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

Appeal Nos.293-308 /ATVAT/2014
Date of Judgment : 27/4/2022

1. M/s Indian Oil Corporation Ltd.
World Trade Centre,
Babar Road, New Delhi-110001. ..... Appellant

V.

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

Counsel representing the Appellant : Sh. A.K. Bhardwaj.
Counsel representing the Revenue : Sh. P. Tara.

Appeal Nos. 332-347/ ATVAT/2014
Date of Judgment : 27/4/2022

2. M/s Hindustan Petroleum Corporation Ltd.
6-7th Floor, North Tower, Scope Minar,
District Centre, Laxmi Nagar
New Delhi-110092 ..... Appellant

V.

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

Counsel representing the Appellant : Sh. A.K. Bhardwaj.
Counsel representing the Revenue Sh. P. Tara.

Appeal Nos. 314-329/ ATVAT/2014
Date of Judgment : 27/4/2022

Narinder Kumar 27/4/22

3. M/s Bharat Petroleum Corporation Ltd.
28-A, ECE House, Kasturba Gandhi Marg,
Connaught Circus,
New Delhi-110001 ..... Appellant

V.

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

Counsel representing the Appellant : Sh. A.K. Bhardwaj.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. This common judgment is to dispose of the above captioned appeals as the same involve common questions.

2. The dealer – appellants are Government Undertakings dealing in marketing of petrol, diesel and petroleum products. As on 1/6/2006 rates of petrol and diesel inclusive of VAT, to be paid by a consumer, inter alia, were respectively Rs. 43.51 and Rs. 30.47. As per the notification of Government of India dated 06/06/2006, there was certain increase in prices of petrol and diesel. The Addl. Commissioner (Policy) of Department of Trade & Taxes issued memorandum No. F1(13)/PII/VAT/ Act/2006/2069 dated 20/06/2006.

3. Thereafter on 21/06/2006 an Ordinance was promulgated by the Hon'ble Lieutenant Governor of Delhi whereby the following

proviso was added to the definition of word "Sale Price" in section. 2(zd) just above the Explanation:

> "Provided that an amount equal to the increase in the prices of petrol and diesel (including the duties and levies charged thereon by the Central Government) taking effect from the 6th June, 2006 shall not form part of the sale price of petrol and diesel sold on and after the date of the promulgation of this Ordinance till such date as the Government may, by notification in the Official Gazette, direct:"

4. With effect from 30/11/2006, there was certain roll back by certain amount in prices of diesel and petrol but the proviso remained in force. With effect from 16/2/2007, there was complete roll back and the prices of petrol and diesel were restored back to the prices as on 1/6/2006.

5. Appellants submitted their respective returns for the respective tax periods noted as above. Learned VATO carried out default assessments of tax and interest u/s 32 of the DVAT Act, 2004 on the ground that the returns submitted by the appellants were not as per law. He accordingly enhanced the taxable turnover of the petrol and diesel, etc. and created demands.

He also carried out default assessments of penalty u/s 33 r/w sec. 86(10) of the Act on the ground that the returns filed by the appellants were misleading, false or incorrect in material particular.

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6. Appellants filed objections against these default assessments of tax, interest and penalty. Objections above the value of Rs. 16 lac were taken up for hearing by the learned Addl. Commissioner-III, the Objection Hearing Authority (OHA). Objections below the value of Rs. 16 lac were taken up for hearing by the learned Jt. Commissioner (KCS). The objections were rejected by the learned OHAs vide their respective orders.

7. Accordingly, the above named three companies filed appeals No. 134-147/2008 & 397-398/2008, 152-165/2008 & 432-433/2008 and 115-128/2008 & 395-396/2008, challenging the default assessment of tax, interest and penalty. The fourth company Indo Burma Petroleum Corp. Ltd. filed appeals No. 399-400/2008.

