

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

Appeal No.: 1568-1569/ATVAT/2011

Date of Judgment: 02/05/2022

M/s Berger Paints India Ltd.,
14/2, Okhla Industrial Area,
New Delhi.

.....Appellant

v.

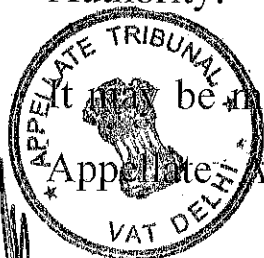
Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. Atul Gupta
Counsel representing the Revenue : Sh. P. Tara

JUDGMENT

1. Present 2 appeals pertain to tax period 1996-97. Dealer was registered with Department of Trade and Taxes. It used to deal in sale of paint, etc. Dealer is feeling aggrieved by order dated 22/12/2011 passed by learned Special Commissioner – III – First Appellate Authority, whereby the first appeal filed by the dealer challenging the assessment has been disposed of, rejecting the objections taken by the dealer to the increase of 10% GTO, and as to the penalty imposed by the Ld. Assessing Authority.



It may be mentioned here that vide impugned order Ld. First Appellate Authority remanded the case to the Assessing

Authority only ^{on} one point, i.e. to consider 2 'C' Forms and 1 'ST-35', which the dealer could not submit earlier, i.e. at the time of assessment. The matter was remanded with the direction that the Appellate Authority shall afford to the dealer, opportunity to submit the said forms and pass fresh order in accordance with law.

2. Vide assessment order dated 31/12/1999, Ld. Assessing Authority had framed assessment in respect of the tax period 1996-97. Ld. Assessing Authority had directed the dealer to pay a sum of Rs. 59,49,503/- (i.e. Rs. 32,23,254/- towards tax, Rs. 17,26,249/- towards interest and Rs. 10,00,000/- towards penalty).

The above said assessment was made after service of notices in ST-13.

For ready reference, **assessment under local Act** is reproduced as under :

"GTO	714333898.00
LESS GOODS RETN.	(-) 17601773.00
ADD BACK GOODS	
RETURNED REJECTED	(+) 109162.00
ADJUSTED GTO AS	
SALE SUMMARY	696841287.00
ADD 10% OF GTO AFTER	
DEDUCTING STOCK TRF.	31858400.00
NET GTO	728699687.00



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ISS	437413139.00
RD SALE	34012930.00
EMBASSY SALE	18349.00
TTO 7%	203042.00
TTO 10%	257052227.00
TAX PAYABLE	25719436.00
TAX DEPOSITED	22496182.00
TAX PAYABLE	3223254.00
INTEREST	1726249.00
PENALTY	1000000.00
TOTAL TAX PAYABLE	5949503.00

The dealer is directed to pay a sum of Rs. 59,49,503/- in terms of the demand notice enclosed herewith.”

Assessment framed under Central Act is to the following effect:

The facts, as explained in the Local order shall prevail in the Central Act as well.

“ISS	437413139.00
STOCK TRANSFER	340431556.00
TTO 4%	54585039.00
TTO 10%	42396544.00
TAX PAYABLE	6423056.00
TAX DEPOSITED	2579925.00
PENALTY	2000000.00
TOTAL TAX PAYABLE	5843131.00



The dealer is directed to pay a sum of Rs.58,43,131/- in terms of the demand notice enclosed.”

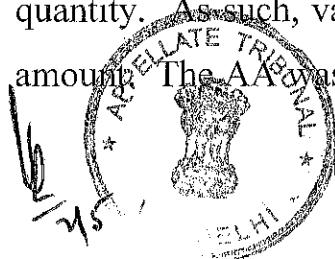
3. Feeling aggrieved by the assessment framed, the dealer filed First Appeal. Vide impugned order dated 22/12/2011, Ld. First Appellate Authority disposed of the appeal while observing in the manner as :-

“I have heard the arguments put forth by the representative of the appellant and gone through the records in detail.

I am of the view that return of goods pertain to 1995-96 and has been time barred as per rule as such, AO has not allowed credit and the Assessment Order of the AA is upheld on this count.

The Gate passes were important in view of stock transfers to other branches and on the bases of the same the A.A had rejected. These were the secondary documents on which AA wanted to assess the inter-state sales as books in the circumstances could not be relied upon. The dealer could not produce gate passes as such the AA took 10% stock transfer as inter-state sales. And the decision of the AA in the circumstances is justified.

After extensive interaction between the AA and the dealer on the enforcement survey, there was a **variation** of Rs. 1163867/- at **Janakpuri Branch** and the AA treated it as suppression of sale at Janakpuri Branch. The dealer could not provide Trading a/c in terms of amount inspite of asking for that and provided in quantity. As such, variation could not be calculated in terms of amount. The AA was handicapped on this count..... The AA in



above circumstances has justifiably increased the 10% GTO. The contention of the counsel is thus rejected.

