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

Appeals No. 337-338/ATVAT/2021
Date of Judgment: 20/5/2022

M/s. S.K. Strips ,
Khasra No. 6/37, R.S.Dharm,
Kanta Vali Gali, GT Karnal Road,
Village Siraspur, New Delhi – 110 042. .....Appellant

v.

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

Counsel representing the Appellant : Sh. Rahul Gupta.
Counsel representing the Revenue : Sh. N.K.Gulati.

## JUDGMENT

1. Dealer- appellant, a proprietorship, is feeling aggrieved by order dated 25/06/2020 passed by Ld. OHA – Joint Commissioner –I whereby two objections filed by the dealer u/s. 74 of Delhi Value Added Act, 2004 (hereinafter referred to as DVAT Act), against assessment of tax, interest and penalty, have been dismissed.

2. The two assessments, referred to above, pertained to the tax period 2nd Quarter – 2014-15. Vide Notice of Default Assessment of Tax and Interest, u/s. 32 of DVAT Act, AVATO/VAT (AUDIT) directed the dealer to pay additional tax

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of Rs. 26/- i.e. Rs.25/- towards tax and Rs.1/- towards interest, due to the following reasons:-

> "A survey of M/s. S. K. Strips (TIN – 07340383726) was conducted by team of Enforcement - I Branch on 29/09/2014. Sh. Kushal Jain, partner of the firm was present at the time of survey and he duly signed statement, trading account and physical stock inventory, total variation of cash and stock during the survey of Rs. 27,94,744/- @ 5%. The tax on the total variation @5% come to Rs. 1,39,737/-. The dealer could not produce the GRs for the 24 Central Sales made @ 2% amounting Rs. 86,76,270/-, details of which is placed opposite in the file as Annexure A. The tax @ 3%, as the dealer has already paid tax @ 2% thereon with equivalent penalty comes to Rs. 5,20,576/-. The dealer has submitted a challan of Rs.4.80 lakhs (Rs. 4 lakhs as tax and Rs. 80,000/- as penalty) within a three working days towards tax due hence dealer is entitled to get 80% rebate on penalty u/s. 87 (6) of DVAT Act no interest liable. The dealer is entitled to get the refund of excess tax penalty if paid so."

For the aforesaid reasons, vide separate notice of assessment u/s. 33 of DVAT Act, Ld. Assessing Authority raised demand of Rs. 80,005/-, towards penalty u/s. 86(10) of DVAT Act.

3. Vide Impugned order, Ld. OHA upheld the assessments by observing in the manner as :-

> "As the objector could not produce counter evidence with verification and that too are inconsistent, therefore, i am of considered opinion that impugned order is upheld and objector is

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directed to deposit the requisite amount within one month of receipt of this order."

4. In these appeals, one of the ground put forth on behalf of the appellant is that a notice u/s. 74 of DVAT Act was served upon the Commissioner- OHA on 09/12/19 with the request for disposal of the objections within 15 days and the said period came to an end on 24/12/19, but Ld. OHA disposed of the objections on 25/06/2020 i.e. after 184 days, and as such the impugned order deserves to be set-aside, being in violation of provisions of Section 74 (9) of DVAT Act.

   On the aforesaid ground, learned counsel for the dealer – appellant has contended that the impugned order passed by learned OHA upholding the demand raised by the Assessing Authority deserves to be set aside and the objections filed by the dealer shall be deemed to have been allowed.

5. Section 74(8) of DVAT Act-2004 provides that a person may serve a written notice requiring the Commissioner to make a decision within 15 days where the Commissioner has not notified the said person of his decision on the objections filed u/s 74 of the Act. As per sub section (9) of section 74, if the decision has not been made by the end of the period of 15 days after the giving of the notice referred to in sub-section (8), then, at the end of the said period of 15 days, the Commissioner shall be deemed to have allowed the objection.

6. In this case, on 9/12/2019 dealer – objector submitted two forms of DVAT-41, with request to the Commissioner that its objections No.88664 and 88666 be decided within 15 days from the receipt of the said notice. As per rubber stamp of the office of the Joint Commissioner, Department of Trade & Taxes, two DVAT- 41 were submitted at the said office on 9/12/2019. It is true that the person receiving the two forms of DVAT-41 made a note on the said receipt issued to the dealer that there was no record available in the said branch i.e. the Principal Branch of Joint Commissioner, Department of Trade & Taxes regarding the said objections, but it does not mean that said two forms of DVAT-41 were not submitted in the said office. Learned OHA clearly observed in the impugned order that objector had submitted form DVAT-41.

7. The objections came to be disposed of by learned Joint Commissioner-I – OHA on 25/6/2020. In view of provision of section 74(8), the objections were required to be disposed of within 15 days of the submission of DVAT-41.

8. When sub-section (9) of section 74 provides that the Commissioner shall be deemed to have allowed the objections, does it mean that all the objections, whatsoever the same may be, are deemed to have been allowed. We are of the view that only such objections are deemed to have been allowed which are

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legally permissible i.e. which are maintainable under the law and which deserve to be allowed, in accordance with law.

9. To find out as to what were the objections which deserved to be legally allowed as per section 74(9), we have gone through the material on record. In the notices of assessment of tax and penalty, learned Assessing Authority clearly observed that the dealer had submitted challan of Rs. 4,80,000/- (Rs. 4.00 lacs as tax and Rs. 80,000/- as penalty) within a three working days towards tax due, and as such the dealer was entitled to get 80% rebate on penalty u/s 87(6) of DVAT Act, and further that no interest was leviable. Accordingly, demands of Rs. 26/- towards tax and Rs. 80,005/- towards penalty was raised.

