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BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar: Member (Judicial) & Sh. Rakesh Bali; Member (Administration)

Appeal No. 387-388/ATVAT/2008

Date of Judgment:13/4/2022

M/s. Relaxo Footwears Ltd.,
316-319, 3rd Floor, Allied House,
Inderlok, Delhi – 110035. .....Appellant

V

Commissioner of Trade & taxes, Delhi ..... Respondent

Counsel representing the Appellant : Sh. S. K. Verma.
Counsel representing the Respondent : Sh. N. K. Gulati.

JUDGMENT

1. Present appeals came to be filed by the dealer against order dated 18.7.2008 passed by Learned Joint Commissioner (I) as the objections filed against notice of default assessment of tax & interest issued u/s 32 of Delhi Value Added Tax Act (hereinafter referred as DVAT Act) and another notice of Assessment of Penalty issued u/s 33 of DVAT Act, framed by the Assessing Authority, were disallowed.

Dealer-Objector-Appellant stands registered with Department of Trade & Tax vide TIN No.-07350145052. It deals in plastic and leather footwears.

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The matter pertains to tax period March 2005-2006.

While making assessments of tax & interest, Assessing Authority-VATO observed in the manner as :-

> "On 14.3.2006 plastic foot wears having MRP less than Rs. 300/- per pair embossed indelibly on footwear itself were exempted from DVAT.
>
> On 15.3.2006 dealer was having stock of Rs.2229746/- purchased locally with ITC @4% and 12.5% but did not reverse the ITC on such stock. Dealer should have reversed the ITC on such stock which was to be sold tax free from 15.3.2006 onwards, hence, ITC worth Rs. 192436/- on such stock purchase locally is reversed. Penalty order shall be issued separately. The dealer is hereby directed to pay tax of an amount of Rupees 238146/- (Two lacs thirty eight thousand one hundred forty six only) and furnish details of such payment in Form DVAT-27 A alongwith with proof of payment to the undersigned on or before 23.12.2007 for the following tax period :

Tax Period	Amount (Rs)		
	Tax	Interest	Total
March- 2005-2006	192436	45710	238146

2. Penalty u/s 86 of DVAT Act came to be imposed due to the reason that the dealer had claimed excess ITC of Rs. 192436/-, for the tax period March, 2005-2006.

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As per impugned order passed by learned OHA, in connection with the objections u/s 74 of DVAT Act, AR of the dealer – appellant submitted before him as under : -

> ".....The dealer purchased footwear from six manufacturing concerns against tax invoices; However, by notification No. F. 3(77)/Finance(T&E)2005-2006/1434-43 kha dated 14.5.2006 the Govt. of NCT of Delhi declared rubber/plastic/rexine foot wears having MRP less than Rs. 300/- per pair provided that MRP is indelibly marked or embossed on the footwear itself, as tax free; Accordingly, as per provisions of sub section 4 & 7 of section 9 of DVAT Act, the tax, credit (input) was reversed by the manufacturers of the amount as shown in column 4".
>
> AR of the dealer further claimed there that the dealer has purchased goods and the goods are to be used partly for the purpose of making sales for taxable goods and partly for tax free goods, the amount of the tax credit shall be reduced proportionately.
>
> Further it was submitted by the AR that disallowance of the input tax is applicable in case of manufacturing unit, but the dealer is a trader not a manufacturer; that the dealer purchased finished goods and resold the goods as it is; that the dealer purchased the goods against purchase tax; that as a trader, the input of the goods are allowable....."

On the other hand, the DR had argued before learned OHA that on 15.3.2006, dealer was having stock of Rs. 22,29,746/- purchased locally with ITC @ 4% and 12.5% but did not reverse the ITC on said stock. Dealer should have reversed the ITC on

said stock which was to be sold tax free from 15.3.2006 as per the notification of the Delhi Government. Hence, ITC on such stock was reversed and penalty order was issued separately".

3. Learned OHA disposed of the objections by observing in the manner as :

> "I have heard the arguments put forth by the objector as well as of the Departmental Representative and have gone through the comments of the ward VATO as well as the Audit Report of the VAT Audit Deptt. I am of the considered opinion that the objector has purchased the goods after paying DVAT from their sister concerns and the stock was sold tax free. In view of the above, VATO Audit has rightly created a demand and penalty imposed. Accordingly, objection is disallowed."