Penalty imposed for corollary to the sales enhanced and quantum could be justified from the additional demand raised. As such, there is no point to interfere in the matter of imposing penalty.”

4. Hence these two appeals. Arguments heard. File perused.
5. As per record, the survey was conducted on 03/10/1996 by the team of officers from Enforcement Branch and during survey, they came across certain papers, registers and other documents. The dealer could not explain certain documents and as such, the same were seized, on surrender. Pre-assessment notices were issued to the dealer with direction to produce the record mentioned therein. After hearing the representative and counsel for the dealer, assessments were framed in the manner indicated above.

Non supply of copies of documents seized by and statement of representative recorded by Enforcement team

6. The first contention raised by learned counsel for the dealer-appellant is that the revenue did not supply copies of the seized papers to the dealer and statement of its representative recorded by the Enforcement team, before seeking explanation from the dealer, as a result of which this is a case where



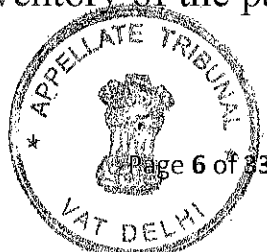
principles of natural justice have been violated. In this regard, reliance has been placed on decisions in **Kothari Filaments v. Commissioner of Customs, Kolkata**, 2009 (233) ELT 289 (SC); **TribhuvandasBhimji Zaveri v. Collector of Central Excise**, 1997 (92) ELT 467 (SC); and **JVS Food Pvt. Ltd. V. Union of India**, 2018 (10) GSTL 291 (Rajasthan).

On the other hand, learned counsel for the Revenue submitted that copy of the inventory, which is prepared at the spot, is always supplied to the dealer or its representative, at the site and the same must have been supplied to the dealer at the site, through its representative.

Learned counsel for the Revenue has also submitted that in case the dealer required any document from the department, he could seek certified copy thereof, but the dealer never applied for any certified copy thereof.

It has been rightly submitted by counsel for the Revenue that the record was seized from the business premises of the dealer in presence of the representative and as such it cannot be said that the dealer was not aware of the documents seized.

There is nothing on record to suggest that at the time of survey, the dealer or its representative lodged any protest with the Enforcement Branch Team to the effect that he was not supplied with inventory of the papers seized from the business premises.



There is also nothing on record to suggest that soon after the survey, the dealer ever lodged any protest with the revenue authorities in this regard. Accordingly, it can safely be said that the officers of the Enforcement Branch Team had supplied inventory to the dealer at the time of survey.

7. In **Kwality Granites and Marbles v. The Registrar**, (2006) 146 STC 25 (Mad), cited on behalf of the dealer-appellant, the petitioner had requested the Assessing Officer for supply of copies of seized records, so as to furnish reply to the pre-assessment notice. Assessing Officer rejected the request. It was held that order of assessment was made in violation of the principles of natural justice.

Decision in Kwality Granites's case is distinguishable on facts.

Admittedly, the dealer was served with 2 separate notices, i.e. one under section 9 of CST Act read with section 23 of DST Act, 1975, and the other was under section 23 of DST Act, i.e. ST13, both issued by Sales Tax Officer-Enforcement.

It was in response to the said notices that Shri Sunil Kumar Sharma, Accounts Officer of the dealer accompanied by Shri Sushil Kumar Verma, Advocate and other staff of the dealer appeared before learned Assessing Authority from time to time.



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Reply on behalf of the dealer is stated to have been filed before the Assessing Authority. In case any document was required by the dealer from the department, before filing of reply or its version the dealer must have brought this fact to the notice of the Assessing Authority with request for supply of any such document. It is not believable that the counsel representing the dealer before the Assessing Authority would have missed to bring this fact to the notice of the Assessing Authority or that he would have participated in the proceedings without availability of complete requisite record. There is nothing on record to suggest that before submitting reply any request was made or objection taken by the dealer regarding its inability in filing of reply on account of non supply of any of documents by the Ward or Assessing Authority.

As is available from the assessment order, Sh. Sunil Kumar Sharma, Accounts Officer-representative of the dealer was confronted with ~~that~~ the material seized. At that time, Shri Sushil Kumar, [✓]Advocate, was also accompanying the representative.

Therefore, decisions cited on behalf of the appellant do not come to the aid of the dealer.


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Show Cause Notices

8. Learned Counsel for the appellant has referred to copy of the notices i.e. u/s. 9 of CST Act, 1956 read with Section 23 of DST Act, 1975 and other notice u/s. 23 of DST Act, 1975, and contended that nowhere it was specified in these notices as to which document the dealer was required to produce.

The contention is that in absence of any specification, it cannot be said that the notices were valid notices. In support of his contention, Learned Counsel for the appellant has referred to decision in **Samsung India Electronics Private Limited v. Government of NCT of Delhi & Others**, 2016 (4) TMI 273 and submitted that analogy be drawn for applicability to the present case.