10. At the stage, for ready reference provisions of section 87(6) are reproduced are as under :-

a. A person is liable to pay penalty under section 86 of this Act; and

b. The person voluntarily discloses to the commissioner, in writing, the existence of the tax deficiency, during the course of proceedings u/s 60; and

c. Makes payment of such tax deficiency within three working days of the conclusion of the said proceedings;

The amount of the penalty otherwise due, against the admitted and paid tax, shall be reduced by eighty per cent.

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11. In the assessment orders dated 1/12/2014, the Assessing Authority clearly observed that it was a case where dealer was entitled to 80% rebate on penalty, as provided u/s 87 (6) of DVAT Act, meaning thereby that it was a case where the dealer had voluntarily disclosed to the commissioner in writing, the existence of tax deficiency during the course of proceedings u/s 60 i.e. conducting the survey.

    The dealer – appellant has submitted before this Appellate Tribunal an affidavit to the effect that he never accepted the liability to alleged variation and liability to pay tax, interest with penalty during the course of survey. Keeping in view this affidavit, and the submission put forth by learned counsel for the appellant in the course of arguments that dealer never made any voluntarily disclosure statement as provided u/s 87(6) of DVAT Act, learned counsel for the Revenue sought time to place on record the voluntarily disclosure made by the dealer to show that he was granted rebate of 80% only on the basis of voluntarily disclosure.

12. Today, learned counsel for the Revenue submitted that the said document of voluntarily disclosure of the tax deficiency i.e. the survey report is not traceable with the Department due to elapse of about eight years.

13. Survey was conducted by the team of Enforcement on 29/9/2014, at the business premises of the dealer. During

survey, variation in cash and stock was noticed. To defend its case, the dealer must have applied for certificate copies of relevant documents. Under section 78 of DVAT Act, the burden of proving any matter in issue in proceedings u/s 74 of this Act, or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act shall lie on the person alleged to be liable to pay the amount. However, dealer has not filed any such certified copy of the survey report.

14. Had the dealer not voluntarily disclosed to the said team of Enforcement-I Branch, in writing the existence of tax deficiency, during the survey proceeding, the Assessing Authority would not have mentioned this fact in the notices of assessment.

Admittedly, the dealer deposited a sum of Rs. 4.80 lacs. within three days. This payment by the dealer is not disputed. In view of clause (c) of sub-section (6) of section 87, this payment can safely be said to have been made by the dealer on the basis of voluntarily disclosure of the tax deficiency. Simply because the dealer has filed an affidavit before this Appellate Tribunal, disputing disclosure to the team regarding tax deficiency, during survey proceedings, and department has not been able to lay hand on the record of the year 2014, it cannot be said that this is not a case of voluntarily disclosure of the tax deficiency by the dealer.

Had it not been so, at the very time of conducting of survey, the dealer would have lodged protest with the team in this regard. Furthermore, soon after the survey, he would have complained to the higher authorities regarding the conduct and proceedings of the team of Enforcement Branch. However, there is nothing on record to suggest that the dealer ever lodged any such protest with the team or submitted any complaint to the higher authorities against the said team.

There is nothing on record to suggest that at the time dealer deposited a sum of Rs. 4.80 lacs with the Department he ever specified therein that it was being deposited under protest, the reason being that it was not on the basis of voluntarily disclosure of existence of tax deficiency.

15. Had it not been a case of voluntarily disclosure regarding existence of tax deficiency, the dealer would have raised it as the very first ground in the objections u/s 74 submitted before the learned OHA. However, a perusal of the ground of objections submitted by the dealer before learned OHA does not reveal any such ground that it was not a case of voluntarily disclosure of the existence of tax deficiency or that he was compelled by the Team of Enforcement Branch to reduce the same in writing.

When this ground was not taken in the ground of objections before learned OHA, the said ground as one of the ground of present appeals can safely be said to be an afterthought.

16. As noticed above, the dealer availed of benefit of rebate of 80% on penalty u/s 87(6) of DVAT Act, but at the same time he opted to challenge the levy of tax and penalty by filing objections.

We are of the considered view that in view of voluntarily disclosure by the dealer – assessee to the Commissioner, regarding the existence of tax deficiency, during the course of survey proceedings, and on account of making of payment of such tax deficiency within the stipulated period, the dealer was estopped from filing objections u/s 74 of DVAT Act as regards the tax and penalty. However, this significant aspect skipped consideration of learned OHA. The fact remains that the objections u/s 74 of DVAT Act were not maintainable against the notice of assessment of tax and penalty in view of the voluntarily disclosure by the dealer regarding existence of tax deficiency and payment of the tax deficiency.

In this situation, it cannot be said that the Commissioner is deemed to have allowed the objections as provided u/s 74(9) of DVAT Act. Consequently, submissions of the two forms i.e. DVAT -41 do not come to the aid of the dealer.

17. No other argument has been advanced by learned counsel for the dealer – appellant.

18. As a result of the above findings, both these appeals deserve to be dismissed, and the same are hereby dismissed.

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19. 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 : 20/5/2022

(Rakesh Bali)
Member (A)

(Narinder Kumar)
Member (J)

Appeal No. 337-338/ATVAT/2021/4444-51 Dated: 23/05/2022

Copy to:-

(1) VATO (Ward-71)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)

**REGISTRAR**

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