4. Feeling dissatisfied, the dealer has come up in appeal.

5. Arguments heard. File perused.

Levy of Tax :

6. One of the submissions put-forth by the Ld. Counsel is that copy of the Audit Report should have been supplied to the dealer - assessee, but this is a case were no such copy was supplied.

In this regard, suffice it to state that the dealer itself has made copy of audit report as part of the appeal. Had no copy of audit report been supplied to the dealer, it could not produce any such copy. Dealer has not filed copy of the objections u/s

74 of DVAT Act suggesting that one of the objections was non supply of copy of audit report. As a result, we do not find any merit in this contention of learned counsel for the dealer – appellant.

7. While referring to the Audit Report Ld. Counsel for the dealer-assessee has submitted that the same does not reveal as to who had authorised the Audit Team to conduct Audit, as regards the business of the dealer.

In the first paragraph of the audit report there is a mention of Steering Committee by which the case of the dealer was selected for the purpose of audit. No such objection appears to have been raised before learned OHA, as is available from the impugned order. No request appears to have been made by the dealer to the department seeking information in this regard. There is nothing to suggest that any protest was lodged by the dealer with the audit team in this regard. No protest appears to have been lodged by the dealer on this point soon after the audit.

In this situation, at the stage, in absence of any material placed on record by the dealer, this contention does not come to the aid of the dealer.

8. Learned counsel for the appellant contended that this is case where the Assessing Authority simply picked up observations made in the audit report and pasted the same

in the notice of assessment, which is a procedure ~~to the~~ contrary to the principles of natural justice. In this regard, learned counsel has referred to decision in **Mahadayal Premchandra v. Commercial Tax Officer, Calcutta and another**, (1958) 9 STC 428 (SC).

In **Mahadayal Premchandra's** case (supra), cited by learned counsel for the appellant, Hon'ble Apex Court observed that the whole procedure adopted by the first respondent therein - Commercial Tax Officer, was contrary to the principles of natural justice. It was also observed that the said respondent – officer did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S).

In **Orient Paper Mills Ltd. v. Union of India,** AIR 1969 SC 48, Hon'ble Apex Court was of the view that therein Learned Assessing Authority accepted the request of the Audit Officer; that the re-assessment by the Assessing Officer as quasi-judicial authority should be independent but not solely based on the report of the Audit Officer.

Here, a perusal of the notice of default assessment of tax and interest would reveal that the Assessing Authority mentioned reasons for levy of tax. Simply because the Assessing Authority referred to the observations made in the audit report,

it cannot be said that the Assessing Authority did not apply mind or that he followed any instructions for levy of tax.

9. Another submission put forth by learned counsel for the dealer – appellant is that in the notice of default assessment of tax, the concerned officer did not strike off the inapplicable portion from the following first sentence.

> "Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reason:"

Learned counsel for the dealer-appellant referred to decision in **Samsung India Electronics Private Ltd. v. Government of NCT Delhi**, W.P. (C) 2685/2014 decided by our own Hon'ble High Court on 07-04-2016, wherein it was observed that where in terms of Section 32(1) (b),(c) or (d) of the DVAT Act, the dealer has furnished incomplete returns that do not satisfy the requirements of the Act or for any reason the return filed is not satisfactory then the Commissioner will 'reassess' to the best of his judgment the amount of net tax due for the tax period. Further it was submitted that the Assessing Authority neither gave reasons nor referred to any provisions or rule for levy of tax.

It is true that the VATO should have tick marked and thereby specified in the assessment framed as regards levy of tax and

interest as to the ground of his satisfaction. But, this is a case where reason finds mentioned in the notice of default assessment for levy of tax. Therefore, non tick-marking one of the three mentioned in the first sentence of the notice of assessment does not come to the aid of the dealer.

10. While referring to the provisions of Section 58 of DVAT Act, it was submitted that notice was required to be served upon the dealer, but no such notice was served upon the dealer – assessee. Learned counsel contended that notice u/s 59(2) of DVAT Act is a must for reassessment and that in absence thereof, the order of reassessment shall be ultra virus.

In this regard, Dealer has not made available to this Appellate Tribunal copy of DVAT 38. It does not form part of the memorandum of appeal. In absence thereof, it cannot be said that any such objection was taken by the dealer before learned OHA. Therefore, it is difficult for us to hold that no notice for the purpose of audit or for inspection of record was issued to the dealer.