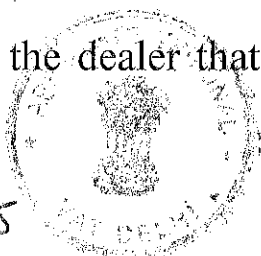
Admittedly, the dealer was also served with 2 notices, with direction to appear before the STO-Enforcement on 18th of November, 1999.

Contents of these notices make it evident that same pertained to assessment year 1996-97; that these were addressed to the dealer; that same were delivered at the given address of the dealer against receipt in the form of rubber stamp affixed by the official of the dealer.

Further, vide notice in Form ST 13, the Assessing Authority apprised the dealer that he proposed to make assessment for

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the above said period under section 23 of DST Act, 1975, and that the dealer was to produce or cause to be produced all evidence on which the dealer relied in support of its return(s) and all its account (including record of purchases and sales).

The other notice under section 9 of CST Act read with sec. 23 of DST Act, the Assessing Authority apprised the dealer that he proposed to assess the amount due by way of tax under the above provisions of law, called upon the dealer to appear and produce further evidence and specifically to produce or cause to be produced all evidence including declarations in form "C" and "F" certificates in form 'D', E-1 and E-2 referred to in the Central Sales Tax (Registration and Turnover) Rules 1957 on which the dealer relied in support of its return (s) and all accounts including record of purchase and sales.

It was in response to the said notices that the Accounts Officer of the dealer accompanied by Advocate and other staff of the dealer appeared before learned Assessing Authority from time to time.

As is evident from the impugned order, while making submissions on objections before Learned OHA, the dealer or its counsel never raised any objection challenging validity of the notices.

In view of the above contents of ST 13, we do not find any merit in the contention of counsel for the dealer as regards



validity of the notices calling upon the dealer to produce the records mentioned therein.

Stock transfer considered as Inter-state Sale

Evidence of Gate Passes

9. The Assessing Authority observed that the representative of the Dealer was asked to produce remaining gate pass books, but he informed that the old record was not available though he tried his best to trace the same.

Learned Assessing Authority went on to observe that perusal of the gate passes revealed that the goods had been sent to branches in pursuance of orders received from customers like Fedco, BGM and NTPC etc., by the branches, in other respective States. He concluded that the said branches had got orders from the dealer(s) mentioned in the gate passes and thereafter the said outside branches placed order with Delhi Branch to send the goods to them for onward transfer to those dealers, and as such the said transfer was inter-state sale and not a plain transfer.

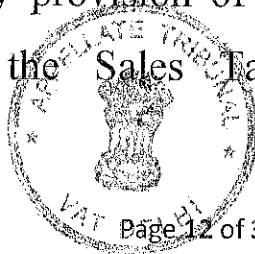
Learned Counsel for the appellant submitted that gate passes are for internal record of a company to keep track as to how much stock went out and that simply on the basis of gate pass stock transfer could not be considered as inter-state sales.



Learned counsel for the dealer referred to decision in **Tata Engineering & Locomotive Co. vs. Assistant Commissioner of commercial taxes and Another 1970(1) SCC 622**, to contend that the Assessing Authority was required to look into each transaction before arriving at the aforesaid conclusion that it was a case of inter-state sale or stock transfer.

In the alternative, Learned counsel for the Dealer-Appellant has submitted that even if it is assumed for the sake of arguments that the said transactions were inter-state sale, the Assessing Authority could make assessment in respect of the said five gate passes treating them as inter-state sales transactions.

10. On the other hand, learned counsel for the Revenue submitted that despite sufficient opportunity, the dealer/its representative failed to produce rest of the gate passes simply on the ground that old record was not available. As further submitted by the learned counsel for the Revenue, the dealer and its authorised representative of dealer failed to produce the relevant record, i.e. other gate passes, before the Assessing Authority or even before Learned OHA. Therefore, Learned Counsel for the Revenue contended that actually this is a case of inter-state sales covered by provision of Section 3(a) of Central Sales Act and the Sales Tax Officer correctly framed



assessment which came to be correctly upheld by Learned OHA.

11. In **Tata Engineering case (Supra)**, Hon'ble Apex Court observed in the manner as:-

“Another serious infirmity in the order of the Assistant Commissioner was a matter which even the Advocate General quite fairly had to concede) that instead of looking into each transaction in order to find out whether a completed contract of sale had taken place which could be brought to tax only if the movement of vehicles from Jamshedpur had been occasioned under a covenant or incident of that contract the Assistant Commissioner based his order on mere generalities. It has been suggested that all the transactions were of similar nature and the appellant's representative had himself submitted that a specimen transaction alone need be examined. In our judgment this was a wholly wrong procedure to follow and the Assistant Commissioner, on whom the duty law of assessing the tax in accordance with law was bound to examine each individual transaction and then decide whether it constituted an interstate sale exigible to tax under the provisions of Act.”

