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

Appeal No. 277/ATVAT/2012
Date of Judgment : 25/04/2022

M/s. Food Processing Equipment Co. Pvt. Ltd.,
A-3/6, Laxmi Building, Acharya Niketan,
Mayur Vihar, Delhi – 110 091. .....Appellant

v.

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

Counsel representing the Appellant : Sh. Rajesh Jain.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. The above captioned appeal No. 277/ATVAT/12 came to be filed on 04/06/2012. The dealer-appellant-assessee is engaged in the business of undertaking turnkey projects.

2. In June, 2003 Municipal Corporation of Delhi (MCD) invited bids to set up a modern slaughter house at Ghazipur, Delhi. MCD awarded contract to the dealer, for a total price of Rs. 65 Crores. However, subsequently, MCD is said to have increased the capacity from 2500 to 5000 animals to be

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slaughtered per day, even though initially the project was to set up the slaughter house with the capacity to slaughter only 2500 animals per day.

3. The dealer put forth the change cost of the project, with the change in the aforesaid capacity, to Rs. 155 Crores but ultimately reduced it to Rs. 150 Crores.

4. Hon'ble Apex Court was seized of the matter in CA No. 3769/96 titled as **Buffalo Traders Welfare Association v. U O I Ors**. During its pendency, on the point of settlement of cost of the project, Hon'ble Apex Court directed the dealer to continue with the civil/ electrical work and ~~to~~ import of additional machinery.

5. The case of the dealer is that on 13/11/07, Learned ASG undertook before the Hon'ble Apex Court that MCD shall directly pay statutory taxes to the Assessing Authorities, on demand. The undertaking was accepted and accordingly, Hon'ble Apex Court directed the MCD to pay the statutory taxes directly to the Revenue as and when demand was raised by them.

6. On 14/01/2008 and thereafter on 01/02/2008 dealer-appellant-assessee is stated to have requested the

Commissioner, Department of Trade and Taxes to frame assessment of tax. Thereupon, on 07th & 08th March 2008, forty default notices of assessment of tax, interest and penalty u/s. 32 & 33 of DVAT Act came to be issued to the dealer. The demand pertained to tax periods 2005-06, 2006-07 & 2007-08 (only up to December 2007).

7. Feeling aggrieved by the said default notices of assessment of tax, interest and penalty dated 12/05/2008, the dealer filed 40 objections before Ld. Additional Commissioner- III/OHA.

8. It was on 11/07/2008 that the dealer learnt from the concerned VATO that MCD had deposited Rs. 4,98,76,391/-.

9. Vide report dated 27/08/2008, the committee constituted by the Hon'ble Apex Court, determined total cost of the aforesaid project to be Rs. 132.33 crores. The committee is also said to have recommended payment of taxes (VAT/Service tax) and land filling charges, over and above the cost of Rs.132.23 crores.

10. As regards the forty objections filed by the dealer, Ld. OHA disposed of the same on 31/12/08 vide a common order, thereby remanding the matter to the Ld. Assessing Authority and at the same time for framing the default assessment, on

filing of revised return in the light of determination of cost of project i.e. Rs. 132.23 crores plus other charges. The relevant portion of the order passed by Ld. OHA reads as under:

> "Secondly, the dealer filed the revised return and thereby decreased his output tax or increased the input tax, for which as per sec. 28(2), the dealer is required to file objection before filing the revised return. In the present case the dealer has not filed the statutory objection and instead directly filed the revised return. For this lapse the VATO has rejected the revised returns and has taken into account a return having higher value. Also in some cases the sale declared in the DVAT-31 is different from that given in the return and while making the default assessment, VATO has considered the higher value. Now, in order to ascertain the actual value, the VATO may check finally revised returns, DVAT-31 from the books of accounts and determine the actual turnover in each tax period.
>
> In view of the provisions of Sec. 28(2), the dealer was required to file objection before filing revised returns, but since the dealer has already revised the returns and filed the objections, now it would be unfair to ask him to file the same returns again. The revised returns filed by him may be taken on records. The dealer is allowed to file revise return, if required, as per the decision of the Supreme Court.
>
> The dispute between the objector and the contractee went in litigation before the Hon'ble Supreme Court and the Apex Court finally ascertained the total cost of the project at Rs.

