a grounds of appeal, in the memorandum of appeal, it may be mentioned here that

nothing has been brought to our notice to suggest that any demand was made by the dealer at the time of survey / audit by the team, for production of DVAT-50, or that the team had refused to produce the same, as provided u/s 68(2) of DVAT Act. There is nothing on record to suggest that soon after the survey/ audit, any representation was made by the dealer to the concerned VATO that the team had failed to produce, on demand, DVAT-50. Furthermore, soon after the survey / audit, no information was sought by the dealer from the Revenue as regards delegation of powers to the team u/s 68(2) of the Act in DVAT -50.

In the given facts and circumstances, the objection taken after so many years that DVAT-50 has not been produced, cannot be allowed to be raised at this stage. It cannot be said that this is a case where the survey/audit was conducted by the team without proper authorization in DVAT-50. The decisions cited by learned counsel for the dealers are distinguishable on facts and as such do not come to its aid.

17. Learned counsel for the dealer – appellant has referred to the following beginning sentence of the notices of default assessment to contend that in view of decision in **Samsung India Electronics Private Limited v. Govt. (NCT of Delhi), 2016 SCC OnLine Del 2231,** the impugned assessment deserves to be set aside.

There is no dispute regarding decision in Samsung's case (supra). However, in the present matters, while making default assessments in respect of tax and interest, the Assessing Authority furnished reasons for framing of the said assessment. Had the Assessing Authority not furnished reasons for the said assessment, then the dealer could take advantage of decision in Samsung's case (supra). Therefore, we do not find any merit in this contention raised on behalf of dealer – appellant.

**Penalty u/s 86(12) of DVAT Act.**

18. While assailing assessment of penalty u/s 86(12) of DVAT Act, in respect of tax period 3rd quarter of 2007-08, learned counsel for the dealer has submitted that since the Assessing Authority did not give any reason for levy of penalty, in view of decision in **Kranti Associates (P) Ltd. v. Masood Ahmed Khan & Ors.,** (2010) 9 Supreme Court Cases 496, the assessment of penalty deserves to be set aside, but learned OHA has upheld the said imposition. In support of this contention, learned counsel has referred to decision by this Appellate Tribunal in **M/s. Shri Atma Ram & Sons v. Commissioner of Trade & Taxes, Delhi,** Appeal No. 97/ATVAT/07-08, decided on 12/4/2010.

On perusal of the notice of assessment of penalty u/s 33 of DVAT Act, in respect of 3rd quarter of 2007-08, we find that the

Assessing Authority has not given any reason for levy of the penalty. Reasons were to be given by the Assessing Authority for levy of penalty. In absence of any reasons, this notice of assessment of penalty deserves to be set-aside. Same is accordingly set-aside.

**Penalty u/s 86(13) of DVAT Act**

19. While challenging the levy of penalty u/s 86(13), learned counsel for the dealer – appellant has submitted that when it was observed that the dealer was maintaining stock register as per excise records in respect of finished cables, and as such levy of penalty u/s 86(13) was uncalled for.

Penalty u/s 86(13) of DVAT Act has been levied for violation of the provisions of section 48 of DVAT Act read with Rule 42 of DVAT Rules 2005.

Under Rule 42 of Rules, following records are also required to be maintained by a dealer at his principal place of business:-

i. Stock records showing stock receipts and deliveries and manufacturing records.
ii. Stock records showing separately the particulars of goods stored in cold storage, warehouse, godown or any other place taken on hire.

While levying penalty, the Assessing Authority observed that the dealer claimed huge ITC on the goods purchase in local but it was found not maintaining records/ register for the year 2007-08 in respect of these purchased goods.

In the course of arguments, learned counsel for the dealer – appellant has not submitted that any stock record / register in respect of goods purchased in local was produced.

In view of the above discussion, we do not find any merit in the contention raised by learned counsel for the dealer as regards this penalty.

20. Learned counsel for the dealer has relied on decision in **Bansal Dye Chem Pvt. Ltd. v. Commissioner of Value Added Tax, Delhi**. 2015 SCC Online Del 12480, to submit that no prior notice was issued by the Assessing Authority before levy of the said penalty.

While dealing with this contention, Ld. OHA referred to decision by our own Hon'ble High Court in **Sales Tax Bar Association (Regd.) v. GNCTD,** WP(C) No. 4236/2012 and reproduced various observations made in the decision by the Hon'ble High Court, to hold that even though no hearing was to be provided to the objector – dealer before issuing the Notice of

Assessment of Penalty, even then the dealer had been provided sufficient opportunity by him (Ld. OHA) while hearing on the objections.

In view of the decision in **Sales Tax Bar Association case (supra)** decision in **Bansal Dye Chem Pvt. Ltd. case(supra)** does not come to the aid of the dealer.

**Result**

21. As a result of the above discussion, the appeal No. 91/11 (challenging levy of penalty in respect of 3rd quarter of 2007-08) is allowed and the penalty levied u/s 86(12) is hereby set-aside;

Appeal No. 87 (challenging assessment of tax & interest in respect of 1st quarter of 2007-08) is partly allowed in respect of rejection of the claim of the dealer as regards inter-State Sales against C-forms, and matter is remanded to learned OHA for decision afresh on this point only, taking into consideration GR's which were produced during objections; Learned OHA to provide reasonable opportunity of being heard to the parties before deciding on the aforesaid point; Parties to appear before learned OHA on 3/3/2022.

But as regards the rejection of ITC of Rs. 91,447/-, in respect of capital goods, telephone cables, the appeal is dismissed;

Other appeals No. 88; 89; 90 & 92 are also dismissed.

23. File be consigned to the record room. Copy of the order be sent 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 : 07/02/2022

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Appeal No. 87-92/ATVAT/2011/1952-59 Dated: 07/01/2022

Copy to:-

(1) VATO (Ward- )
(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)

**REGISTRAR**