8. Vide judgment dated 22/11/2022, learned Appellate Tribunal disposed of the appeals while observing in the manner as :

> "In our considered view purpose of the Govt. of NCT of Delhi in introducing the proviso in question, when considered from the plain language of this proviso, was to direct the appellant dealers to continue to pay the VAT as if there was no increase in the prices by the Central Govt. in our considered view, the act of the Govt. of NCT of Delhi in introducing the proviso in question, by no stretch of imagination, could goad the appellants to embark upon an exercise in reducing the basic price for calculating the VAT, as argued by the Ld. Counsels for the appellants because simple meaning of this proviso is that oil companies were not required to include the increased component as part of sale consideration under

sec. 2(1) (zd) of the Act. When the increased component was not to be a part of sale consideration under sec. 2(1) (zd) of the Act, obviously the appellants were not to charge VAT on the same as per the definition of the term "Sale Price" which came to be controlled by introduction of the proviso in question. When there was no effect of the increased component, in the liability to pay VAT then it was immaterial when there was complete roll back or when the Notification was issued as per this proviso. Thus in our considered view, the submission of the Ld. Counsels for the appellants that the meaning of this proviso was that appellants shall continue to follow the deduction till another notification was issued which was in fact issued in June 2007 and oil companies stopped taking benefit of the proviso after this notification in June 2007, is without any merit. Thus in view of this discussion, we hold that the judgments cited by the Ld. Counsels for the appellants, for assailing the default assessments of tax & interest u/s. 32 of the Act, are not applicable as the facts of these judgments are totally different from the facts of these appeals."

In para 18 of the judgment, Appellate Tribunal went on to observe and hold as under :-

"In view of the foregoing discussion we hold that the appellants were under a legal obligation to pay VAT as per the scheme that existed prior to increase in the price of petrol and diesel and if the appellants had paid VAT as per this scheme then it is required to be investigated as to whether in fact the VAT was so paid for which all the appeals pertaining to default assessments of tax and interest u/s 32 of the Act deserve to be remanded back to the Ld. VATO for considering as to whether the appellants have paid the

VAT on the pre-revised prices. Accordingly all the default assessments of tax and interest u/s 32 of the Act are set aside and all the appeals pertaining to default assessments of tax & interest u/s 32 of the Act are remanded back to the Ld. VATO for considering as to whether the appellants have paid the VAT on the pre-revised prices for all the tax periods in question and in case it is found that the VAT was not paid in this manner then the Ld. VATO would be at liberty to carry out default assessments of tax & interest as per law."

9. As regards penalty imposed u/s 33 read with section 86(10) of DVAT Act, Appellate Tribunal found that the principle of law laid-down in **Cement Marketing Co. of India ltd. v. Assistant Commissioner of Sales Tax,** Indore (1980) 45 STC and **M/s. Jatinder Mittal Engineers and Contractors v. Commissioner of Trade & Taxes, Delhi** decided on 12/5/2011, was squarely applicable to the facts of the appeals relating to the penalty. Accordingly the penalties levied u/s 86(10) of the Act were set-aside. However, the Appellate Tribunal further observed that it would be competent for the learned VATO to consider the question of assessments of penalties as per law, if deemed necessary.

10. As per paper book submitted by the Dealer – appellant, following proceedings took place/ orders came to be passed by the department and by the Learned OHA in respect of the matter in dispute :

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S. No.	Date	Particulars
1.	22/11/2011 (correct date)	DELHI VAT TRIBUNAL SET ASIDE THE ASSESSMENT AND REMANDS THE CASE FOR FRESH ASSESSMENT
2.	29.12.2011	VATO PASSES ORDER IN RESPECT OF THE 3 OIL COMPANIES RECTIFYING US/ 74B THE ORIGINAL ORDERS IN THE WAKE OF TRIBUNAL'S ORDER DATED 01.12.2011-[ORDERS FOR THE TAX PERIOD NOV-06 FOR THE 3 OIL COMPANIES ENCLOSED]
3.	27.02.2012	DELHI HIGH COURT DISMISSES THE APPEALS OF THE OIL COMPANIES-AS ACCORDING TO THE HON'BLE COURT NO SUBSTANTIAL QUESTION OF LAW ARISES FROM THE VAT TRIBUNAL'S ORDER.
4.	28.03.2012	SPECIAL COMMISSIONER-III SET ASIDE THE ORDERS U/S 748 FOR HINDUTAN PETROEUM CORPORATION LTD AND DIRECTS FOR PASSING OF THE ORDERS UNDER APPROPRIATE SECTIONS OF THE DVAT ACT.
5.	28.03.2012	SPECIAL COMMISSIONER-III SET ASIDE THE ORDERS U/S 74B FOR BHARAT PETROLEUM CORPORATION LTD AND DIRECTS FOR PASSING OF THE ORDERS UNDER APPROPRIATE SECTIONS OF THE DVAT ACT.
6.	10.04.2012	SPECIAL COMMISSIONER-III SET ASIDE THE ORDERS U/S 74B FOR INDIAN OIL CORPORATION LTD AND DIRECTS FOR PASSING OF THE ORDERS UNDER APPROPRIATE SECTIONS OF THE DVAT ACT.

