

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

Stay Application No.: 357-371/22 In

Appeal No. : 368-382/ATVAT/2022

Date of Order: 11/05/2022

M/s. Oswal Industrial Enterprise Pvt. Ltd.
(formerly known as Oswal Retail Pvt. Ltd.),
305, Ansal Bhawan, 16, K.G. Marg,
New Delhi-110001.

.....Appellant- *Appel' court.*

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. Gaurav Gupta.

Counsel representing the Revenue : Sh. P. Tara.

ORDER

(On Applications U/s 76(4) of DVAT Act)

1. This common order is to dispose of 15 applications filed by the dealer-appellant with above captioned Appeals No. 368-382/2022, with prayer that the said appeals be entertained without calling upon the dealer to pay any amount towards demand in dispute, by way of pre-deposit.



Narinder Kumar
11/5/22

Rakesh Bali
11/5/22

2. By way of appeals, dealer-assessee-objector has challenged order dated 31/12/2021 passed by learned OHA - Special Commissioner. By way of common impugned order, learned OHA disposed of seventeen (17) objections filed by the dealer. The dealer was earlier registered under the name and style Oswal Retail Pvt. Ltd., vide TIN No. 07840280049. Five objections were filed to challenge notices of default assessment of tax and interest framed u/s 32 of DVAT Act, whereas 12 objections were filed against notices of assessment of penalty u/s 33 of DVAT Act. All the assessments were framed on 29/06/2011.

The matter pertains to tax period from April-2008 to March-2009.

3. The additional demand of tax, interest and penalty, as per table available in the impugned order reads as under:

| S. No. | Tax Period | Impugned Notices Ref. No. | Disputed Amount of Tax & Interest [In Rs.] | Disputed Amount of Penalty [In Rs.] |
|--------|------------|-------------------------------------|--|-------------------------------------|
| 1 | April-2008 | 04031378112/575 | NA | 10,000 |
| 2 | May-2008 | 040313431112/575 & 040313801112/575 | 49,803 | 38,492 |
| 3 | June-2008 | 040313861112/575 | NA | 10,000 |



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|----|-------------|-------------------------------------|----------|----------|
| 4 | July-208 | 040313931112/575 | NA | 10,000 |
| 5 | August-2008 | 040314021112/575 | NA | 10,000 |
| 6 | Sep-2008 | 040313541112/575 & 040314061112/575 | 27,995 | 29,987 |
| 7 | Oct-2008 | 040314111112/575 | NA | 10,000 |
| 8 | Nov-2008 | 040313601112/575 & 040314171112/575 | 4,862 | 20,000 |
| 9 | Dec-2008 | 040313691112/575 & 040314241112/575 | 5,828 | 20,000 |
| 10 | Jan-2009 | 040314271112/575 | NA | 10,000 |
| 11 | Feb-2009 | 040314311112/575 | NA | 10,000 |
| 12 | March-2009 | 040313751112/575 & 040314361112/575 | 8,69,538 | 6,65,408 |

4. Vide impugned order, learned OHA has-

- (a) dismissed all the objections pertaining to penalty and relating to April-2008 to March-2009, thereby upholding levy of penalty only to the extent of Rs. 10,000/- u/s 86(9);
- (b) dismissed all the objections as regards default assessment of tax, interest and penalty, relating to the months of May-2008, November-2008 & December-2008;



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- (c) allowed all the objections against notice of default assessment of tax and interest, relating to the month of September-2008 and also the assessment of penalty, relating to the said month [except penalty of Rs. 10,000/- u/s 86(9) of DVAT Act];
- (d) partly allowed the objections against notice of default assessment of tax and interest, relating to the month of March-2009 and also the assessment of penalty, relating to the said month [except penalty of Rs. 10,000/- u/s 86(9) of DVAT Act], and accordingly, remanded the matter to learned Assessing Authority, due to reasons recorded in para 17 and 18 of the impugned order.

5. Arguments heard. File perused.

Default assessment of tax, interest and penalty in respect of tax period May, 2008-09.

6. As regards these assessments, Learned OHA has observed that second proviso to section 28 of DVAT Act could not be made applicable with retrospective effect.
7. Learned counsel for the applicant has submitted that while filing return on 28/6/2008 stock transfer sale was inadvertently shown, whereas actually it was not a case of stock transfer sale and rather case of inward transfer from a unit of the company – dealer at Ludhiana to Delhi and that this fact transpired only after audit by the department and led to filing of revised return on 28/2/2011. The submission is that in this situation, in view of circular issued



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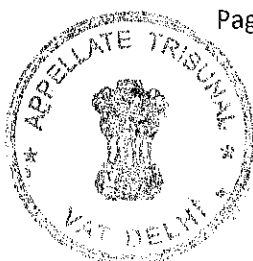
by VATO (Policy) in the year 2006, and second proviso of section 28 of DCVAT Act, the revised return could be legally filed by the appellant.

Admittedly, revised return was filed on 28/2/2011. Learned counsel for the applicant has referred to circular dated 31/5/2006 issued by VATO (Policy-I), clarifying that revised return under Rule 29 of DVAT Act-2004 could be filed in case of clerical error or omission, which had no effect / change in the tax already deposited by the dealer.