11. Learned counsel for the appellant referred to decision in **Itc Ltd vs. Cce, Kolkata Iv**, decided by Hon'ble Apex Court on 18-09-2019. It may be mentioned that complete citation has not been provided. Only abridged version has been made available.

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In Itc Ltd's case (Supra), the question was whether in the case of self assessment without passing a speaking order, it can be termed to be an order of self assessment. It was urged on behalf of the assessee that there was non application of mind and merely an endorsement was made by the authorities concerned on the bill of entry which could not be said to be an order much less a speaking order.

Therein, provisions of section 47 and 17 of Customs Act were under consideration. Hon'ble Apex Court observed that there is a specific provision made in section 17 to pass a reasoned/speaking order in the situation in case on verification, self assessment is not found to be satisfactory, an order of reassessment has to be passed under Section 17(4).

Here, it is not a case where any order of assessment has been passed on any bill of entry. Separate notice of default assessment has been made giving reason, as noticed above.

12. Another contention raised on behalf of the dealer is that the dealer is a trader and not a manufacturer, and as such dealer was entitled to tax credit.

Learned counsel has submitted that the legislature provided under sub section (2) of Section 9 as to in which circumstances no tax credit shall be allowed, and then, in order to remove any kind of doubt in this regard, specifically provided under clause (b) of Sub Section (7) of Section 9 of DVAT Act as to when no

tax credit shall be allowed for the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule.

Sub –Section (1) of Section 9 reads as under:-

> *"(1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period 2 [where the purchase arises] in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making –*
>
> > *(a) sales which are liable to tax under section 3 of this Act; or*
> >
> > *(b) sales which are not liable to tax under section 7 of this Act."*

Sub-Section (3) of Section 10 of DVAT Act reads as under:-

> *"(3) Where –*
>
> *(a) goods were purchased by a dealer;*
>
> *(b) the dealer claimed a tax credit in respect of the goods, and did not reduce the tax credit by the prescribed percentage; and*
>
> *(c) the goods are exported from Delhi,*

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(i) by way of a sale made as per the provisions of sub-section (1) of section 8 of the Central Sales tax Act, 1956; or

(ii) other than by way of a sale, to a branch of the registered dealer or to a consignment agent;]

the dealer shall reduce the amount of tax credit originally claimed by the prescribed proportion."

In view of the above provision of Sub-Section (3) of Section 10, dealer is required to reduce the amount of tax credit (originally claimed) by the prescribed proportion in the above mentioned circumstances.

So far as adjustment of tax credit is concerned, Ld. Counsel for the dealer referred to Section 10 of DVAT Act and submitted that this is not a case where the goods purchased by the dealer were subsequently used for purposes other than those specified under sub-section (1) of Section 9.

Provision of sub-section (2) of section 10 reads as under:

"If goods which have been purchased were –

(a) intended to be used for the purposes specified under sub-section (1) of section 9 of this Act and are subsequently used, fully or partly, for purposes other than those specified under the said sub-section; or

(b) intended for purposes other than those specified under sub-section (1) of said section 9 of this Act, and are

subsequently used, fully or partly, for the purposes specified in the said sub-section;

The tax credit claimed in respect of such purchase shall be reduced or increased (as the case may be) for the tax period during which the said utilization otherwise has taken place".

In this regard, it may be mentioned that authorized representative of the dealer, submitted before learned OHA that the dealer has purchased goods and the goods are to be used partly for the purpose of making sales for taxable goods and partly for tax free goods, the amount of the tax credit shall be reduced proportionately.

This submission on behalf of the dealer, has not been discussed by the learned OHA anywhere in the impugned order. There is nothing in the impugned order to suggest that the dealer submitted any record in support of this submission before learned OHA. But the fact remains that the point raised on behalf of the dealer was not adjudicated by learned OHA. While sitting an appeal, this Appellate Tribunal cannot adjudicate this point, when the same has not been adjudicated by learned OHA. Therefore, the matter needs to be remanded to the learned OHA.

13. Even otherwise, a perusal of impugned order would reveal that learned OHA has not discussed other points raised by the

objector, and which finds mentioned in the impugned order itself, i.e., the tax credit was reversed by the manufacturer of the amount as shown in column No. 4; and that the goods purchased by the dealer were to be used partly for the purpose of making sales for taxable goods and partly for tax free goods and accordingly the tax credit was required to be reduced proportionately. These points can be decided only after evidence led by the dealer and for that reasonable opportunity is provided to the dealer. Even on this ground, the matter needs to be remanded to learned OHA.