Decision in **Indian Rayon and Industries Ltd. v. Commercial Tax Officer, Mylapore Assessment Circle, Chennai and Ors.**, 2010 SCC online Mad 6449, cited by learned counsel for the applicant was also based on decision in **Tata Engineering's case (supra)**.

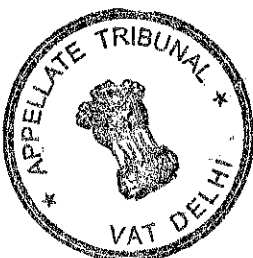
It is true that the Assessing Authority is bound to examine each individual transaction and then decide whether it constitutes an interstate sale exigible to tax under the provisions of Act.

At the stage, we deem it appropriate to refer to the observations made by the Assessing Authority, as regards the gate passes. Same read as under :-

“The officers from the Enforcement Branch visited dealer’s premises on 03.10.1996 for survey, etc. They found certain papers, registers and were surrendered to the visiting officers at its various places/additional places of business. The dealer was confronted with such material. He produced sales bill, Sales Tax Account Registers, Stock register and other excise record. Some papers were verified from such records.

One gate pass book containing gate passes No. 501 to 533 written (rest blank) was also surrendered and gate pass No. 502 dated 10.09.96 reads GZBD(NTPC) and it has a quantity 4000 pack.

The dealer explained that these goods were transferred to Gaziabad Branch and the bill was raised by the Gaziabad Branch in favour of NTPC. Similarly Gate No. 504 and 13.09.96 containing 4000 packs to Faridabad (Fedopnp). It was explained that these goods were sent to Faridabad Branch and bill was raised by them in favour of (Fedo PNP).



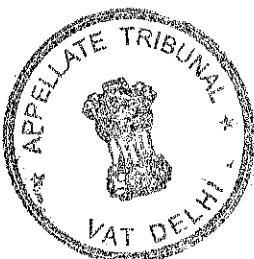
The gate pass No. 515 dated 24.09.96 reads Faridabad (BGM India) for 2000 pack, he explained that goods were sent to Faridabad Branch and the bill was raised by them in favour of BGM India.

Similarly Gate Pass no. 517 & 518 reads the same as gate pass no. 504. The gate passes mentioned above were entered in the record as transfer to the branches mentioned above. He was also asked to produce remaining gate pass books, but he informed that the old record was not available though he tried best to trace the same.

The above mentioned gate passes particulars revealed that the goods have been sent to branches in pursuance of the orders received from customers like Fedco, BGM and NTPC, etc. by the branches in their state. Its and thereafter the these outside branches placed order on Delhi Branch to sent the goods to them for onward transfer to those dealers. Therefore, such types of transfer cannot be deemed as a plain transfer but inter-state sale to such dealer whose names are mentioned in these gate passes.

These are gate passes for month of Sept. only and similarly in other months of year for which gate passes were not available such sales cannot be ruled out.

In view of the above it is clear that the dealer is making sales interstate but showing it mere transfer to the branches. Keeping in view these examples 10% of the transfer are taken as interstate sale and taxed @10% under the Central Sale Tax Act."



12. As noticed above, the Assessing Authority, observed in the assessment order that five gate pass nos. 501, 502, 504, 517 and 518, were found to have been entered in the record as transfer to the branches, i.e. Ghaziabad Branch, Faridabad Branch.

As rightly pointed out by counsel for the Revenue despite sufficient opportunity, representative of the dealer failed to produce rest of the gate passes simply on the ground that old record was not available.

The fact remains that even on subsequent occasions and opportunities, the dealer and its authorised representative of dealer failed to produce the relevant record, i.e. other gate passes, before the Assessing Authority or even before Learned OHA.

The only submission put forth on behalf of the dealer before Learned OHA, as regards gate passes, was that same are internal record of the company and evidence as to how much stock had gone out.

Learned OHA observed in the impugned order that gate pass is important in case of stock transfer transaction to other branch.

As observed by the Assessing Authority, as regards gate pass No. 502; 504; 515, the goods were transferred to Ghaziabad



Branch and bill issued by said branch in favour of NTPC; in respect of goods transferred to Faridabad Branch, bills were issued by the said branch in favour of FEDCO PNP and BGM India; that similarly, gate pass No.517 and 518 had similar transactions.

In this way, the Assessing Authority took up each transaction one by one while passing detailed assessment order.

Undisputedly, the dealer was asked to produce remaining gate pass books, but the representative informed that old record was not available, despite best efforts. The fact remains that this record was not made available ~~before~~ subsequently before the Assessing Authority and before Learned OHA, for which reasonable opportunities were undisputedly granted to the dealer.

The above gate passes pertained only to September, 1996. For want of production of record, i.e. other gate pass books by the dealer, Learned Assessing Authority was justified in observing that possibility of such sales in other months of the year, i.e. from April, 1996 to August, 1996 could not be ruled out.

In the given facts and circumstances, decision in **Samsung's case** (supra) cited on behalf of dealer does not come to the aid of the dealer.