132.23 crore. The Hon'ble Court further added that over and above the amount determined by the committee the taxes like VAT and service tax, as applicable, and land filing charges at Ghazipur and the charges for removal of scrap at Idgah, if any, will have to be paid extra.

In the end, since the Hon'ble Supreme Court has already decided the project cost along with other payables, the dealer may file his revised returns after ascertaining his liability and deposit the admitted tax immediately in the department as per the revised return filed. Keeping in view the observations of the Hon'ble Court, the VATO while scrutinizing the returns, shall keep in mind the observations of the Hon'ble Court, for determining the actual turnover of the dealer for any tax period.

The liability of interest and penalty may be worked out, keeping in view the deficiency in tax, the other provisions of DVAT Act and Rules on subject."

11. On the point of interest and penalty levied by the Ld. Assessing Authority vide orders of March 2008, Ld. OHA observed in the manner as :

"The dealer has filed returns in the department in time except for the period October and Nov. 2005. The dealer claimed to have filed the returns on the basis of the amount received by him whereas the VATO considered the amount as given in the DVAT 32 filed by the dealer. As per Section 5(2) of the DVAT Act 2004 dealing with the taxable turnover, say that

"In the case of turnover arising from the execution of a work contract, the amount included in the taxable turnover is the total consideration paid or payable to the dealer under the contract excluding the charges towards labour, services and other like charges, subject to such conditions as may be prescribed."

In view of the above, the VATO has rightly taxed the amount of the bills raised by the dealer as it represents the consideration payable to the dealer.

The VATO taxed the dealer mainly for two reasons, firstly the dealer had not paid the tax admitted in the returns and had carried forward the same to the next tax period, whereas there is no such provision and every dealer has to pay the admitted tax in the return by the due date.

Therefore, the dealer is liable to pay interest on the amount of tax left unpaid along with penalty u/s. 86(12), till the time said amount is adjusted in the next return."

12. On remand of the matter, the dealer submitted 'Nil' returns before Ld. Assessing Authority.

13. After hearing Ld. Counsel for the dealer, the Ld. Assessing Authority framed fresh assessment on 20/07/09 by observing in the manner as :-

"Sh. Ramesh Johri (Advocate) of the dealer had filed detailed work sheet of the company, showing the cost of the project and revised returns w.e.f. 01-04-2005 to 31-12-2007 for the Remand of DVAT Objections. After scrutinizing/test check

the papers and the revised returns of the said period which is filed by the dealer vide dated 24-04-2009, it seems that the sale of the dealer is Nil in all revised returns, while in the worksheet of the dealer. He is showing sale of Rs.96,05,91,246/- and shows the TDS Amount of Rs. 46,57,056/- and tax paid Rs. 1,61,95,311/-. Vat Audit on the request of the dealer has audited their accounts for scrutinizing the tax w.e.f. 01-04-2005 to 31-12-2007 and levied a Tax of Rs. 9,70,90,131/- interest Rs. 78,70,950/- and penalty Rs. 9,79,78,055/-.

As per the direction of the Additional Commissioner-III to re-examine the case as per DVAT Act and Rules, it is state that it is not possible to re-assess the case because of filing of "Nil" returns by the dealer.

Hence the above demand of Tax/Interest/Penalty raised by VAT Audit is justified and the calculation sheet of the assessment orders. Now the dealer is hereby directed to deposit the total amount of Rs. 20,29,39,146/- as per assessment order."

14. It may be mentioned here that during pendency of the objections, on 09/03/2009, dealer – appellant is said to have written to the MCD to comply with the directions issued by the Hon'ble Apex Court to avoid any delay or levy of interest and penalty.

15. Feeling aggrieved by the above said assessments framed by the Ld. Assessing Authority, on 17/09/2009 the dealer filed objections before Ld. Special Commissioner – I/OHA.