7.	30.08.2012	SPECIAL COMMISSIONER-I SET ASIDE THE ORDERS U/S 74B FOR BHARAT PETROLEUM CORPORATION LTD FOR PENALTY U/S 86[12] AND DIRECTS FOR PASSING OF THE ORDERS UNDER APPROPRIATE SECTIONS OF THE DVAT ACT.
8.	14.03.2014	REASSESSMENT ORDERS PASSED TO GIVE EFFECT TO VAT TRIBUNAL'S ORDER IN RESPECT OF THREE OIL COMPANIES.
9.	15.09.2014 (correct date)	OHA PASSES ORDER REJECTING THE OBJECTIONS FILED AGAINST THE ORDERS OF RE-ASSESSMENTS PASSED ON 14.03.2014 IN RESPECT OF THE 3 OIL COMPANIES.
10.	13.05.2016	THE HON'BLE SUPREME COURT DECIDES THE APPEALS OF THE OIL COMPANIES AGAINST THE HIGH COURT ORDER - FAVOURING THE REVENUE.

11. As noticed from the sequence of events reproduced above, our own Hon'ble High Court, while dismissing the Sales Tax Appeals (filed while challenging the judgment delivered by this Appellate Tribunal), upheld that no substantial question arose in the said appeals for consideration.

12. Civil Appeal No. 5103 to 5127 / 2016 filed before Hon'ble Apex Court by the Oil Corporations against the judgment delivered by the Hon'ble High Court, came to be dismissed vide

judgment dated 13/05/16, while affirming the view taken by the Hon'ble High Court and this Appellate Tribunal.

As per decision, Hon'ble Apex Court upheld the view by observing in the manner as :-

> "The idea was to protect the interest of the consumers by giving exemption in respect of enhanced ad valorem VAT payable on account of increase in prices of diesel ad petrol from 06.06.2006. On the element of increase no additional ad valorem VAT was payable and according to the proviso the increased component was not to be part of sale consideration. Consequently VAT was not to be charged in respect of such increased component, as per definition of the term "Sale price" which came to be controlled by introduction of the proviso. When there was no increased component and therefore no liability to pay VAT in respect of such increased component, benefit under the proviso ceased to be applicable. The proviso cannot be given operation beyond the element of increase, so much so that even after complete roll back, the benefit in respect of that amount must operate. That certainly was not the intent. The idea was to grant benefit only in respect of that element of VAT respecting increase in rates and not beyond. If that component of increase ceased to be in existence, the benefit of proviso also ceased to be in operation."

13. By way of present set of appeals, dealer – appellant has challenged legality of the assessments as per order dated 15/09/14 passed by the Learned DHA, whereby the

reassessments framed on 14/03/2014 by Learned Assessing Authority have been upheld and objections filed by the dealer have been rejected.

14. The only ground raised by the dealer before Learned OHA was that the reassessments framed on 14/03/14 were bad in law, same having been made after the period of limitation of one year as provided u/s. 34(2) of DVAT Act.

Learned OHA dealt with the said point by observing in the manner as :-

> "The Objector has mentioned in his Objection that he is not challenging the passing of the impugned orders to give effect to the directions of the Hon'ble Tribunal as he is aware that orders passed to give effect to an order of the Appellate Tribunal are not appealable under section 79 (1)(j) of the Delhi Value Added Tax Act' 2004. When the Objector has awareness of the said Section, he should not have preferred an Objection against the reassessment order of the assessing authority in compliance of the decision of Hon'ble VAT Tribunal and that too only on technical grounds stating that the order should have been issued under Section 34(2) of Delhi Value Added Tax Act' 2004 and not under section 74B of Delhi Value Added Tax Act' 2004."

Learned OHA referred to the provision of Section 80 of DVAT Act, which was taken note of by Assessing Authority as well.

In the result, Learned OHA held that the reassessment orders dated 14/03/14 were in order and not in violation of provisions of DVAT Act, 2004.

