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

Appeal No. : 806-808/ATVAT/12

Date of Judgment: 25/03/2022.

M/s. Cool Bird Aircon Pvt. Ltd.,
BP-29, Maurya Enclave,
Opp. MD Market, Pitampura,
Delhi.

.....Appellant

v.

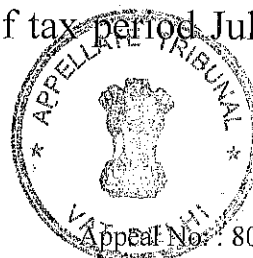
Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant : Sh. M. K. Gandhi
Counsel representing the Revenue : Sh. M. L. Garg

JUDGMENT

1. Dealer – appellant, registered with Department of Trade and Taxes vide TIN 07970213290, has come up in appeals by challenging order dated 06/07/12 passed by Special Commissioner / Objection Hearing Authority (hereinafter referred to as OHA), whereby its objection u/s. 74 of Delhi Value Added Act, 2004 (hereinafter referred as DVAT Act) of tax and two penalties, in respect of tax period July 2011 were dismissed.



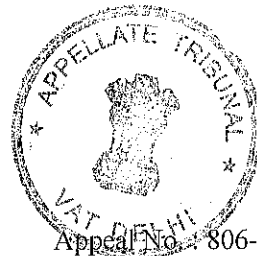
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2. The assessment of tax and interest was framed by the Assessing Authority – VATO on 20/03/2012, u/s. 32 of DVAT Act.
3. The Assessing Authority framed all the abovesaid assessments by observing in the manner as:

“This deliberate act of the dealer to avoid the furnishing of requisite information & documents apart from explanation / clarification with respect to variations in stock and cash along with that of seizure documents / material, left no option but to consider/ treat the same as unaccounted sale leading to suppression of sale and eventually to evasion of tax resulting in causing loss to the Government exchequer. Therefore, the variation in stock and cash for Rs. 47,37,033/- (short) and Rs. 8,05,466/- (short) respectively, along with valuation of seizure documents amounting to Rs. 52,50,000/- is taxed at 12.5%.”

4. For the same reasons, penalty came to be imposed under section 86 (10) of DVAT Act 2010. Separate penalty also came to be levied under Section 86 (14) read with Section 33 of DVAT Act.
5. Feeling aggrieved by the assessments, the dealer filed objections. Learned OHA dismissed the objections, due to the following reasons:

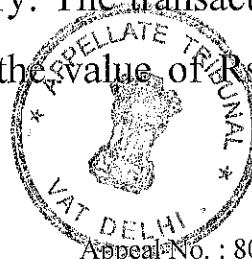


"I have gone through the contents of the submissions, and grounds of the objections filed by the objector, it is observed that with regard to the stock variation, inventory was prepared by the enforcement team in presence of the objector which was duly signed by him. In a day to day business affair, objector is well conversant about the rates and quantity mentioned. In spite of sufficient opportunity, objector has not offered satisfactory explanation to the assessing authority. After considering the complete facts VATO has assessed detailed, reasoned and speaking order which is upheld. The objections are disallowed."

6. Hence, these three appeals.
7. Arguments heard. File perused.
8. Dealer- appellant is engaged in trading of Air Conditioners and has distributorship of Voltas Air Conditioners.

On 29/06/2011, Enforcement –I branch of Department of Trade and Taxes conducted survey at the business premises of the appellant's proprietorship concern.

The survey led to detection of stock variation of Rs. 4737033/- (short), cash variation of Rs.8,05,466/- (short). In addition to these variations, Enforcement – I Branch also seized certain documents, comprising of one diary. The transaction recorded in the seized documents were of the value of Rs. 5252000/-.



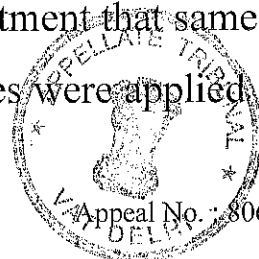
That is how, assessments, referred to above came to be framed and the same were upheld by Ld. OHA.

9. On behalf of the dealer, it was submitted during arguments that the department did not produce relevant record pertaining to survey even when directions were issued by this Appellate Authority for its production, and that on this ground, adverse inference be drawn against the Revenue.

It is true that during pendency of this appeal, at one stage, directions were sought from the Appellate Tribunal for production of record pertaining to survey, and same was not produced by the department.