16. The case of the dealer-appellant is that during pendency of objections on 09/04/2010, MCD deposited a sum of Rs. 5 Crores, with the department of Trade and Taxes. It may be mentioned here that earlier only a sum of Rs. 4,98,76,391/- stood deposited by the MCD with the Department.

In this way, in total, a sum of Rs. 9,98,76,391/- stood deposited with the department up to 09/04/2010.

17. Ld. Special Commissioner disposed of the objections vide order dated 25/08/2011 and recorded findings as under:-

> "The records reveals that he has revised returns three times. Thus the returns filed by him cannot be believed and are dissipative, misleading and incomplete. He himself has accepted the cost of the project as Rs. 1,32,23,00,000/- in his worksheet accounts submitted before the VATO on 20/07/2009 and sale of Rs. 96,05,91,246/- and TDS amount of Rs 46,57,056/- and tax paid of Rs 1,36,95,311/-. He has received the payment of Rs 132crore from MCD. He executed the work and he is squarely within the ambit of work contract. Initially, he paid the tax and later on, he reduced the tax and taken all benefits of input tax whereas he should have filed objection u/s 28(2), DVAT Act which he never did. The objector has even claimed refund of Rs 3,32,839/- and purchased goods worth in crores on the strength of C-forms at the reduced rate of CST.

The dispute with the objector was with MCD on the cost of the project and not on VAT. On the direction of Hon'ble Supreme Court tax of Rs 5,00,00,000/- has been paid by the MCD directly to the VAT Deptt. on 03/04/2010. However, the Supreme Court in its judgement pronounced that the tax like VAT & Service tax as applicable and land filling charges at Ghazipur and the charges for removal of scrap at Idgah, if any, will have to be paid extra on the amount over and above of RS 132crore. Thus the tax below this amount shall be paid by the objector. The objector never paid this amount. The Hon'ble Supreme Court has no where pronounced that the penalty and interest shall also be paid by MCD. Further, the Hon'ble Court has nowhere prevented him to pay tax. Therefore, the objector is liable to pay interest and penalty from the due date.

I have gone through the records placed before me and the arguments of the objector & DR. I find that the objector is filing incorrect misleading, dissipative return and has not paid tax in due time so he is liable to pay interest as well as penalty as held by the assessing authority and the orders of the assessing authority dated 20/07/2009 are upheld by me".

18. Hence, this appeal.

19. Arguments heard. File perused.

20. Learned counsel for the appellant has submitted that as per Section 74(8) of DVAT Act where the Commissioner has not

notified the person of his decision on objections filed u/s 74 of DVAT Act, the person may serve in writing, a notice requiring him to make a decision, but this is a case where the learned OHA despite written notice did not dispose of the objections within 15 days, and as such the objections filed by the dealer against the assessments should be deemed to have been allowed.

Page 76 of the appeal file is copy of said notice dated 14/01/2011 from the dealer to the Commissioner, Department of Trade & Taxes.

21. The case of the dealer – appellant is that during pendency of the objections, it had submitted letters dated 14/01/11, 24/06/11 & 20/07/11 requesting the Commissioner, Department of Trade and Taxes to decide the objections. Since the objections were not disposed of, the dealer dropped another letter dated 25/07/11 to the Ld. Special Commissioner / OHA, that in view of Section 74 (9) of DVAT Act, the objections were deemed to have been allowed, the same having not been disposed of within the prescribed period of 15 days. It was thereafter on 25/08/2011 that the objections were disposed of.

The second letter dated 24/06/2011 from the dealer to the Commissioner, Department of Trade and Taxes was to the effect that since the Commissioner was requested for disposal of

objections vide letter dated 12/04/2011, but the same were not disposed of, the objections shall be deemed to have been allowed. Accordingly, the dealer asked the Commissioner for issuance of orders in this regard i.e. deemed allowing of the objections u/s. 74(9) of DVAT Act.