Contentions

15. Learned Counsel for the dealer-appellant has raised before us the same ground i.e. the reassessment orders being bad in law, same having been passed after the expiry of one year i.e. period prescribed u/s. 34(2) of the Act.

On the other hand, Learned Counsel for the Revenue has submitted that in view of the directions framed by this Appellate Tribunal vide judgment dated 22/11/11., Learned VATO was simply to consider as to whether the dealer – appellant company had paid VAT at the pre-revised prices for all the tax periods in question to which the appeals pertained, and that by way of remand to Learned VATO the consequential direction issued by this Appellate Tribunal was that in case VAT had not been paid on the pre-revised prices for all the tax periods in question, Learned VATO shall be at liberty to carry out default assessments of tax and interest as per law.

As noticed above, the point of law involved in the matters before this Appellate Tribunal was upheld by the Hon'ble High

Court and also by Hon'ble Apex Court. Assessments had already been framed by Learned VATO raising demands of specific amounts towards tax, interest and penalty.

16. In the given facts and circumstances, it can safely be said that after the disposal of the appeals, Learned VATO was simply to take steps to give effect to the said judgment. As a result, the assessments framed by the Learned VATO on 29/12/11, the orders dated 28/03/12, 28/3/2012 and 10/4/2012 passed by the Learned VATO u/s. 74(B) of DVAT Act and the subsequent assessments framed by Learned VATO on 14/03/14 can safely be termed to be the orders passed / assessments issued only to give effect to the judgment passed by this Appellate Tribunal, i.e to find out as to what amount of VAT, on the pre-revised prices, for all the tax periods, had not been paid.

17. In the impugned orders passed by ~~Learned~~ Learned OHA it stands recorded that in the objections, dealer-appellant did not challenge the passing of the orders by Learned VATO to give effect to the directions of this Appellate Tribunal (as the dealers were aware that orders passed to give effect to an order of the Appellate Tribunal are non-appealable u/s 79(1)(j) of the DVAT Act). In the course of arguments before us, learned counsel for the dealer – appellant has not disowned this averment before learned OHA.

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18. In the given facts and circumstances, we find that it was not a case of framing of assessments afresh or re-assessments, and rather a case of issuing of assessment to give effect to the order passed by this Appellate Tribunal, simply after making calculations of the amount due. Therefore, Learned OHA was rightly of the view that the said assessments issued by the Learned VATO could not be challenged by way of objections u/s. 74 of DVAT Act.

19. We find that in the given facts and circumstances, when only calculations of VAT, not paid by the dealer-assessee, on the pre-revised prices for the concerned tax periods, were to be carried out, in view of the special bar u/s. 79(1)(j) of the Act, dealer could not challenge the same either by way of objections or by way of appeals.

Now, coming to Section 80 of DVAT Act, and the same is reproduced for ready reference, as under:-

> "Section 80 Assessment proceedings, etc. not to be invalid on certain grounds :
>
> 1. No assessment, notice, summons or other proceedings made or issued or taken or purported to have been made or issued or taken in pursuance of any of the provisions of this Act or under the earlier law shall be invalid or shall be deemed to

be invalid merely by reason of any mistake, defect or omission in such assessment, notice, summons or other proceedings, if such assessment, notice, summons or other proceedings are in substance and effect in conformity with or according to the intent and purposes of this Act or any earlier law.

2. The service of any notice, order or communication shall not be called in question if the said notice, order or communication, as the case may be, has already been acted upon by the dealer or person to whom it is issued or which service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication.

3. No assessment made under this Act shall be invalid merely on the ground that the action could also have been taken by any other authority under any other provisions of this Act."

20. We find that this is a case where provisions of Section 80 of DVAT Act come into application as learned Assessing Authorities made fresh assessments / re-assessments u/s 32 & 33 of DVAT Act, while only calculations were to be carried out to find out that the dealers had paid the entire due amount of tax in respect of the relevant tax periods.

21. In the given facts and circumstances, we find merit in the contentions raised by the Learned Counsel for the Revenue that provision of Section 34(2) of DVAT Act is not attracted in case of giving effect to the decision of Appellate Tribunal or Court

and rather would be attracted in case were reassessment is required. Here, it cannot be said that it was a case requiring reassessment.

As noticed above, it was a case simply calling for calculations to find out if any VAT remained to be paid by the dealer on the basis of pre-revised prices in respect of any of the concerned tax period. In view of the above discussions, we do not find any merit in the contentions raised by Learned Counsel for the dealer-appellants that the steps taken by the Ld. VATOs were barred due to expiry of any period of limitation, as provide u/s 34(2) of the Act.