However, dealer - appellant itself placed on record copies of survey report with annexures pertaining to the survey. In the course of arguments, counsel for the appellant has been referring to said record. Submission of learned counsel for applicant was that these copies are certified copies collected from the department.

10. On the other hand, learned counsel for the Revenue rightly pointed out this record presented by the dealer-appellant does not bear any stamp to the effect that same are certified copies or any endorsement from the department that same was ever so applied for. In case, certified copies were applied for, Counsel



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for the appellant could not put forth any submission to explain as to why this record is not in the form of certified copies. As a result, it cannot be said that the dealer ever applied for any certified copy of the record pertaining to survey or that that is how, the same was supplied by the department subsequently. Rather, the record pertaining to survey, submitted by the dealer during pendency of this appeal, may be copy of material provided by Enforcement I branch team to the Authorized Representative of the dealer ^{on} ~~at~~ the spot, subject to the condition that the dealer did not collect it by any other mode.

Fact remains that the dealer was having the record pertaining to survey with it.

11. Furthermore, as requested, we shall be referring to the said record pertaining to survey, submitted by the dealer, wherever necessary. Therefore, no adverse inference can be drawn against the Revenue due to non production of record by department.

Authority to conduct survey

12. Ld. Counsel for the appellant submitted that this is a case where it cannot be said as to who had authorized Enforcement – I Branch for conducting the survey, and that on this ground, the survey conducted by the said team is illegal. In this regard,



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Ld. Counsel for the appellant has referred to reply dated 07/08/2015 received from PIO(EI)/Assistant Commissioner (E-I), in response to the information sought by the dealer under the Right to Information Act.

As regards delegation of powers to Enforcement- I branch team, dealer was supplied information under RTI Act, in reply to its query.

The query was raised by the dealer under Right to Information Act, for the first time on 27/08/2015 i.e. after the disposal of the objections by Learned OHA, and surprisingly, never prior thereto.

13. It was informed by the PIO "survey is assigned with the approval of the competent authority. Photocopy of the deployment register was stated to have been enclosed to the said response. But there being no enclosure, the dealer filed appeal before the First Appellate Authority, under RTI Act, and accordingly the department was directed to furnish copy of deployment order.

Undisputedly, the deployment order came to be supplied to the dealer. It may be mentioned here that the dealer has not submitted copy of said deployment order.



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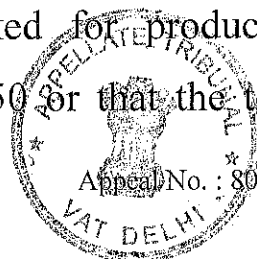
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There is no reason for non furnishing of said deployment order. As a result, adverse inference has to be drawn against the dealer that if the said deployment order was placed, it would not have supported the case of the dealer on the point of approval by the competent authority to Enforcement-I branch to conduct survey at the business premises of the dealer- assessee.

Section 68 (2) of DVAT Act provides that where the Commissioner delegates his powers under Chapter X, the delegatee shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers.

Admittedly, Authorized Representative of the dealer was present at the site at the time survey was conducted. Here, it is not case of the dealer that at the time survey was conducted at the business premises, its Authorized Representative asked for production of DVAT 50 and that the team from Enforcement-I did not produce the same.

Furthermore, no material has been brought to our notice to suggest that ^{or} at the spot or soon after survey, the dealer lodged any protest that survey was conducted even after authorised representative of the dealer asked for production of the authority in the form of DVAT 50 or that the team did not



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produce the same or any member of the team represented that it was not carrying any such authority.

As a result, we find that dealer- appellant has failed to establish that Enforcement – I branch visited the business premises of the dealer – assessee and conducted survey, without delegation of any powers.

Is it a case of empowering the team, without recording reasonable grounds, to enter the business premises,?

14. Ld. Counsel for the dealer- appellant contended that as per Section 60 (2) of DVAT Act, power to entering/ searching any business premises, the commissioner has to record reasonable grounds to believe that any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner and for the purposes of administration of this Act, it is necessary so to do the acts as prescribed in clause (f) of sub section 2 of Section 60.

The contention is that, in this case, revenue has failed to prove that there was any such reasonable ground, and as such the survey conducted by Enforcement – I Branch is illegal.