The third letter dated 20/07/2011 came to be issued by the dealer to the Commissioner, Department of Trade and Taxes, again with the prayer that necessary orders be issued, as the objections filed by it on 17/09/09 shall be deemed to have been allowed.

Still another letter dated 25/07/2011, similar to the letter dated 20/07/11 was sent by the dealer to the Commissioner.

The contents of document dated 14/01/2011, would reveal that it was a request from the dealer to the Commissioner for decision of objections filed on 17/09/09 before Special Commissioner –I, but no order had been received by the dealer by then i.e. on 14/01/2011. In this way the dealer requested the learned Special Commissioner that needful be done at the earliest.

22. As provided u/s. 74(8) of the DVAT Act, the dealer may serve a written notice requiring the Commissioner to make a decision on the objections "within 15 days". But in this case, the dealer in its letter dated 14/01/2011 did not make any request to the Commissioner specifically mentioning that the objections be disposed of "within 15 days". Nowhere in this letter, it was mentioned that the said letter was being submitted u/s. 74(8) of

DVAT Act. Had this provision (i.e. 74(8) of DVAT Act) been specifically mentioned in this letter, the Commissioner would have taken note that the dealer wanted disposal of the objections under this provision of law and that too within specified period i.e.,15 days.

In the absence of any mention of the prescribed period of 15 days and the provision of Section 74(8) of DVAT Act, this letter cannot be said to be a written notice requiring the Commissioner to dispose of the objections within 15 days. Rather, it appears to be a general request for disposal of the objections filed by the dealer.

So it cannot be said that with the expiry of the period of 15 days provided under Section 74(8) of DVAT Act, the objections can be said to have been allowed.

23. It is correct that Section 74(8) of DVAT Act provides for service of written notice, and does not require any format to be furnished for the purpose of written notice, as rightly submitted by the Ld. Counsel for the appellant, but Ld. Counsel for the appellant has admitted that Rule 56 of DVAT Rules , 2005 provides that a notice for the purpose of sub-section (8) of section 74 shall be in Form DVAT-41. However, Ld. Counsel for the appellant has referred to decision in **Deep Chand Jain v. Income Tax Officer, C-Ward, Ambala,and Others ,** 1983 SCC Online P & H 850,wherein as regards the contention raised that the

application for refund was not in the prescribed form, the Hon'ble High Court observed that the given form was prescribed to facilitate an enquiry, if one becomes necessary, to see whether the assesse was entitled to a refund and further that by prescribing a given form, the framers of the Rules intended to facilitate the refund and not to bar or hinder the right of an assesse for getting his money back.

Undisputedly, that was a case under Income Tax Act. There the Income Tax Department had taken the stand that no application was moved in the prescribed form and that the refund was barred by limitation. Therein, the matter did not pertain to issuance of notice like the one required to be served u/s. 74(8) of DVAT Act.

Here, in this case, as discussed above, the dealer was required to specifically issue such a notice so as to attract his attention that the dealer wanted that its objections were disposed of within 15 days and that too u/s 74(8) of the Act. Here, from the contents of the written notices sent by the dealer to the Commissioner, it appears as if the dealer had simply requested the Commissioner for an early disposal of the objections which had been taken up from time to time, and as such the said prayer could not be taken to be a written notice u/s. 74(8) of DVAT Act calling upon the Commissioner to decide the objections within 15 days.

24. Ld. Counsel for the appellant also referred to decision in **Lloyds Steel Industries Ltd. v. Commissioner of Central Excise, Nagpur,** 2007 (211) E.L.T. 275 (Tri. Mumbai),wherein the Ld. Tribunal observed that credit was admissible even on invoices, which were not in the prescribed form.

Therein, Hon'ble Tribunal further observed that credit was admissible on invoices when there was no dispute that duty was paid on the goods received in the factory and utilised in the manufacture of finished goods.

Here, in this case, as discussed above, the dealer was required to specifically issue such a notice so as to attract his attention that the dealer wanted that the objections were disposed of within 15 days. From the contents of the written notice sent by the dealer to the Commissioner, it appears as if the dealer had simply requested the Commissioner for an early disposal of the objections which had been taken up from time to time, and as such the said prayer could not be taken to be a written notice u/s. 74(8) of DVAT Act calling upon the Commissioner to decide the objections within 15 days.