Whether a case of rectification by Commissioner?

14. Further it was contented on behalf of the dealer that Section 74 B of DVAT Act empowers the Commissioner to rectify any mistake apparent on record within a period of four years from the end of the year in which any order passed by the Commissioner was served upon the dealer, but in this case the Commissioner did not invoke powers under section 74 B of the Act and that even on this ground the impugned assessment deserves to be set-aside.

In this regard, suffice it to say that it remains unexplained as to why the Commissioner was required to invoke power u/s 74B of the Act. The tax period, to which the assessments pertain, is March, 2005-2006. The assessment orders were passed on

23/11/2007, whereas the impugned order was passed on 18/7/2008.

On the point of Interest

15. While assailing the default assessment of Interest, it has been contented on behalf of the dealer that before levy of interest, Assessing Authority should have issued notice to the dealer calling upon him to explain as to why the interest was to be levied, and that since no such notice was served upon the dealer, the impugned assessment as regards interest also deserves to be set-aside.

Learned counsel referred to the provisions of Rules 26 & 28 of DVAT Rules and also to the decision in J.K. Synthetics Ltd. v. Commercial Taxes Officer, 1994 AIR 2393.

While assailing the impugned order, it has been submitted that no reason was given by Ld. OHA for upholding the levy of interest by the Assessing Authority, and as such the same deserves to be set-aside.

In J.K. Synthetic Mills Ltd Vs Commercial tax Officer (1994) 94 STC 422(SC), Hon'ble Apex Court while dealing with the point of interest as per provisions of CST Act, 1956, observed in the manner as :-

"Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish

prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than 15 days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2-A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(a) uses the expression "tax payable under sub-sections (2) and (2-A) of Section 7", that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex hypothesi on the turnover and taxable turnover "shown in or based on the return". The word 'payable' is a descriptive word, which ordinarily means "that which must be paid or is due or may be paid" but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2-A) and 11-B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11-B can only mean the full amount of tax which becomes due under sub-sections (2) and (2-A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the 11 (19641) 3 SCR 164, 185-90: AIR 1963 SC

1685 12 (1985) 1 SCC 283: 1985 SCC (Tax) 85: (1985) 151 ITR 433 13 (1986) 3 SCC 461: 1986 SCC (Tax) 601: (1986) 160 ITR 961 tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under clause (a) of Section 11 -B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

However, it may be mentioned here that decision in J.K. Synthetic Mills Ltd's case pertained to the period prior to amendment. In this regard, Hon'ble Court made it very clear by making observation therein.

Learned counsel for the Revenue has rightly pointed out that with the enactment of DVAT Act, in the year 2004, provisions as regards grant or levy of interest, in the form of section 42 (1) to (5) have been introduced. As per sub-section (2), when a person is in default in making the payment of any tax, penalty or other amount due under this Act, he shall, in addition to the amount assessed, be liable to pay simple interest on such amount, from the date of such default.

As noticed above, we have observed that the matter needs to be remanded to learned OHA for decision afresh after providing

reasonable opportunity to the dealer, of being heard. Therefore, in case learned OHA comes to the conclusion that it is a case of any tax liability of the dealer, learned OHA shall decide the objection as regards grant of interest, in view of settled law.

On the point of Penalty

16. In this case, penalty came to be imposed u/s. 86(10) of DVAT Act vide notice of Default Assessment dated 23/11/2007, on the ground that during audit it was found that the dealer had claimed excess ITC of Rs.,192,436/-, and that the same having been reversed, the penalty was being levied.

Contention raised on behalf of the dealer is that u/s. 86(10) of DVAT Act, a person is liable to pay penalty in case of furnishing of a return, under this Act, which is false, misleading or deceptive in a material particular, but here is a case where it cannot be said that the return furnished by the dealer was false.

In this regard learned counsel has referred to only the last paragraph of the decision in **Amrit Foods vs. Commissioner of Central Excise, UP, 2005-VIL-44-SC-CE** wherein it was observed that it was necessary for the assessee to be put on notice, on the point of penalty, and that same having not been done as required under Rule 173Q of Central Excise Rule,

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1944, the findings recorded by the Tribunal could not be faulted.

