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

Rev. Application No.402-406/ATVAT/2022
Appeals No.87-90 & 92/ATVAT/2010
Date of Order: 2/5/2022

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

.....Applicant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

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

JUDGMENT

1. The applicant- dealer registered with Department of Trade & Taxes, Ward 67, Delhi, challenged before this Appellate Tribunal, by way of appeals No. Appeals No. 87-92/ATVAT/ 2011 order dated 24.03.2011 passed by Ld. Additional Commissioner (Special Zone) – learned OHA.

2. Appellant felt aggrieved as its objections against default assessment of tax, interest and penalty framed/levied u/s 32 of

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DVAT Act were rejected. The default assessments were framed by the Assessing Authority on 26.04.2010.

3. An audit is said to have been conducted. Audit revealed that during the financial year 2007-08, the Dealer had purchased lubricating oil and it claimed 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 dealer had also 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 acommodity which the dealer can be said to have been dealing into and also because the dealer could not explain the disposal of the Telephone cable.

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.

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

4. 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/-

5. Arguments heard. File perused.

6. As noticed above, out of six appeals, Appeal No. 87-92/2011 were filed by the dealer-applicant. Out of said appeals, appeal No.91/2011 was allowed and imposition of penalty u/s. 86(12) of DVAT Act was set aside.

Appeal No. 87 (challenging assessment of tax & interest in respect of 1st quarter of 2007-08) was partly allowed in respect of rejection of the claim of the dealer as regards inter-State Sales against C-forms, and matter remanded to learned OHA for

decision afresh on this point only, taking into consideration GR's which were produced during objections; further that the Learned OHA shall provide reasonable opportunity of being heard to the parties before deciding on the aforesaid point.

As regards rejection of ITC in respect of capital goods and telephone cables, the appeal was dismissed.

Remaining four appeals Nos. 88/11, 89/11, 90/11 & 92/11 were also dismissed, for the reasons given in the judgment.

Grounds for Review raised

7. The first ground raised is that the Tribunal has erroneously recorded that the dealer did not take any ground in the appeal that the audit conducted by the team was without jurisdiction, whereas actually this ground was ground No. 4.

Learned counsel for the Revenue has submitted that by way of these Review applications, the appellant is seeking re-hearing on merits and fresh decision, which is not permissible, when this Appellate Tribunal dealt with each argument at length advanced at the time of final arguments. The contention is that in the given situation in case the dealer is feeling aggrieved by the said judgment, he should have gone in appeal instead of filing these review applications.

Learned counsel for the Revenue submitted that this ground was not raised in the memorandum of appeal, and was taken as additional ground.

Learned counsel for the applicant admits that this ground was initially not raised in the memorandum of appeal and was subsequently allowed to be taken as additional ground.

While disposing of the appeals, what we observed in Para No. 16 of the judgment was that in the objection filed before Learned OHA, the dealer had not raised any objection that the audit conducted by the team was without any jurisdiction. However, taking it as a legal point raised in the course of arguments in the appeal, we proceeded to deal with the said objection. For the reasons recorded in the judgment, we held that it was not a case where survey/ audit was conducted by the team without proper authorisation. Therefore, our decision does not suffer from any such error apparent on record, simply because we observed that this legal point was not raised in the memorandum of appeal.

8. As regards another ground taken by the applicant in the Review Application as regards DVAT-50, the point of jurisdiction of the audit team to conduct audit was taken up as a legal point raised by the dealer in the course of arguments on appeals, dealt with and decided by the Appellate Tribunal.

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Learned counsel for the applicant has submitted that in his written arguments, learned counsel for the Revenue had submitted that it was a case of irregular assumption of jurisdiction and as such the orders passed by the Assessing Authority was not a nullity, but this Appellate Tribunal did not take into consideration the said contention raised by learned counsel for the Revenue.

Learned counsel for the Revenue has submitted that the Appellate Tribunal recorded reasons while dealing with the point of jurisdiction and on the point of DVAT -50, and that there is no merit in this contention raised by learned counsel for the Applicant.

Whatever submissions were made by learned counsel for the parties in the course of arguments, on the point of DVAT-50 and jurisdiction, were recorded in the judgment. For ready reference, relevant portion of the judgment in appeals is extracted below:

> "**DVAT-50**
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> 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.