So, when in the above cited case, point regarding issuance of written notice u/s 74(8) of DVAT Act calling upon the Commissioner to decide the objection within 15 days was not

involved for adjudication, the said decision does not come to the aid of the appellant.

25. Learned Counsel for the Appellant also referred to decision in **Premier Irrigation Equipment Ltd. v. Commissioner of Central Excise, Calcutta-I,** 1998(101) E.L.T 653 (Tribunal)to point out that therein, a declaration required to be furnished in prescribed form, as per rule 57G of the Central Excise Rule, 1944, was not furnished and the Hon'ble Tribunal observed that it was only a case of technical error, when the applicant had made their intention clear by making the declaration in the classification list in form-I and also through their letter dated 17-03-1994.

Here, in this case, as discussed above, the dealer was required to specifically issue such a notice so as to attract his attention that the dealer wanted that its objections were disposed of within 15 days. From the contents of the written notice, sent by the dealer to the Commissioner, it appears as if the dealer had simply requested the Commissioner for an early disposal of the objections which had been taken up from time to time, and as such the said prayer could not be taken to be a written notice u/s. 74(8) of DVAT Act calling upon the Commissioner to decide the objections within 15 days.

26. Then, Learned Counsel for the appellant referred to decision in **Balaji Steel Re-rolling Mills v. Commissioner of Excise and Customs,**2014(310) E.L.T. 209 (S.C.) to point out that, Hon'ble Apex Court observed that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution, when the Act did not empower the tribunal to dismiss the appeal in default of appearance or for want of prosecution, in case the appellant was not present at the time the appeal was taken up for hearing.

Here, there is a particular provision in the form of section 74(8) which provides for service of written notice and that the said written notice must specify that the Commissioner was being asked for disposal of the objections filed u/s 74 of DVAT Act within 15 days period. Therefore, the notice was required to be inconsonance with the provisions of section 74(8) of DVAT Act. As such, the decision in Balaji Steel's case (Supra) also does not come to the aid of the appellant.

27. Learned Counsel for the appellant then referred to decision in **Commissioner of Value Added Tax and Another v. J.C. Decaux Advertising India Pvt. Ltd.** (2017) 98 VST 287 (Delhi)to point out that the invoices relied upon by the dealer were described as "Retail invoices" but section 9 (8) of DVAT

Act provides that there should be a tax invoice with the dealer so as to claim tax credit.

Here, in this case, as discussed above, the dealer was required to specifically issue such a notice to the Commissioner as to attract his attention that the dealer wanted that all the objections were disposed of within 15 days. From the contents of the written notices sent by the dealer to the Commissioner, it appears as if the dealer had simply requested the Commissioner for an early disposal of the objections which had been taken up from time to time, and as such the said prayer could not be taken to be a written notice u/s. 74(8) of DVAT Act calling upon the Commissioner to decide the objections within 15 days.

28. Learned Counsel for the appellant referred to the impugned order where Learned OHA, while dealing with the point raised u/s 74(9) of DVAT Act, observed that the objections were being taken up for regular hearing from the date of their filing and objector was regularly attending the proceedings, but he did not attend the proceedings any further and chose to write letter to the Commissioner, Department of Trade & Taxes and not to her (Learned OHA). The contention raised by the Learned Counsel for the appellant is that even if the letter dated 14-01-2011, was submitted by the dealer to the Commissioner, Department of Trade & Taxes, the written notice was validly served and as such

the Learned OHA fell in error while recording the findings that the plea of the Dealer-Objector about deemed acceptance of the objections u/s 74(9), could not be accepted. In support of his contention Learned counsel for the appellant referred to decision in **Combined Traders v. Commissioner of Trade & Taxes,** (2019 68 GSTR 31 (Delhi).