Interest

22. As noticed above, Learned VATOs had made assessments initially and the same were upheld by the Learned OHA. The law point involved in the matters came to be decided by this Appellate Tribunal on 22/11/11 and the said view was upheld by the Hon'ble High Court and by the Hon'ble Supreme Court. Admittedly, the dealer-appellant has already deposited tax, interest and penalty, u/s. 76(4) of DVAT Act as per the orders passed by this Appellate Tribunal.

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Admittedly, during pendency of the previous sets of appeals decided on 22/11/11 by this Appellate Tribunal, it was never submitted by the Revenue that any error had taken place in the calculations made before raising demands. The order passed u/s. 76(4) of DVAT Act in the previous set of appeals was admittedly never challenged by the Revenue.

In the given facts and circumstances, the dealers cannot be said to be liable to pay any further interest on the amount, due from the dealers as on 22/11/11 towards tax & interest. Therefore, the subsequent order passed by Learned VATO raising demand of interest for the period beyond 22/11/11 cannot be sustained.

Penalty

23. As noticed above, this Appellate Tribunal, while disposing of the earlier set of appeals on 22/11/11 set aside the penalties levied u/s. 86(10) of the DVAT Act, taking into consideration the principle of law laid down in the decisions of Cement Market Company of India and Jitender Mittal Engineers and Contractor's Cases (Supra).

However, subsequent to the passing of the said judgment by this Appellate Tribunal, Learned VATO imposed penalties by which the dealer – appellants are feeling aggrieved.

Chapter XIII of DVAT Act pertains to Penalties and Offences. It is not case of the Revenue that after the disposal of the judgment dated 22/11/11 by this Appellate Tribunal, dealer – appellants committed any offence u/s. 86(10) of DVAT Act. Once the penalties already imposed were set aside, keeping in view of the principle of law as regards bona-fides in filing of returns, and that these are the matters not pertaining to filing of returns stated to be false, misleading or deceptive in material particular, no question of levy of penalty for the same offence arose. Therefore, the impugned assessments issued by Learned VATO imposing penalty u/s. 86(1) of DVAT Act deserve to be set aside.

24. It may be mentioned here that vide separate order of even date, an application filed by the dealer – Indian Oil Corporation to raise one additional ground in respect of turnover relating to tax period April, 2007 has been dismissed for the observations and reasons recorded therein.

Result

25. As a result, all the above captioned appeals filed by the dealer – appellants challenging the assessments framed by Learned VATO as regards tax in respect of all the tax periods are dismissed while rejecting their contention that the re-

assessments made by the Assessing Authority were barred by limitation; all the appeals challenging levy of interest for the period subsequent to 22/11/2021 are allowed while setting aside the demands towards interest for all the tax periods; all the appeals challenging the penalties relating to all the tax periods are allowed and all the assessments relating to penalty are set-aside.

In the given facts and circumstances, we deem it a fit case where the department – concerned VATO shall take into consideration the prayer of the dealer – appellant and find out if there is any error in the calculation of turnover relating to tax period April, 2007, as alleged in para 9 of the application dismissed by separate order of even date, and in case it is found to be a case of error in calculation, the department shall take steps to do the needful i.e. to issue assessment, only to give effect to the judgment dated 22/11/11 and the present judgment. In this regard, learned VATO to allow the dealer – applicant to render assistance by production of relevant documents / account books, as desired by learned VATO.

26. Dealer-appellant to appear before Learned VATO on 17/05/2022.

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27. Copy of this common judgment be also placed in the connected set of appeals i.e. 314-329/2014 & 332-347/14. Copy of order be also 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.

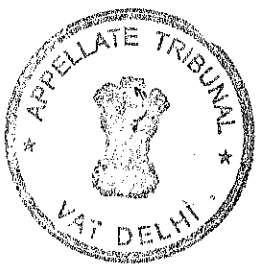
Date : 27/4/2022

27/4/2022

(Rakesh Bali)
Member (A)

27/4/2022

(Narinder Kumar)
Member (J)



Appeal No. 293-308 / 332-347 / 314-329 / ATVAT/14/4220-27 Dated: 29/4/22

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)

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REGISTRAR 29/4/22