In support of his contention, Ld. Counsel for the appellant has referred to decisions in **Larsen and Toubro Ltd. v. Govt. (NCT of Delhi)** 2016 SCC Online Del 664 (2016) 89 VS 35



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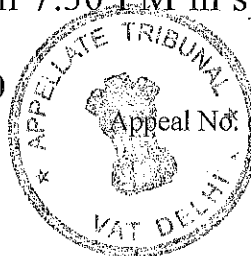
and **Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner, Trade & Taxes, Delhi & Ors** W.P.(C) 714/2016.

In **Larsen and Toubro Ltd.** case's (supra), there was nothing in the file to suggest as to what reasons weighed with the Commissioner to order a survey u/s 59 of the Act and subsequently order sealing of the property u/s 60 of the Act.

In that case as on 15/03/2013, that is the date of inspection, the petitioner was not functioning at H-45, Udyog Vihar and rather it was functioning D-4, Udyog Vihar.

In **Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner, Trade & Taxes, Delhi & Ors** case's (supra), Hon'ble High Court observed that Section 60 mandates that the Commissioner must have reasonable grounds to believe that "any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner"; that this satisfaction of the Commissioner has to be based on materials that are available on record.

Therein, the power was found to have been mechanically exercise^d using a cyclostyled form. The notice set out only one ground, in a pre-printed form, that the dealer "failed to produce the books of accounts till 7:30 PM in spite of issue of



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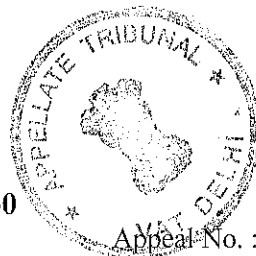
notice under Section 59 of the DVAT Act 2004". Hon'ble Court observed that all this did not satisfy the statutory requirement u/s 60(2)(f) of the Act.

15. On the other hand, learned counsel for Revenue submitted that survey was conducted after due permission and authorization granted in accordance with law.
16. In this regard, it is significant to note that the dealer never sought any such information from the department about deployment order, in form DVAT 50, soon after the survey or during assessment or during hearing on objections in this regard. Had it been so urgently sought for, the department would have supplied the same. In such a situation, Learned OHA would have also called for the record from the department and satisfied itself.

Raising of this ground for the first time in appeal does not rebut the presumption attached to the proper discharge of functions by the authorities in discharge of their official duties. Therefore, we do not find any merit in the contention raised by the learned counsel for the appellant the search and survey conducted by Enforcement-1 team was illegal.

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Non-compliance with provisions of Section 60(6) of DVAT Act

17. Learned counsel for the appellant referred to provisions of section 60(6) of DVAT Act and submitted that every search/seizure made u/s 60 of DVAT Act, is to be carried out while complying with the provisions of Code of Criminal Procedure relating to search/seizure.

The argument is that in this case Enforcement-1 branch team, while conducting survey, did not comply with the said provisions, in having not prepared any such memo, and in having not joined any independent witness. So, it was contended that the survey was not conducted validly. In support of his submission, learned counsel referred to decision in **Capri Bathaid Private Limited v. Commissioner of Trade & Taxes**, 2016 SCC OnLine Del 1332 and **Pradeep Narayan Madgaonkar and Others v. State of Maharashtra**, (1995) 4 Supreme Court Cases 255.

On the other hand, learned counsel for the Revenue rightly contended that the provisions contained in sub-section (6) of Section 60 of DVAT Act are directory in nature.

As rightly submitted by learned counsel for the Revenue, the survey was conducted in presence of the authorised representative of the dealer and the said representative signed



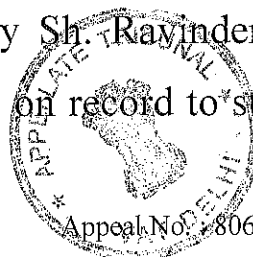
the papers prepared, and seized at the spot. As further submitted by learned counsel, even copy of the seizure/inventory was supplied to the authorised representative.

As noticed above, dealer has placed on record copies of survey report and annexures, supplied to him by the Enforcement- I team at the spot. Dealer has not brought on record any material to suggest that no such survey was conducted at the business premises of the dealer or that everything was done while sitting in the department. At the time of survey, no protest, in this regard, appears to have been lodged by the authorized representative of the dealer as regards any of the proceedings conducted by the Enforcement-I branch team.