In Combined Trader's case (Supra), the dealer had initially tried to serve notice u/s 74(8) of DVAT Act twice, by visiting the office of Learned OHA, but the notice could not be served and it was thereafter that notice in form DVAT 41 and in terms of Rule 56 of DVAT Rules 2005 was served by counsel for the objector in person on the Commissioner.

Here, as noticed above, firstly, the written notice dated 14-01-2011, has been held to be not a notice u/s 74(8) of the DVAT Act for the reasons mentioned above, and secondly, Learned counsel for the Dealer-Appellant admits that the cited decision pertained to a case where a notice was served in form DVAT-41 but this is a case where no such notice in form DVAT 41 was served.

Had it been a written notice containing all the ingredients of Section 74(8), then it would have amounted to due service of notice even if delivered at the office of the Commissioner, after

the attempts to deliver the same at the office of Learned OHA had failed. Therefore, decision in the given facts and circumstances in Combined Trader's case also does not help the Dealer-Appellant to say that the said letter dated 14-01-2011 was actually a notice u/s 74(8) of DVAT Act.

29. It may be mentioned here that the appeal was presented in June, 2012, but surprisingly enough, in the course of arguments on merits, for the first time, on 24/3/2022 learned counsel for the appellant pointed out that an application filed with prayer to raise additional ground 'F' and also to place on record additional documents in support of said ground, was pending for disposal. Accordingly, arguments were advanced on the said application as well, while raising contentions by way of final arguments in the appeal. Vide separate detailed order, said application stands dismissed for the reasons recorded therein.

Default assessment of Tax

Framing of default assessments for more than one tax period.

30. One of the contentions raised by learned counsel for the appellant is that the Assessing Authority framed assessments for tax periods 2005-06, 2006-07 and 2007-08 by way of a composite order which is in violation of the provisions of section – 34 of DVAT Act.

In support of this submission, learned counsel for the dealer – appellant referred to following decisions :-

i. **Devendra Ch. Das v. CTO** (1978) 42 STC 438 (Cal).

ii. **J.K. Engineering v. CST**, (1995) 99 STC 209 (Bom).

iii. **Perfect Engineering Solutions Pvt. Ltd. v. CTT**, (passed by this Tribunal in Appeal No. 358/80/ATVAT/15 on 15/9/2016)

31. On the other hand, learned counsel for the Revenue has submitted that it was on the basis of application dated 14/1/2008 (Annexure P-2), submitted by the dealer – assessee to the Commissioner, VAT with prayer for assessment of demand for the year 2005-06, 2006-07 and 2007-08 (upto December, 2007), that the Assessing Authority framed assessments.

Learned counsel for the Revenue has referred to provisions of Section 80 of DVAT Act and submitted that merely because of some mistake, defect or omission in assessment, notice, summons or other proceedings, none of them can be termed to be invalid when same are in substance and effect in

conformity with or according to the intent and purpose of DVAT Act.

On the other hand, learned counsel for the appellant has submitted that the order regarding assessment being a composite order, it cannot be said to be a case of mistake, defect or omission as provided u/s 80.

Relevant portion of Section 80 of DVAT Act is reproduced here as under:

> "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."

32. The assessments, as noticed above, came to be framed in the peculiar facts and circumstances of the case, while the project of establishment of Modern Slaughter House at Gazipur, MCD was being executed under the directions of Hon'ble Supreme Court and the project cost and other payables were decided by Hon'ble Apex Court, Section 80 does not come into application in the given peculiar facts and circumstances.

We do not find any merit in the contention of learned counsel for the appellant that framing of assessment by the Assessing Authority vide a composite order is illegal, and in the peculiar situation, the decisions cited by learned counsel for the appellant do not come to the aid of the appellant.

33. Learned counsel for the dealer-appellant has submitted that in the given situation, the matter needs to be remanded for fresh assessment in accordance with law.

On the other hand, learned counsel for the Revenue has submitted that this is not a case which calls for remand of the matter and that as per provisions of Section 76(7) of DVAT Act, this Appellate Tribunal shall dispose of the matter by way of final determination, in accordance with law.