Learned counsel also referred to decision in **Orix Auto Infrastructure v. Commissioner, DVAT, Delhi & Ors.,** ST Appeal No. 47/2004, by our own Hon'ble High Court on 5/2/2015, to contend that for levy of penalty u/s 86(1) of DVAT Act, firstly a finding is to be recorded that it is a case of tax deficiency.

Learned counsel also referred to decision in **Commissioner of Sales Tax UP v. M/s. Sanjiv Fabrics,** decided by Hon'ble Apex Court on 10/9/2010.

Sanjiv Fabrics's case (Supra) pertained to levy of penalty u/s 10(b) read with section 10A of the Central Sales Tax Act. In the first set of appeals no. 2344-2347/2004, the Assessing Authority imposed penalty on the dealer for making false representation in respect of certain items/products.

Settled law in case principles of natural justice are not followed

17. Learned counsel for the appellant has submitted that this is a case where principles of natural justice were not followed by the department in levy of penalty. In this regard, learned counsel has referred to the following decisions :–

i. Rajesh Kumar &Ors. v. D.C.I.T. &Ors., SLP (Civil) No. 9427-9430 of 2005.

ii. Raipur Development Authority and Others v. M/s Chokhamal Contractors and Others, (1989) 2 SCC 721.

iii. K.I. Shephard and Others v. Union of India and Others, (1987) 4 SCC 431.

iv. Ponkunnam Traders v. Additional Income Tax Officer, decided by Hon'ble Kerala High Court on 5/2/1971.

vi. Uma Nath Pandey &Ors. vs. State of UP &Anr. On 16/3/2009(complete citation not made available).

vii. M/s. Nkas Services Private Ltd. v. The State of Jharkhand & Ors., WP(T) No. 2659 of 2021.

In **Umanath Pandey's case** (Supra), Hon'ble Apex Court was of the view that the notice must be precise and unambiguous; that it should appraise the party determinatively the case he has to meet; that the time given for the purpose should be adequate so as to enable him to make his representation; and that in the absence of such kind of notice and reasonable opportunity, the order passed would stand vitiated.

In **Biecco Lawrie Ltd v. State of West Bengal** (2009) 10 SCC 32, Hon'ble Apex Court was of the view that one of the essential ingredients of fair hearing is that a person should be served with a proper notice.

In **Ponkunnam Traders v. Addl. ITO** (1972) 83 ITR 508 (Ker.), a case under the Income Tax Act, Hon'ble Court held

that failure to conform to the principles of natural justice would make a judicial or quasi-judicial order void.

In **Orix Auto Infrastructure's** case (Supra), the case of the Revenue was that agreements between appellant and third parties were actually sale by way of instalments and not transfer by way of right to use. Additional Commissioner accepted the objections filed by the assessee on this aspect.

It was held that transactions were not hire purchase contracts or purchase of chattels by way of instalments. However, an order of remit was passed with the direction to the Assessment Authorities to re-examine the matter after scrutiny of documents.

Therein reference was made to decision in **Jatinder Mittal Engineers and Contractors v. Commissioner of Trade and Tax** (2011) 46 VST 498 (Delhi) wherein distinction was drawn between the penalty under sub-section (10) of Section 86 and sub-section (12) of Section 86, and it was observed that the latter is compensatory in nature and deals with tax deficiency.

M/s. Nkas Services Private Ltd. v. The State of Jharkhand & Ors., (supra), pertains to sections 73 & 142(1)(a) of GST Act, where admittedly, there is a specific provisions for issuance of show cause notice. Same is not applicable to the present case.

18. It was also contended that this is not a case where any mens-rea can be attributed to the dealer.

Section 86(1) defines "tax deficiency" as the difference between the tax properly payable by the person in accordance with the provisions of this Act and the amount of tax paid by the person in respect of a calendar month.

As per Explanation-I of this section, 'Tax properly payable' includes the amount of tax assessed under section 32 of the 'Act'. As per Explanation-II of this section, due tax paid after the period specified in sub-section (4) of section 3 of the Act, is also a tax deficiency.

As per sub-section (4) of section 3, the net tax of the dealer shall be paid within 21 days of the conclusion of each calendar month. As per explanation appended to sub-section (4), the obligation to pay the tax arises by virtue of this provision and is not dependent on furnishing a return, nor on the issue of a notice of assessment to the dealer.