15. 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.

16. 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 ground 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 to 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 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."

In view of the above reasons, present ground for review is without any basis.

9. Another ground for review of the judgment, as per contents of the application, is that in the course of arguments Learned Counsel for the appellant had, while referring to record, submitted about the role of lubricant oil in the manufacturing cables, and as such the finding recorded by this Tribunal that appellant neither produced any material before the Learned OHA nor before this Tribunal is contrary to the facts.

Learned counsel for the Revenue has submitted that whatever submission was made on behalf of the appellant at the time of final arguments stands correctly recorded in the judgment and that the observations made by this Appellant Tribunal have also

been correctly recorded, and the submission made by the learned counsel for the applicant today is not correct.

In this regard, we may refer to para No. 9 of the judgment. Therein, we referred to the case of the dealer-applicant and submission of counsel for the appellant that lubricant is one of the basic raw materials of the product being manufactured by the dealer. But we rejected this contention, while observing that in the course of arguments on appeals, when we inquired from Ld. Counsel for the dealer as to which is the particular item/product, to manufacture which lubricating oil is required, Ld. Counsel was not able to point out any such product. We had raised another query, i.e. as to the manner in which lubricating oil is used for preparation of any of its products. But, Ld. Counsel for the Dealer-Appellant once again could not point out any such product or the manner of use of lubricating oil.

We further observed that there was 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 was produced in order to answer the said two points/queries.

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

Therefore, we do not find that the judgment by the Appellate Tribunal on these points suffers from any error apparent on face of record.

10. Another ground raised by the Learned Counsel for the dealer-applicant is that this Appellate Tribunal erred in not returning any findings as regards levy of penalty u/s. 86(13) of DVAT Act.

On the other hand, learned counsel for the Revenue has submitted that specific finding has been recorded by the Appellate Tribunal while dismissing the appeal challenging the said penalty.

In this regard, it is significant to point out that during arguments as regards levy of penalty u/s. 86(12) of DVAT Act, Learned Counsel for the appellant had put-forth submission only in respect of the tax period- 3rd Qtr 2007-08 and the ground of challenge was that the Assessing Authority had not given any reason for levy of the penalty.

While deciding this point raised only in respect of 3rd Qtr. 2007-08, we set-aside the levy of penalty for the said tax period.

The penalty in respect of tax period of 4th quarter 2007-08 was levied under section 86 (13) for violation of the provision section 48 of DVAT 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 purchase 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."

11. Learned counsel for the dealer has submitted that in the course of arguments in appeal he had referred to decision in **M/s. Shri Atma Ram & Sons v. Commissioner of Trade & Taxes, Delhi,** Appeal No. 97/ATVAT/07-08, decided on 12/4/2010, but this Appellate Tribunal considered the said decision while deciding legality of penalty u/s 86 (12) of DVAT Act and as such the application deserves to be allowed.

In para No. 18 of the judgment, while dealing with penalty u/s 86(12) of the Act, we took into consideration two decisions cited by learned counsel for the appellant, including **M/s. Shri Atma Ram & Sons case (supra),** and set-aside the said penalty for want of reasons for its levy.

While challenging penalty u/s 86(13) of DVAT Act, learned counsel for the appellant had submitted that levy of penalty u/s 86 (13) was uncalled for in view of the observation that dealer was maintaining stock register as per excise record in respect of the finished cables.

In this regard, we referred to the provisions of Rule 42 of DVAT Rules 2005 and also took into consideration that in the course of arguments learned counsel for the appellant had not put forth submission that any stock record/ register in respect of the goods purchased in local was produced.

In the given situation, the judgment passed by this Appellate Tribunal as regards penalty u/s 86(13) of DVAT Act does not suffer from any error.

12. For the reasons given above, the applications deserve to be dismissed. Same are hereby dismissed with cost of Rs. 2,000/- each i.e. in total Rs. 10,000/- to be deposited with the Revenue under the appropriate head.

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13. 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 : 02/05/2022

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Review No. 402-406/ATVAT/22 | 4076-83

In Appeal No. 87-90&92/ATVAT/10

Dated: 4/5/22

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