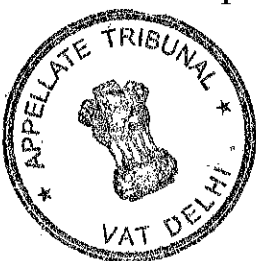
As a result, we find merit in the contention raised by Learned Counsel for the Revenue that in the given facts and circumstances, actually this is a case of inter-state sales covered by provision of Section 3(a) of Central Sales Tax Act and the Sales Tax Officer correctly framed assessment which came to be correctly upheld by Learned OHA.

Non production of relevant record

13. As regards observations made by the Assessing Authority about non production of certain records by the dealer, Learned counsel for the dealer-appellant submitted that the concerned officer of the dealer was on leave and as such, requisite record could not be produced before the Assessing Authority. The contention is that this being the situation, no adverse inference could be drawn by the revenue against the dealer.

As per assessment order the representative of the dealer submitted that the concerned officer, who was having the record, was on leave when the record could not be produced. It is not being said that assessment proceedings were completed in a day.

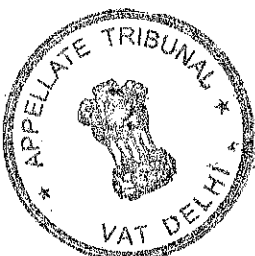
There is nothing to suggest that said employee having custody of record remained on leave for such a long period that the dealer could not produce the requisite record even subsequently.



Learned counsel for the Revenue has rightly submitted that there is nothing on record to suggest as to who was the concerned officer, having custody of the record, and that it is not believable that when one official proceeds on leave, the record would not be produced before the competent authority for its perusal and that too despite several opportunities.

Learned Counsel for Revenue has referred to the provisions of section 78 of DVAT Act and rightly submitted that the burden of proving any matter in pursuance u/s 74 of DVAT Act or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under the law shall lie on the person alleged to be liable to tax amount. As rightly argued, the dealer failed to explain, by bringing on record cogent and evidence material, non production of record for perusal.

The fact remains that survey was conducted in ^{the} presence of authorized representative of the dealer and requisite record was to be produced before the enforcement team, but the dealer failed to produce the same without any reasonable justification at that time or subsequent thereto. No material was brought on record to suggest that such and such person was the dealing clerk, who happened to be on leave for such and such period or that that he was the only custodian of the record.



In ^{the} absence of any satisfactory explanation or proof in this regard, it can safely be said that the requisite record was deliberately not produced by the dealer, despite opportunity, for perusal and for explanation.

In **Maggy Sunny v. State of Kerala** (2012) 14 VSTI B-372 (Kerala), some unaccounted slips were also seized. Assessment was made. Hon'ble High Court held that burden of proof was upon the dealer to establish that all slips were accounted for as sales in the books of accounts.

In view of the above discussion, we do not find any merit in the contention raised by learned counsel for the appellant.

Three Entries in diary seized from the business premises

14. As regards the diary, Learned Counsel for the appellant has submitted that as observed by the Assessing Authority, names of dealers written as BAWD & ML VIG Contractor respectively, could not be explained by the official of Appellant, and as such the Assessing Authority could not place reliance on non explanation.

As per impugned order passed by Learned OHA, on behalf of the dealer it was submitted before him that this diary was provided to the salesman of the dealer to take note regarding availability, requirement, order, prospective deal, etc; and that only after satisfying all the conditions, salesman used to



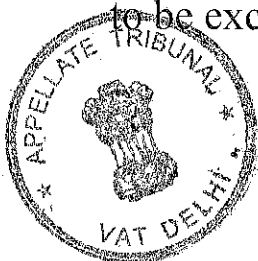
finalize the deal, and that merely because the salesman took orders, same could not amount to sales.

Regarding these entries in the diary, the observations made by learned Assessing Authority read as under:

“One dairy was also in this record. Page No. 14 of this diary reads MRG-20Kg.- 2142-20.09.96 and etc. The dealer state that MRG stand for Magat Ram Gupta and the stock of the batches was lying with the dealer but same has not be returned by the MRG to Company. Page-15 of the same dairy reads BAWD having a quantity of various paints. He stated that it is order of some dealer but the names of dealer not known. Similarly page No. 35 of the same dairy reads Suresh (J.E), Sh. Paramjeet (J.E.), CPWD, on the account of M.L. Vig contractor, 20x20 white. He stated that it is order from some one but name not known neither supply made. These pages were not satisfactorily explained as evident from the above explanation.”

We find that as regards transactions at page nos.14 and 15, Assessing Authority was justified in observing that same were not satisfactorily explained by the dealer.

However, as regards entry at page 35 of the diary, when the representative stated that neither name of the party was known nor supply was made, for want of any better evidence, Assessing Authority was not justified in taking this entry into consideration as a transaction of sale. Therefore, this entry is to be excluded for the purpose of assessment.