As a result, it cannot be said that the survey was not conducted in accordance with law. In the given facts and circumstances, decisions in Capri Bathaid's case (supra) and in M/s Pradeep Narayan Madgonkar's case (supra), do not come to the aid of the dealer.

Authorization to make assessment

18. Learned counsel for the dealer-appellant submitted that the impugned assessment was made by Sh. Ravinder Pal Singh Bhatia, VATO, but there is nothing on record to suggest as to



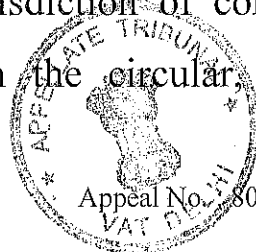
by whom the said VATO was authorized to frame assessment in respect of the dealer-assessee. The contention is that in absence of proof of such authorization, the assessment framed by the Assessing Authority is illegal.

Learned counsel for the appellant referred to the assessment order where the Assessing Authority observed that the sale under Central Sales Tax Act (CST) made during the concerned tax period against C-forms etc. shall be looked into by the VATO/AVATO concerned of ward 64, during reconciliation / assessment of Central Sales.

In support of this contention, reliance was placed on decision in **Bathla Teletech Pvt. Ltd. v. Commissioner of Trade & Taxes**, 2017 SCC OnLine Del 9813.

In **Bathla Teletech Pvt. Ltd.** case's (supra), the question that arose in the Writ Petition was as to whether notices of default assessment of tax and interest u/s 32 of DVAT Act were issued by the concerned VATO exercising jurisdiction on the petitioner.

Hon'ble Court observed that such notice can only be issued by the VATO who exercises jurisdiction on a party on the concerned date. In that case, jurisdiction of concerned two wards was clearly mentioned in the circular, to be with



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VATO-69, it was held that AVATO Ward 72 lacked jurisdiction.

19. In this regard, it is significant to note that the dealer has not brought on record any material to suggest that Sh. Ravinder Pal Singh Bhatia, VATO, framed assessment without any authorization. Onus to prove this fact was on the dealer, in view of provisions of Sections 78 of DVAT Act, which provides that the burden of proving any matter in issue in proceedings under section 74 of this Act, or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act shall lie on the person alleged to be liable to pay the amount.

Record does not reveal that after having appeared before the VATO-Assessing Authority, at any point of time, the authorized representative of the dealer ever questioned the authority of the said Assessing Authority to frame assessment.

Record reveals that in the assessment order, learned Assessing Authority specifically recorded the conduct of the authorized representative of the dealer regarding appearance/non-appearance in the proceedings, after service of notice u/s 59(2) of DVAT Act.

As noticed above, after service of the said notice u/s 59(2) of



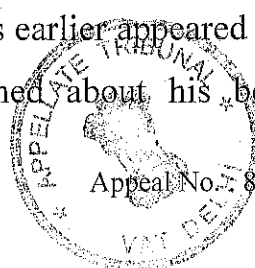
DVAT Act, the AR of the dealer failed to appear on 09/02/2012. Reminder was sent on 14/02/2012 calling upon the dealer to furnish requisite information on 23/02/2012. Sh. Manish Kumar Bansal appeared before learned Assessing Authority for the first time on 23/02/2011 and submitted certain documents. He was asked to furnish rest of the documents for the period 2010-11 and 2011-12 (upto June 2011), while the proceedings were adjourned to 01/03/2012.

To be specific, as regards the conduct of the AR of the dealer, learned Assessing Authority observed in the assessment order as under:

“The dealer or any of his representative not only failed to appear on the date of hearing i.e. 01st March, 2012 but also failed to appear thereafter till the date of passing of order.

This is despite the fact that not only Shri Manoj Kumar Bansal, the Authorised representative but the Proprietor of the firm Shri. Vinay Jain, both were contacted as their contact numbers were available on the file record. Subsequently a few days later the proprietor was again contacted on his mobile no.(9811220115). On both the occasion^s, he informed that his Chartered Accountant Shri. Manoj Kumar Bansal, the authorised representative would be asked to appear and file the requisite documents.

However, the representative has earlier appeared as employee of the firm and on being informed about his being Chartered



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Accountant, his credentials were checked and it was found that he was not Chartered Accountant either. This aspect also violates the provisions of DVAT Act i.e. Section 82 of DVAT Act 2004.”