Section 86(10) comes into application where any person (a) furnishes a return under this Act which is false, misleading or deceptive in a material particular or deceptive in a material Particular; or (b) omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular. Such person

shall be liable to pay, by way of penalty, the sum of Rs. 10,000/- or the amount of tax deficiency, whichever is greater.

In the decision of **Cement Marketing Co. of India Ltd. vs. Asstt. Commissioner of Sales Tax,** 1980 SCR (1)1098, Hon'ble Apex Court while dealing with the issue of absence of reasons in the order imposing penalty on the Assessee for not showing the amount of freight as forming part of the taxable turnover in its returns, and while interpreting the expression of 'false return' observed in the manner as:

> "The next question that arises for consideration is whether the Assistant Commissioner of Sales Tax was right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its returns. The penalty was imposed under section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and section 9 sub-section (2) of the Central Sales Tax Act, 1956 on the ground that the assessee had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Now it is difficult to see how the assessee could be said to have filed 'false' returns, when what the assessee did, namely, not including the amount of freight in the taxable turnover was under a bonafide belief that the amount of freight did not form part of the sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of 'sale price' in section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and section 2(h) of the

Central Sales Tax Act, 1956, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. This was the reason why the assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now, it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the Court and the belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be malafide or unreasonable. What section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in Hindustan Steel Limited v. State of Orissa(1) where it has been held that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing

to impose penalty, when there is a technical venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....." It is elementary that section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the result would be that even if the assessee raises a bonafide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been intended by the Legislature.

We are, therefore, of the view that the assessee could not be said to have filed 'false' returns when it did not include the amount of freight in the taxable turnover shown in the returns and the Assistant Commissioner of Sales Tax was not justified in imposing penalty on the assessee under section 43 of the Madhya Pradesh General Sales Tax, 1958 and section 9 sub-section (2) of the Central Sales Tax Act, 1956."

19. **Rasiklal Ranchhodbhai Patel vs. Commissioner of Wealth-Tax** is a decision by Hon'ble Gujarat High Court on 19-09-1978, (complete citation not made available) on the necessity

of reasons in support of conclusions arrived at by quasi-judicial authorities, wherein Hon'ble High Court relied upon the following observations in Woolcombers of India Ltd. v. Woolcombers Worker's Union, AIR 1973 SC 2758:-

> "It may be observed that the first passage quoted by us states only the conclusion. It does not give the supporting reasons. The second passage quoted by us states merely one of the reasons. The other relevant reasons are not disclosed. The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decisions of judicial and quasi-judicial authorities to this court by special leave granted under Art. 136. A judgment which does not disclose the reasons will be of little assistance to the Court. The Court will have to wade through the entire record

and find for itself whether the decision in appeal is right or wrong. In many cases, this investment of time and industry will be saved if reasons are given in support of the conclusions. So it is necessary to emphasise that judicial and quasi-judicial authorities should always give the reasons in support of their conclusions.

"In Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India, AIR 1976 SC 1785, the question before the Supreme Court was in the context of the Tariff Act and the decision of the Assistant Collector of Customs in the context of the Tariff Act. In para. 6 of the judgment at page 1789, Bhagwati J., speaking for the Supreme Court, has dealt with this question of reasons having to be given. He has pointed out that the Assistant Collector, the Collector and the Government of India disposed of the proceedings before them without giving reasons."

In Rasiklal case (Supra) the only reason which was found mentioned in the order of commissioner wealth tax was, "looking to this fact", viz., that the conditions of section 18(2A) are satisfied, and looking to the other facts of the case, the Commissioner reduced the minimum penalty.

20. Further, it has been submitted that no prior notice was issued by the Assessing Authority to the dealer so as to provide opportunity of being heard, before imposition of penalty, and as such the impugned assessment regarding levy of penalty deserves to be set-aside. In support of this contentions,

reference has been made to decision in **Bansal Dye Chem Pvt Ltd vs Commissioner**, Value Added Tax, ST.APPL. 29/2015 decided by our own Hon'ble High Court, while further submitting that decision in **Sales Tax Bar Association (Regd.) vs Union Of India & Ors,** W.P. (C) 10284/2018 and CM No. 40111/2018 is of no relevance in view of the decision in Bansal Dye Chem's case , which is a decisions subsequent to the decision in Sales Tax Bar Association, and that the decision in Bansal Dye Chem's case is binding.