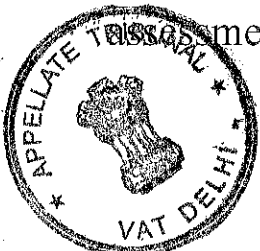
Loose Papers ✓

15. As per assessment order, one loose paper in the form of internal letter head was seized. In the assessment order, it has been observed as under :-

“A loose paper No.1 dated 12.08.96 in shape of internal letter head shows some transactions from Ashok Kumar to Pyare Lal directing to take Rangoli A.E. Base 36x4 lt. The dealer stated that these goods were returned back as these were purchases by M/s Mahabir Pd. And Co. But no paper of such return back were produced. The visiting team also visited Janak Puri Branch and there they found certain loose papers.”

As regards this transaction, in absence of production of any record by the dealer-appellant, the dealer could request the Assessing Authority to call upon the other dealer namely, M/s Mahabir Parsad and Company, to produce record pertaining to supply of goods and return thereof. Nothing has been brought to our notice to suggest that any such request was made by the dealer before the Assessing Authority. In absence of any such request by the dealer and for want of any proof regarding return of the goods by the said company, to the dealer, Assessing Authority has rightly taken into consideration said transaction.

No such request appears to have been made even before learned OHA during pendency of first appeal. So, the assessment framed in this regard cannot be said to be invalid.



**Suppression of sale at Janak Puri branch-worth
Rs.11,63,867/-.**

16. Learned Counsel for the appellant has contended that in the given facts and circumstances it could not be held to be a case of suppression of sale at the said branch.

At the same time, Learned Counsel for the appellant submitted that even if it is assumed for the sake of arguments that it was a case of suppression of sale of Rs. 11,63,867/- the demand could not to the tune of Rs. 3,18,58,400/- and rather it comes to Rs.27,72,55,269/-.

At the stage, the observations made by the Assessing Authority on this point, are reproduced hereunder :-

“The paper No. 1 a challan No. 974 dated 29.09.96 is delivery challan in favour of Spread Coating in account with Berger Paint Ltd. The details of goods transfer from Udyog Nagar, Gujrat to Delhi Berger and similarly another challan No. 8190 dated 29.09.96 of similar No. 8190 dated 29.09.96 of similar nature was also confronted to the dealer. He stated that the concerned officer was on leave and record was with him and the same could not be produced and remained unexplained. The physical stock taking was also made by the visiting team and total stock of 4249.5 Kg. 192 Kg. of material was available, whereas the quantity given by the dealer at the time of assessment as on 03.10.96 at Janka Puri was 116823 Lt. & 43726 Kg. There is thus variation the both the figures. It shows the concealment of the sale/purchase and nothing else. It has also been reported that



the challan mentioned above were not entered the record of the dealer and the suppression as per the report at the Janak Puri Branch comes to Rs. 1163867/-.”

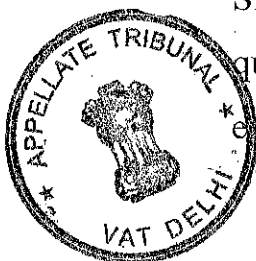
In this regard, suffice it to state that no explanation has been furnished on behalf of the dealer as regard this variation in the figures. It was for the dealer to explain said variation. In the impugned order passed by learned OHA, this variation was sought to be justified with the submission that stock reconciliation duly certified by the auditors of the company was made available to the Assessing Authority and that all the challans were duly entered in the books of accounts.

No such stock reconciliation ^{duly} during, certified by auditors of the company has been brought to our notice. In absence thereof, it cannot be said that it was not a case of variation as observed by the Enforcement Team and found by the Assessing Authority.

Observations regarding Okhla Branch.

17. As is available from the assessment framed by learned Assessing Authority, in this regard he observed as under :

“Besides the dealer could not explain some of the paper taken from Okhla Branch. Sl. No. 51 & 54 are mentioned as bill. The dealer could not produce the record to explain the figures. Similarly pages 62 is the detail of good in value as well as in quantity he could not produce any record to give the satisfactory explanation. Similarly Page No. 87, 12/12 Rangoli Raw Material



containing the quantity also remained unexplained. Sl. No. 166 which contains the details of consignment dispatched and Page No. 170 containing the similar details, 171 & 172 of similar nature and page No. 178 also remained unexplained on the ground that his record was with in charge of Spread Coating Unit and he was not available.”

In this regard, suffice it to state that in absence of complete details and proper discussion about the transactions recorded in these pages, legality of assessment framed in respect thereof cannot be judged. So we hold that same are to be excluded from consideration while making calculation.

18. While framing assessment, learned Assessing Authority observed that the visiting team also reported the physical stock position but could not calculate variation at various places since the rates list were not provided.

Learned counsel for the appellant has submitted that rate list must have been available with the Department and the valuation could be calculated accordingly.