In view of the above conduct of the dealer/its authorized representative in the proceedings before the Assessing Authority and non-raising of any objection to the jurisdiction of the VATO to frame assessment, also non-raising of any such objection before learned OHA, and for want of production of any record on the point of jurisdiction of the Assessing Authority by the dealer-appellant, we do not find any merit in the contention raised by the learned counsel for the appellant that the assessment deserves to be set aside on the ground of jurisdiction.

It is true that the Assessing Authority recorded in the assessment that the sale under Central Sales Tax Act (CST) made during the concerned tax period against C-forms etc, shall be looked into by the VATO/AVATO concerned of ward 64, during reconciliation / assessment of Central Sales. But, from this fact recorded in the default assessment alone, it cannot be said that Sh. Ravinder Pal Singh Bhatia framed assessment under DVAT Act, on the basis of survey, without any authority.



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Non recording of reasons before issuance of notice u/s 59(2) of DVAT Act

20. Learned counsel referred to decision in **Sainath Trade Home Pvt. Ltd. v. Commissioner of VAT & Anr.**, WP(C) 413/2017, decided by our own Hon'ble High Court on 26/4/2017, wherein, the Hon'ble Court was of the view that the VATO is firstly to record reasons in the file i.e. even before issuing the notice u/s 59(2) of DVAT Act.

The contention is that here the Assessing Authority failed to record any such reason and this failure reflects lack of knowledge of basic requirement of law prior to the exercise of Statutory Powers, and as such the impugned assessment deserves to be set-aside.

As noticed above, notice under section 59(2) of DVAT Act came to be issued after the survey and on the basis of facts which the survey had disclosed. Conducting of survey by Enforcement-I branch team at the business premises of the dealer is not in dispute. Therefore, it cannot be said that notice under section 59(2) of DVAT Act was issued to the dealer without recording any reasons.

Following were the objections raised/submissions made on behalf of the dealer before learned O.A.



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“1. Ld. VATO did not give proper opportunity of being heard while the assessment proceeding was attended on 23rd February'12 and the case was adjourned for 01st March'12. Due to the surgery of the mother of Shri Manoj Kumar, A.R., case was not attended on 01st March'12 but, thereafter, without giving further adjournment, assessment was framed.

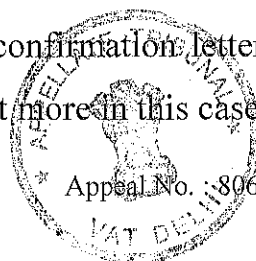
2. The objector is having proper stock registers of quantity wise as well as value wise and also having proper cash book.

3. The difference of Rs.47,37,033 in stock and cash of Rs.8,05,466/- are subject matter of reconciliations, valuations of stock, cash received/expenses and the source of information received.

4. The seizure document amounting to Rs.52,50,000/- are subject matter of reconciliation, valuations of stock and the source of information received.”

Learned OHA further observed in the assessment order as under:

“Shri Manoj Bansal, A.R. present before the undersigned and submitted that the penalty is wrongly imposed and seizure amount Rs. 52,50,000/- is doubling because they have already paid tax. He has also argued that variation in stock is due to not receiving of credit as the same was to be received later on. He further submitted that shortage in cash was due to the cash was in the house of proprietor. No any confirmation letter filed in this regard. He does not want to submit more in this case.”



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So, record does not reveal that after having appeared before the VATO-Assessing Authority, at any point of time, the authorized representative of the dealer ever questioned as to why notice under section 59(2) was issued to the dealer.

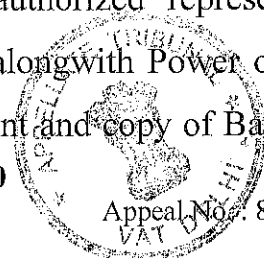
However, record reveals that the dealer did not raise any such objections before learned OHA. In view of the fact that the survey was conducted and it was thereafter that notice u/s 59(2) was issued to the dealer, on the basis of variations detected, and observations made during the survey, this is not a case where dealer can take any advantage of the submission that notice u/s 59(2) was issued without recording any reasons.

Ambiguity as regards dates of proceedings.

21. While referring to the proceedings for framing of assessments, in the assessment order, the Assessing Authority observed as under :

“The dealer was (issued) *sic* notice u/s 59(2) of DVAT Act 2004 on 31/1/2011 for filling the requisite information on 9/2/2011 but the Proprietor or any representative of his failed to appear on the said date. Again a subsequent reminder was sent on 14/2/2011 for filing the requisite information on 23/2/2011.