34. A perusal of order dated 31-12-2008 passed by learned OHA while disposing of objections dated 15-05-2008, filed against disputed notice of default assessment of tax and penalty would reveal that said objections were partly allowed and the matter was referred to learned VATO to re-examine the case as per provisions of DVAT Act and Rules.

Following extract from the order dated 31-12-2008 would reveal that learned OHA had upheld the amount of tax as regards the bills raised by the dealer, as the same represented the consideration payable to the dealer:

"The dealer has filed returns in the department in time except for the period October and Nov 2005. The dealer claimed to have filed the returns on the basis of the amount received by him whereas the VATO considered the amount as given in the DVAT-31 filed by the dealer.

As per Section 5(2) of the DVAT Act 2004 dealing with taxable turnover, says that:

"In the case of turnover arising from the execution of a work contract, the amount included in the taxable turnover is the total consideration paid or payable to the dealer under the contract excluding the charges towards labour, services and other like charges, subject to such conditions as may be prescribed."

In view of the above, the VATO has rightly taxed the amount of the bills raised by the dealer as it represents the consideration payable to the dealer."

As regards the objections filed for the first time, while dealing with the point of filing of revised return, without filing any objections as provided u/s 28(2) of DVAT Act, learned OHA had allowed the dealer to file revised return, if so required, as per decision of Hon'ble Apex Court, as he was of the view that it would have been unfair to ask him to file the same returns again.

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It is significant to note that learned OHA also observed that the dealer shall have to deposit the admitted tax immediately with the department as per the revised returns, the reason being that learned VATO had observed that in case of some of the returns the dealer had not deposited even the admitted tax.

Accordingly, as observed by learned OHA, for the purpose of determination of the actual turnover of the dealer, learned VATO was to keep in mind the observations made by Hon'ble Apex Court.

35. As already noticed above, on remand of the matter the dealer filed revised returns on 24-04-2009, but these revised returns were surprisingly 'Nil' returns. In the course of arguments, no explanation has been put forth as to why "Nil" returns were filed, when the department was so benevolent and had given it opportunity to revise the returns. This conduct goes to show that the dealer deliberately opted to file such "Nil" returns and did not abide by the directions to avail the golden opportunity granted to it in this regard.

Learned VATO observed that it was only in the worksheet that the dealer had shown sale of Rs. 96,05,91,246/-, TDS amount of Rs. 46,57,056/- and tax paid as Rs. 1,61,95,311/-.

Record reveals that it was the dealer who had requested the department for assessment for the above said 3 tax periods

and thereupon audit of the dealer was conducted by the department and initially a demand of Rs. 21,49,39,136/- was raised. The said audit was admittedly conducted from 11-02-2008 to 04-03-2008. The audit team found that while filing its returns, the dealer had taken rebate of 25% on account of labour and services. In the course of arguments, all this fact has not been disputed.

36. On remand by learned OHA vide order dated 31-12-2008, when the learned VATO (w-84) found that the dealer had filed 'Nil' returns, he was duty bound to go ahead. The VATO, accordingly, directed the dealer to deposit a sum of Rs. 20,29,39,146/- as per table made available in the assessment dated 20-07-2009.

The fact remains that as per record, the dealer got three opportunities to revise returns and the last time the revised returns it filed were 'Nil' returns. This fact and other acts of the dealer weighed with Learned OHA. It is clear from the following observations of Learned OHA:

> "The record reveals that he has revised returns three times. Thus the returns filed by him cannot be believed and are dissipative misleading and incomplete. He himself has accepted the cost of the project as Rs. 1,32,23,00,000/- in his works sheet accounts submitted before the VATO on 20-07-2009 and sale of Rs. 96,05,91,246/- and TDS amount Rs. 46,57,056/- and tax paid of Rs. 1,61,95,311/-. He has received the payment of Rs.

132Crores from MCD. He executed the work and he is squarely within the ambit of work contract. Initially he paid the tax and later on, he reduced the tax and taken all benefits of input tax whereas he should have filed objection under section 28(2) DVAT Act which he never did. The objector has even claimed refund of Rs. 3,32,839/- and purchased goods worth in crores on the strength of C forms at the reduced rate of CST."