In this regard, suffice it to say that notification or List depicting Tax rate may be available with the department, but the rate list was to be submitted by the dealer. Since the representative failed to provide the same, how could the team calculate valuation of the physical stock. There is nothing in the assessment order that the dealer provided any rate list to

the learned Assessing Authority. Therefore, Learned



Assessing Authority was justified in framing assessment, for the reasons recorded and in the manner indicated therein.

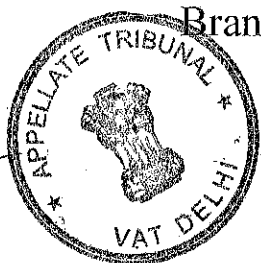
Trading Account as on 3/10/1996 was not in terms of value

19. As is available from the assessment orders, the dealer was issued ST-32 & 31 and he filed trading account as on 3.10.96 in terms of quantity and not in value.

In this regard, it may be mentioned that there is nothing on record to suggest that soon after the survey the dealer provided to the department Trading Account as on 3.10.1996 in terms of value. There is also nothing to suggest that before the Assessing Authority or before Learned OHA, the dealer submitted or opted to submit trading account in terms of value. From non production of such a trading account, i.e. depicting value instead of quantity only, despite ample opportunities, adverse inference has to be drawn against the dealer. Therefore, we do not find any merit in the contention raised by learned counsel for the appellant in this regard.

Exemptions allowed by the Assessing Authority

20. It is significant to note that while making assessments, the Assessing Authority even allowed to the dealer, benefit of the statutory forms above Rs. 1 lac got verified from concerned wards, credit in respect of ST-5/35 and credit on the basis of Branch transfer in view of F forms as shown in assessment

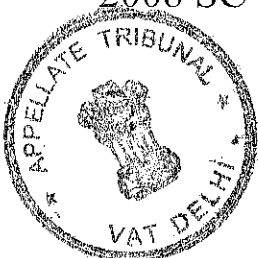


order passed under CST Act. This shows that the Learned Assessing Authority did not frame assessments arbitrarily and simply keeping in view the interest of the department or Revenue, and rather held the dealer entitled to exemptions admissible under the law.

10% of stock-transfer-transactions considered as inter-state sales

21. In the Assessment Order, Learned Assessing Authority considered only 10% stock- transfer- transactions to the branch of the dealer-appellant, as inter-state sales and levied tax @ 10% under CST Act, by way of the examples given in the assessment framed.

Learned Counsel for the dealer-appellant has contended that the Assessing Authority has not given any basis or reason as to why he considered only 10% of the transfers as inter-state sales and as to why he did not consider some other percentage of the said transactions of stock transfers as inter-state sales, and as such the impugned assessment deserves to be set-aside. In support of this contention reliance has been placed on decision in **Kranti Associates Pvt. Ltd. V. Masood Ahmed Khan**, 2010(9) TMI 886 (SC); **Chandna Impex Pvt. Ltd. V. Commissioner of Customs, New Delhi**, 2011 (269) ELT 433 (SC) and **State of Rajasthan v. Rajendra Prasad Jain**, AIR 2008 SC 1589.



As regards the percentage of 10% considered as interstate sales, in the given facts and circumstances, when the dealer withheld the documents or record available, Learned Assessing Authority had no option but to do guess work, and Learned OHA rightly upheld the assessment framed in this way.

Increase in sale by 10% of the net GTO

22. Learned Counsel for the appellant has referred to the impugned assessment whereby the Assessing Authority enhanced the sale of the dealer by 10% of the net GTO (after deducting the stock transfer figure of GTO) and levied tax under the local act @ 10%, with interest and after considering 10% of the transfers, as mentioned in the sales summary to be central sales levied tax @ 10% under the Central Act.

Contention is that Assessing Authority has framed assessment on this point without giving any reasons and as such the same cannot be termed to the best judgment assessment. In this regard, reliance has been placed on following decisions:

- (1) Varshney Packaging Corporation v. Commissioner, Trade Tax, U.P. Lucknow, 2016 SCC Online All 1294;
- (2) State of Kerala v. C. Velukutty, (1966) 60 ITR 239 (SC);
- (3) V.B. Gadkari v. Sales Tax Officer, Indore, 1984 SCC Online MP 206; and



(4) Raghubar Mandal Harihar Mandal v. State of Bihar, AIR 1957 SC 810.

In this regard learned Assessing Authority observed in the impugned assessment as under :

“It was further explained that there has not been any suppression as most of the record has been explained the remaining could not be explained on account of the officer in charge on leave, as the record was with him. The above mentioned record which pertain to sale and purchase stock was neither found as recorded in its books nor satisfactorily explained cannot be over looked moreover large variation has been noticed at one of the branches and similarly all other places of the business. Therefore version of the dealer that there is no suppression is not convincing one. In view of finding mentioned above like variation in stock, unsatisfactory explanation of the adverse material discussed above, interstate sale in the shape of transfer of goods procedure, the return version of the dealer is beyond satisfactory and reliability and thus needs to be considered accordingly. The return version of the dealer is, therefore rejected. Its sale is enhanced by the 10% of the net GTO after deducting the stock transfer figure of GTO and taxed under the Local Act @ 10% along with the interest.”