While referring to the decision in **Bansal Dye Chem** case, learned counsel for the appellant has referred to para no. 6, 9 and 12 and then submitted that said decision took into consideration two decisions by our own Hon'ble High court which were given after the decision in Sales Tax Bar Association's case.

In this regard, surprisingly a contention has been raised by counsel for the appellant, without any basis, that the decision in Bansal Dye Chem's case was given while disposing of an appeal u/s. 81 of DVAT Act, whereas decision in Sales Tax Bar Association (supra) case was in a writ petition, and that decision in Bansal Dye Chem's case would be said to be in force.

As regards the contention raised by learned counsel for the appellant that no notice was issued by the Assessing Authority

to the appellant before imposition of penalty u/s 33 or 86(10) of DVAT Act, and the decisions cited by learned counsel for the appellant, it is pertinent to mention here that in view of decision in Sales Tax Bar Association (Regd.) Vs. GNCTD, WP (C) No. 4236/2012, by our own Hon'ble High Court, also relied on by learned counsel for the Revenue, no notice was required to be issued to the appellant before passing orders of penalty.

In Bansal Dye's case (supra), our own Hon'ble Court observed that penalty order u/s 86(10) of the Act was passed by the Assessing Officer, without service of prior notice of penalty on the Assessee and also without affording the Assessee an opportunity of being heard on the point of imposition of penalty, and as a result, set aside the impugned order holding that the said order was unsustainable in law. Therein, it was also observed that the very nature of the proceedings under section 33 of the DVAT Act read with Rule 36(2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order, that this entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the assessee an opportunity of being heard prior to passing the penalty order and further that the imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances

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of the case.

In that case, the premises of the Assessee were surveyed and it was found that there was variation in cash and stock, and as a result, the Assessing Officer enhanced the gross profit and levied tax, interest and also penalty. In that case, the Assessee had paid tax, interest and penalty, and it questioned the penalty order, inter alia, on the ground that no opportunity of hearing was afforded on the point of penalty before the passing of the order.

In Bansal Dye's case (supra), it was seen that on the basis of survey, a notice was issued to the Assessee under section 59 of the Act as regards the assessment of tax, but the Assessee did not participate in the assessment proceedings and accordingly, notice of default assessment of Tax and interest was issued by the Assessing Officer. On the same day, the Assessing Officer passed the order of penalty, without service of prior notice on the Assessee.

In Sales Tax Bar Association's case (supra), our own Hon'ble High Court clearly observed that the scheme of the statute (DVAT Act) itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. As further held, with such a statutory scheme, it cannot be said that the post

decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal.

Undisputedly, the decision in Sales Tax Bar Association's case on the relevant point of opportunity of being heard, before assessment of penalty, was not referred to by learned counsel for the petitioner or the respondent in Bansal Dye's case (supra).

In the given situation, in view of decision in Sales Tax Bar Association Case, decision in Bansal Dye's case (supra), and other decisions cited by learned counsel for the appellant do not come to the aid of the appellant.

21. A perusal of impugned order would reveal that learned OHA has not given any reason to uphold the demand towards the penalty levied. In absence of any reason, while sitting in appeal, this Appellate Tribunal finds it difficult to decide if it is a case where assessment by way of penalty was or was not called for.

22. As noticed above, we have observed that the matter needs to be remanded to learned OHA for decision afresh after providing reasonable opportunity to the dealer, of being heard. Therefore, in case learned OHA comes to the conclusion that it is a case of any tax liability of the dealer, learned OHA shall decide the objection as regards levy of penalty, if any in view

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of settled law referred to above and after providing reasonable opportunity to the dealer – objector of being heard.

23. No other argument was advanced before us on behalf of the parties.

Result

24. For the forgoing discussion and findings, these appeals are disposed and while setting aside the impugned orders passed by learned OHA as regards tax, interest and penalty, the matter is remanded to learned OHA for decision afresh, in accordance with law, after providing reasonable opportunity to the dealer – objector. Objector to appear before learned OHA on 27/4/2022.

25. File be consigned to 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 : 13/4/2022

13.4.22

(Rakesh Bali)
Member (A)

Narinder Kumar 13/4/2022

(Narinder Kumar)
Member (J)

Appeal No. 387-388/ATVAT/2008/4060-67 Dated: 18/4/22

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 18-4-22

APPELLATE TRIBUNAL VAT DELHI