In the given facts and circumstances and the conduct of the dealer, we find no illegality or irregularity in the assessment of Rs. **9,70,90,131/-towards tax.**

Interest & Penalty

37. Vide assessment order dated 20/7/2009, learned Assessing Authority levied interest and penalty for the following tax period :-

Tax Period	Interest	Penalty
First Quarter 2005-06	113540	300304
Second Quarter 2005-06	346388	1015515
October, 2005-06	263023	800027
November, 2005-06	124796	394376
December, 2005-06	96618	317709
January, 2005-06	0	10000
February, 2005-06	0	10000

March, 2005-06	0	10000
Total :-	**944365**	**2857931**
April, 2006-07	0	10000
May, 2006-07	0	10000
June, 2006-07	0	10000
July, 2006-07	244484	1062340
August, 2006-07	0	10000
September, 2006-07	0	10000
October, 2006-07	0	10000
November, 2006-07	215503	1205496
December, 2006-07	0	10000
January, 2006-07	0	10000
February, 2006-07	0	10000
March, 2006-07	895958	6965381
Total : -	**1355945**	**9323217**
April, 2007-08	3479	30780
May, 2007-08	0	10000
June, 2007-08	0	10000
July, 2007-08	5305795	69787940
August, 2007-08	0	10000
September, 2007-08	0	10000
October, 2007-08	0	10000

November, 2007-08	0	10000
December, 2007-08	261366	15899787
Total :-	**55,70,640**	**8,57,78,507**
Grand total :-	**78,70,950**	**9,79,78,055**

Learned OHA, vide impugned order dated 25/8/2011, upheld liability towards interest and penalty levied by the Assessing Authority.

38. Learned counsel for the dealer – appellant has contended that the Assessing Authority nowhere specified in the impugned assessment as to under which provision of law, the said penalty was imposed and that accordingly, the levy of penalty, deserves to be set-aside. It has also been contended that the learned OHA has upheld the penalty without any cogent and convincing reasons.

39. Chapter-XIII of DVAT Act pertains to penalties and offences. Section 86 of the Act specifies different categories of penalties. It is well settled that it is necessary that the Assessing Authority puts the dealer – assessee on notice as to the exact nature of contravention and for which the assessee is liable to any penalty.

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40. As per decisions in **Amrit foods v. CCE** ,(2005) 190 ELT 433 (SC); **CCE v. Nakoda Textile Industries Ltd.,** (2009) 240 ELT 199 (Bom) and **DKM Cassettes ltd. v. UOI,** (2010) 260 ELT 404 (Del), relied upon by the learned counsel for the appellant, necessity of specification of the exact nature of contravention by the assessee was one of the reasons for setting aside of the orders passed by the Assessing Authority. Here, the Assessing Authority nowhere specified as to under which provision of law of DVAT Act, penalty was being levied or as to exact nature of the contravention of the said Act. Consequently, the assessment regarding levy of penalty and the impugned order passed by Learned OHA upholding levy of penalty are hereby set-aside.

41. In the given facts and circumstances and the conduct of the dealer, we find no illegality or irregularity in the assessment of **levy of interest Rs. 78,70,950/-**

However, in view of the above findings that assessment as regards levy of penalty and the impugned order upholding the penalty are set aside.

Result

42. As a result of the above findings, the appeal is partly allowed, and while setting aside the levy of penalty and the impugned order passed by Learned OHA upholding levy of penalty are set

aside; that while upholding the default assessment of tax and interest and the impugned order passed by Learned OHA dismissing the objections in respect of tax and interest, the appeal is hereby dismissed.

43. No other argument has been advanced by learned counsel for the parties.

44. 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: 25/04/2022.

25/4/2022

(Rakesh Bali)
Member (A)

25/4/2022

(Narinder Kumar)
Member (J)

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Appeal No. 277/ATVAT/2012/4164-71 Dated: 27/4/22

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