For the above said reasons, and in view of the above discussion, when the Assessing Authority rejected the version made available by the dealer in its return, he was justified in enhancing the sale by 10% of the net GTO, in the manner

indicated above. In the given facts and circumstances of this



case, decisions cited on behalf of the dealer do not help the dealer in support of the contention that the assessment is arbitrary on all aspects.

Penalties

23. While challenging the levy of penalty, Learned counsel for the appellant has contended that the assessment order relating to tax, interest and penalty is consolidated assessment, without specifying as to under which provision of law the said penalty was imposed, and as such the assessment regarding penalty deserves to be set-aside. In support of his contention, Learned Counsel for the appellant has referred to decision in ~~As per~~ ~~decisions~~ in **Amrit foods v. CCE**, (2005) 190 ELT 433 (SC).

Similarly, while challenging penalty of Rs. 20,00,000/- imposed under Central Sales Tax Act, Learned Counsel for the appellant has contended that nowhere in the assessment order it has been specified that the same was being levied under such and such provision of law, and for want of specification the same deserves to be set-aside.

It is significant to note that before making assessments, two separate notices were issued by the Sales Tax Officer-Enforcement -Assessing Authority to the dealer. It was specified therein that the dealer was required to attend the office also to show cause as to why a penalty under section 9

of Central Act read with section 55 of Delhi Act and section



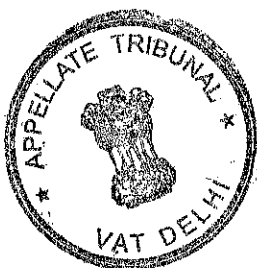
55 of Delhi Act in respect of the tax period 1996-97 should not be imposed.

Here, in the assessment orders, the Assessing Authority nowhere specified as to under which provision of law of CST Act or DST Act, penalty was being levied or as to the exact nature of the contravention of the said Act.

The notice was served for the offence u/s 55 of DST Act, but the Assessing Authority levied penalty for the offence under section 56 of DST Act, i.e. on the ground of concealment of sale, evasion of tax, incorrect filing of returns and showing central sales as branch transfer. So, we find that this is a case where the dealer was not apprised of the specific allegations and the offence, for which he was called upon to explain and then face proceedings.

Punishment^{was} awarded by way of penalty for a different offence, in respect of commission of which no show cause notice was issued. So, this is a case where penalties have been levied in violation of the principle^s of natural justice.

Consequently, the assessment regarding levy of penalty and the impugned order passed by Learned OHA upholding levy of penalty are hereby set-aside.



No other argument was advanced by learned counsel for the parties. From the compilation submitted on behalf of the dealer, decisions from Sr.No.1 to 13 only were cited.

Result

24. As already noticed above, First Appellate Authority remanded the case to the Assessing Authority only ^{on} one point, i.e. to consider 2 'C' Forms and 1 'ST-35', which the dealer could not submit earlier, i.e at the time of assessment. The matter stands remanded with the direction that the Assessing Authority shall afford to the dealer, opportunity to submit the said forms and pass fresh order in accordance with law.

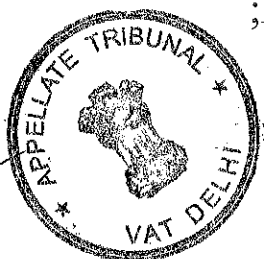
As regards levy of tax and interest, in view of the findings recorded above, the other appeal is partly allowed and the Assessing Authority is directed to issue assessment after making calculations afresh, while excluding the following turnover or the value(s) which, as discussed above, should not have been taken into consideration:

(A) Pertaining to Janak Puri Branch

As regards entry at page 35 of the diary

(B) Pertaining to Okhla Branch

Sl. No. 51 & 54 ; page 62 ;Page No. 87, Sl. No. 166 ;Page No. 170 ;171 & 172 ; page No. 178 .




In view of the above discussion, the **appeal challenging the penalties** is allowed.

25. Dealer to appear before the Assessing Authority on 18.5.2022.
26. 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.

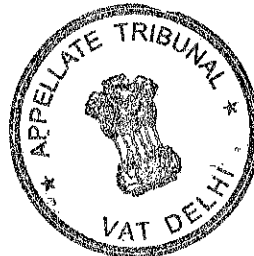
Date : 02/05/2022


21/5/2022

(Rakesh Bali)
Member (Administrative)


21/5/2022

(Narinder Kumar)
Member (Judicial)



Appeal No. 1568-1569/ATVAT/11/4284-91

Dated: 5/5/22

Copy to:-

- | | |
|---|----------------|
| (1) VATO (Ward-9) | (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