Shri. Manoj Kumar Bansal authorized representative of the dealer appeared on 23/2/2011 alongwith Power of Attorney and filed DVAT-16, Trading Account and copy of Bank statement of



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SBI (OD A/C) for the period 2010-11 & 2011-12 (upto June 2011) and Audited Balance sheet for the FY 2010-2011.

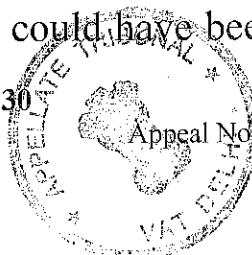
Dealer was asked to furnish the rest of the requisite documents for the period 2010-11 & 2011-12 (upto June 2011) viz.

- i) Sale & purchase summary.
- ii) DVAT-30 and 31.
- iii) Copies of GR's alongwith corresponding invoices of Central Sale against Forms-C.
- iv) Detail of Bank A/cs alongwith statement and summary of deposits & withdrawals for 2010-11 & 2011-12 (upto June 2011).

And the case was adjourned for 01/3/2012."

The contention raised by learned counsel for the appellant is that survey was conducted on 29/6/2011 and as such it remains unexplained as to how the above proceedings are stated to have taken place on the dates given in the para reproduced above, which creates doubt regarding the manner in which the proceedings were conducted by the Assessing Authority, particularly when there is no order sheet regarding the proceedings for the said dates.

As noticed above, survey was admittedly conducted on 29.6.2011. Therefore, no notice could have been issued by the



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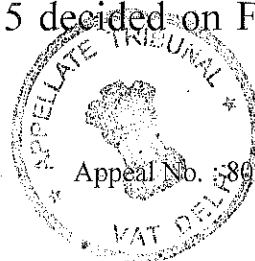
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Assessing Authority to the dealer prior thereto. Had any notice been issued for 31.1.2011, dealer could easily produce the same before Learned OHA or before this Tribunal. It has not filed any such notice depicting the date of appearance as 31.1.2011.

Even otherwise, from the last sentence of the portion of the default-assessment-notice, it appears that the proceedings were adjourned to 1.3.2012. It appears to be a case of typographical mistakes which crept in the notice of default assessment, to rectify which the Assessing Authority appears to have not taken care of, before appending his signatures to the default-assessment-notice.

Was the Authorized representative not apprised of allegations levelled against the dealer?

22. Learned counsel for the dealer – appellant submitted that the Assessing Authority did not apprise the authorized representative of the appellant of the allegations levied against the dealer, and as such not provided opportunity to explain the allegations, and that even on this ground the assessments deserve to be set-aside. In this regard, learned counsel referred to decision in **Brilliant Metals Pvt. Ltd. v. Commissioner of Trade & Taxes**, WP(C) 6656/2015 decided on Feb. 3, 2016, by our own Hon'ble High Court.



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On the other hand, it has been rightly contended that when notice was issued to the dealer under section 59(2) of DVAT Act, after conducting of survey, and on the basis of survey report and facts available in the annexures, and opportunity was granted by the Assessing Authority to explain the things by producing relevant records, it cannot be said that the Assessing Authority did not explain to the dealer the allegations levelled against the said dealer. From the default-assessment-notice it appears that matter was adjourned from time to time. It goes to show that reasonable opportunity of being heard was provided by the Assessing Authority to the dealer before framing of assessments.

Is the Impugned order not a well reasoned order?

23. Learned counsel for the applicant referred to the impugned order passed by learned OHA and submitted that while disposing of the objections raised by the dealer – objector, learned OHA did not deem it appropriate to give reasons for dismissal of the objections, and as such the impugned order deserves to be set-aside. In support of this contention learned counsel referred to decision in **Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan and Others**, (2010) 9 Supreme Court Cases 496, and decision dated 7/2/2022 by this Appellate Tribunal in Appeal No. 87-92/2011, M/s. Prestige Cable

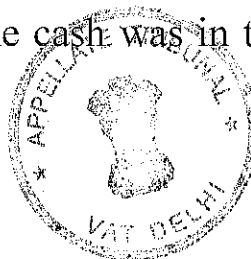


Industries.