Learned counsel ^{for Revenue} has referred to all the three returns and submitted that in the last mentioned revised return, totally a different amount was shown in the column R.11.3, which falsify^{-ies} the case of the dealer that it was a case of clerical error or mistake.

8. The question involved in these appeals pertaining to May, 2008-09 is as to what led the dealer – applicant to file the earlier revised return dated 11/7/2008 and as to whether any document or explanatory note was attached to the subsequent revised return of 28/2/2011, as is being submitted by counsel for the applicant in the course of arguments.

Another question involved here is if the dealer manipulated the records and filed the revised return on 28/2/2011 only after the audit report was submitted by the audit department.



Default assessments of tax and interest u/s 32 & 33, relating to tax period Nov. & Dec., 2008.

9. Learned counsel for the applicant has referred to certificate dated 17/8/2011 issued by Textile Engineer of the dealer of Vardhman Polytex Ltd., to the effect that (16 KWVG) is 100% cotton yarn, whereas "16 KWVGLYCRA" is a commodity in which percentage of spun yarn of cotton is 94.46% and that of lycra is 5.54% and that in view of the certificate, the transactions which took place vide bills No. 1780, 1801, 1897 & 1898, were tax free transactions / sales.

On the other hand, learned counsel for the Revenue has submitted that in the subsequent invoices which find mentioned in the default assessment of tax and interest, it was nowhere specified that the items sold were cotton and silk yarn in hank and cone, and as such the assessment has been correctly framed and upheld in the objections.

Learned OHA has observed that except the abovementioned certificate no document was filed to substantiate the said case of the dealer and further that these two items do not find mentioned in entry No. 10 of Schedule-I of DVAT Act.

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Therefore the question involved is as to whether the above said two items were not exigible to tax in view of entry No. 10 of Schedule-I of the Act.

Penalty u/s 86(9)

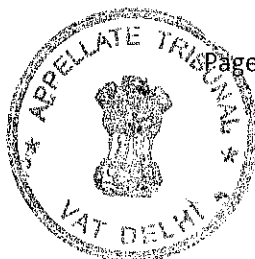
10. As regards penalty u/s 86(9), learned counsel for the applicant has contended that the ^{last}/revised return was filed by competent person authorized by the Board of Directors, in view of provisions of section 29 of DVAT Act and the definition of "Principal Officer" as defined u/s 2 (35) of Income Tax Act-1961, and as such the same can be said to have been duly signed and verified by authorized dealer.

On the other hand, learned counsel for the Revenue has submitted that at the time of registration of the company – dealer name of the said signatory to the revised return, was not submitted to the department and as such the filing of the return under the signatures of the said signatory cannot be said to be due signing and verifying of the return by the authorized signatory of the dealer. In this regard, reference has been made to DVAT Form 04D and DVAT 07D.

In view of the above submissions, the question involved is if the said signatory was competent to sign and verify ^{last-revised} return on behalf of

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the dealer, even though e-version of the return was also submitted separately.

11. Sub-section (4) of section 76 of the Act provides that no appeal against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person.

As per first proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

On the point of admission of appeal with or without pre-deposit, in **Ravi Gupta Vs. Commissioner Sales Tax**, 2009(237) E.L.T.3 (S.C.), it was held as under:-

“It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to



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be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

Furthermore, in the case of **UOI v Adani Export** [2007(218)ELT 164(Supreme Court)], Hon'ble Apex Court has held that following are the three aspects to be focused while dealing with the application for dispensing of pre-deposit:

- (a) prima facie case,
- (b) balance of convenience, and
- (c) irreparable loss.

The discretion of stay has to be exercised judiciously by the Appellate Authority.

12. In the given facts and circumstances, we deem it a fit case to entertain the appeal, subject to deposit Rs. 25,000 in total, as against the disputed demand, by way of pre deposit. Accordingly, appellant-applicant to deposit by way of pre-deposit Rs. 25,000/- of the disputed demand of tax, interest and penalty, within 25 days from today. Counsel for appellant-applicant to apprise Appellate



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Tribunal and counsel for the Revenue regarding compliance with this order, well in time, so that on the next date i.e. 27/6/2022, appeals are taken up for final arguments. These applications u/s 76(4) are disposed of accordingly.

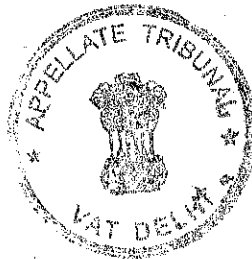
13. Be put up on 27/06/2022 for final arguments.
14. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned web-site.

Announced in open Court.

Date : 11/5/2022.


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)

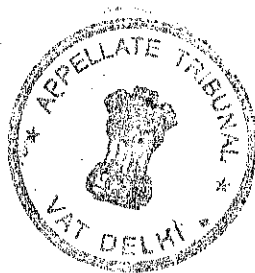


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in Appeal No. 368-382/ATVAT/22

Dated: 12/5/22

Copy to:-

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| (1) VATO (Ward-) | (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. | |




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