24. Learned OHA dismissed the objections, due to the following reasons:

"I have gone through the contents of the submissions, and grounds of the objections filed by the objector, it is observed that with regard to the stock variation, inventory was prepared by the enforcement team in presence of the objector which was duly signed by him. In a day to day business affair, objector is well conversant about the rates and quantity mentioned. In spite of sufficient opportunity, objector has not offered satisfactory explanation to the assessing authority. After considering the complete facts VATO has assessed detailed, reasoned and speaking order which is upheld. The objections are disallowed."

The proceedings conducted by Learned OHA while hearing on objections would reveal that that Sh. Manoj Bansal, AR of the dealer appeared before the learned OHA and put forth his submissions. IN this regard, learned OHA observed that the AR submitted "that the penalty was wrongly imposed and seizure amount Rs. 52,50,000/- was doubling because they had already paid tax; that variation in stock was due to not receiving of credit as the same was to be received later on; and that shortage in cash was due to the cash was in the house of proprietor.



Learned OHA observed that no confirmation letter was filed on behalf of the dealer in support of the submission put forth before him. The AR did not want to submit anything more before the learned OHA, as stands recorded in the impugned order. Other reasons recorded by the learned OHA for disallowing the objections have already been recorded above.

Stock Variation.

25. As regards stock variation, the contention of learned counsel for the appellant was that the dealer had submitted before the learned Assessing Authority reconciliation statement depicting return of certain goods purchased, but no reliance was placed by the Assessing Authority on these documents, and as such the assessment framed deserves to be set-aside.

A perusal of the copy of reconciliation statement would reveal that same is dated 26/06/2011. There is no mention in the assessment framed by learned Assessing Authority that any such plea was taken by the dealer.

A perusal of impugned order would reveal that only four objections were raised by the dealer. As per objection no. 3 difference in stock and cash was subject matter of reconciliation, valuation of stock, cash received/expenses and the source of information received.



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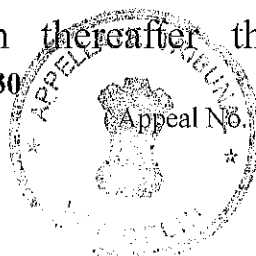
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There is nothing in the impugned order to suggest that any such document in the form of reconciliation statement, accompanied by delivery note/purchase return dated 26/06/2011 was submitted by the dealer before learned OHA. Had it been produced, dealer would have submitted proof regarding its submission there. No such receipt or document regarding submission of this delivery note before learned OHA has been filed. In absence thereof, it cannot be said that learned OHA failed to consider the point of purchase return.

As noticed above, Learned Assessing Authority observed in the notice of default assessment that many documents were not furnished in respect of tax period 2010-2011, 2011-12 (upto June 2011). Those were specified in the assessment framed.

The dealer failed to appear before Learned Assessing Authority on 01-03-2012. Before Learned OHA, the dealer raised objection that the A. R. could not attend the proceeding on 01-03-2012, before learned Assessing Authority due of surgery of mother of A. R. Sh. Manoj Kumar. There is nothing in the impugned order to suggest if the dealer filed any medical certificate in this regard.

The Assessing Authority tried his best to again contact the dealer, on mobile phone, and the reply was that his A. R. shall be appearing. However, even thereafter there was non



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appearance on behalf of the dealer, what to say of production of four type of documents initially sought by the Assessing Authority and ultimately for 01/03/2012.

There is nothing in the impugned order passed by Learned OHA, that during objection proceeding, the dealer produced any document which it had earlier failed to produce before Learned Assessing Authority.

In the given facts and circumstances, we do not find any ground to set aside the findings recorded by the Assessing Authority and Learned OHA, on the point of stock variation.

Cash Variation.

26. As regards this variation, observed in the survey report, contention of learned counsel for the appellant is that justification was put forth by the authorized representative before the survey team that cash had been taken away by the representative to his house, but the Enforcement Team, did not believe the said explanation. Learned counsel referred to decision in **Sholamal Zalim Sing v. Commissioner of Sales Tax, UP**, (1975) 36 STC 94 (All), so as to contend that even if the accounts book did not show that the assessee had taken any amount to his house, this fact was irrelevant.

The dealer is a proprietorship concern. In case any



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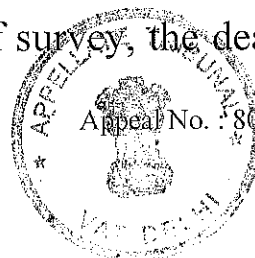
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amount/cash is taken away by any dealer to his house, entry is required to be made in the account books. This is not a case where any entry is taken to have been made by the dealer in the account books. The dealer did not make any statement before Enforcement-1 team that the cash varied because he had taken away some cash to his house. In his statement made before the enforcement team, the dealer stated to have voluntarily counted the physical cash and declared it as Rs. 1,24,860/-. He did not state therein to have taken away any amount to his house. From the impugned order it does not transpire if the dealer put forth any such plea or objection on the point of cash variation. As noticed above, the dealer had failed to produce four type of documents before the Assessing Authority. No document pertaining to cash variation appears to have been presented before Learned OHA.

As a result, we do not find any ground to set aside the assessment as regards cash variation, framed by the Assessing Authority and upheld by the Learned OHA.

Valuation on the basis of seized documents

27. The Assessing Authority valued the seized documents at Rs. 52,50,000/-. These documents were in the form of a diary. In the survey report ^{seizure} ~~seizer~~ of diary stands recorded in column no. 11. In his statement, at the time of survey, the dealer stated to



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have voluntarily surrendered the said diary before the visiting team.

It may be mentioned here that as regards this diary, Assessing Authority was required to deal with each transaction before assessing their value. From the Impugned assessment, it cannot be said that the Assessing Authority took any such step. Even Learned OHA did not take any such step before upholding the assessment as regards the valuation of the seized documents. In this situation, we deem it a fit case to remand the matter to Learned Assessing Authority-Concerned VATO to make fresh assessment as regards the seized documents, in accordance with law, after providing reasonable opportunity to the dealer, of being heard.

Result

28. As a result of the above findings, on the point of levy of tax, the impugned assessment as regards the seized documents i.e. in the form of a diary, is set aside and while disposing of the appeal, we issue direction to the Learned Assessing Authority to make fresh assessment as regards the seized documents, in accordance with law, after providing reasonable opportunity to the dealer, of being heard.
29. As regards the stock variation and cash variation, as noticed



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above, in view of the above findings, while disposing of the appeal No. 806/2012, the default assessment of tax in respect thereof, is upheld.

Penalties

30. As regards the imposition of penalty, as per impugned order, one penalty was imposed u/s 33 of DVAT Act, and the other u/s 86(14) of DVAT Act.

As already discussed above, the dealer failed to produce before Learned Assessing Authority, four types of documents specified in the notice u/s 33 of DVAT Act, despite issuance of notice u/s 59(2) of DVAT Act. The Assessing Authority gave reasons for imposition of this penalty. The dealer did not provide any such record even before learned OHA. Therefore, we do not find any ground to set-aside the said penalty u/s 86(14) read with section 33 of DVAT Act.

As regards, penalty u/s 86(10) of DVAT Act, so far as impugned order passed by Learned OHA is concerned, Learned counsel for the dealer-appellant rightly submitted that Learned OHA has not given any findings so as to uphold the said penalty. Therefore, the impugned order regarding imposition of penalty u/s 86(10) of DVAT Act is set aside.

When the matter has been remanded for fresh assessment as



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regards valuation of the seized documents, fresh assessment as regards the said penalty^{if any} is required to be made after providing reasonable opportunity of being heard to the dealer. Accordingly, the point of levy of penalty u/s 86(10) of DVAT Act, as regards tax deficiency, if any ultimately found, is left open to be decided by the Assessing Authority afresh. However, learned Assessing Authority shall keep in mind, while passing the fresh order, that assessment regarding the stock variation and cash variation has been upheld by this Tribunal as noticed above.

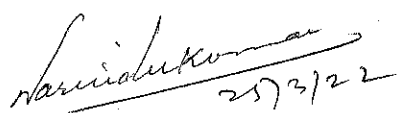
Appeals Nos. 807 & 808/12 are also disposed of accordingly,

32. Dealer to appear before learned ^{Assessing Authority} ~~OA~~ on 12/04/2022.
33. 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 : 25/03/2022


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)



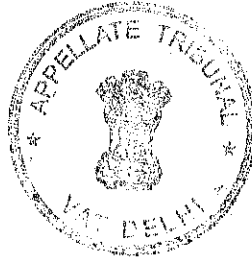
Appeal No. : 806-808/ATVAT/18

Appeal No. 806-808/ATVAT/12/3144-51

Dated: 30/3/22

Copy to:-

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|--|----------------|
| (1) VATO (Ward-14) | (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