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

Rev. Application No. 449-450/22
Appeal No. : 806-808/ATVAT/12
Date of Order:2/6/2022

M/s. Cool Bird Aircon Pvt. Ltd.,
BP-29, Maurya Enclave,
Opp. MD Market, Pitampura,
Delhi. .....Applicant

V.

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

Counsel representing the Appellant : Sh. M. K. Gandhi
Counsel representing the Revenue : Sh. M. L. Garg

ORDER

1. This order is to dispose of Review Applications No. 449/22-450/22 filed u/s. 76(13) of Delhi Value Added Tax Act, 2004 (here-in-after referred to as DVAT Act) read with Regulation 24 of Delhi Value Added Tax (Appellate Tribunal) Regulations, 2005 (here-in-after referred to as DVAT Regulations).

Narinder Kumar 2/6/2022

The prayer in the applications is for review of judgment dated 25/03/2022 in Appeal Nos. 806-808/2012.

2. Vide judgment dated 25/03/2022, the above referred to appeals came to be disposed of with the following directions:

> "As a result of the above findings, on the point of levy of tax, the impugned assessment as regards the seized documents i.e. in the form of a diary, is set aside and while disposing of the appeal, we issue direction to the Learned Assessing Authority to make fresh assessment as regards the seized documents, in accordance with law, after providing reasonable opportunity to the dealer of being heard.
>
> As regards the stock variation and cash variation, as noticed above, in view of the above findings, while disposing of the appeal No. 806/2012, the default assessment of tax in respect thereof, is upheld.
>
> **Penalties**
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> As regards the imposition of penalty, as per impugned order, one penalty was imposed u/s 33 of DVAT Act, and the other u/s 86(14) of DVAT Act.
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> As already discussed above, the dealer failed to produce before Learned Assessing Authority, four types of documents specified in the notice u/s 33 of DVAT Act, despite issuance of notice u/s 59(2) of DVAT Act. The Assessing Authority gave

reasons for imposition of this penalty. The dealer did not provide any such record even before learned OHA. Therefore, we do not find any ground to set-aside the said penalty u/s 86(14) read with section 33 of DVAT Act.

As regards, penalty u/s 86(10) of DVAT Act, so far as impugned order passed by Learned OHA is concerned, Learned counsel for the dealer-appellant rightly submitted that Learned OHA has not given any findings so as to uphold the said penalty. Therefore, the impugned order regarding imposition of penalty u/s 86(10) of DVAT Act is set aside.

When the matter has been remanded for fresh assessment as regards valuation of the seized documents, fresh assessment as regards the said penalty if any is required to be made after providing reasonable opportunity of being heard to the dealer. Accordingly, the point of levy of penalty u/s 86(10) of DVAT Act, as regards tax deficiency, if any ultimately found, is left open to be decided by the Assessing Authority afresh. However, learned Assessing Authority shall keep in mind, while passing the fresh order, that assessment regarding the stock variation and cash variation has been upheld by this Tribunal, as noticed above. "

3. Dealer-applicant filed above referred to appeals challenging order dated 06/07/12 passed by learned Special Commissioner / Objection Hearing Authority (hereinafter referred to as OHA), whereby its objection u/s. 74 of DVAT Act of tax,

interest and two penalties, in respect of tax period June, 2011-2012 were dismissed.

4. The assessment of tax and interest was framed by the Assessing Authority – VATO on 20/03/2012, u/s. 32 of DVAT Act, by observing in the manner as:

> "This deliberate act of the dealer to avoid the furnishing of requisite information & documents apart from explanation / clarification with respect to variations in stock and cash along with that of seizure documents / material, left no option but to consider/ treat the same as unaccounted sale leading to suppression of sale and eventually to evasion of tax resulting in causing loss to the Government exchequer. Therefore, the variation in stock and cash for Rs. 47,37,033/- (short) and Rs. 8,05,466/- (short) respectively, along with valuation of seizure documents amounting to Rs. 52,50,000/- is taxed at 12.5%."

5. For the same reasons, penalty came to be imposed under section 86 (10) of DVAT Act 2010. Separate penalty also came to be levied under Section 86 (14) read with Section 33 of DVAT Act.

6. Feeling aggrieved by the assessments, the dealer filed objections. Learned OHA dismissed the objections.

Assessments were made after survey report was submitted by Enforcement-I Branch of Department of Trade & Taxes as

regards survey conducted on 29/06/2011 at the business premises of the dealer-applicant – a proprietorship concern. The survey led to detection of stock variation of Rs. 4737033/- (short), cash variation of Rs.8,05,466/- (short). In addition to these variations, Enforcement – I Branch also seized certain documents, comprising of one diary. The transaction recorded in the seized documents were of the value of Rs. 52,52,000/-.

8. As noticed above, appeal No. 806/12 pertaining to default assessment of tax was dismissed. Out of the other two appeals, one appeal challenging penalty u/s 86(10) of DVAT Act was allowed while setting aside the said penalty and the impugned order passed by learned OHA , but as regard the third appeal we did not find any ground to set-aside the penalty u/s 86(14) read with section 33 of DVAT Act. Thereafter dealer – appellant has filed these two review applications.

9. Arguments heard. File perused.

10. Learned counsel for the applicant has referred to decision in **BCCI vs. Netaji Cricket Club (2005) 4 SCC 741.** We have gone through the said decision on the point of maintainability of such an application for review of an order and proceed to deal with the grounds raised by learned counsel for the

applicant for review of the judgment passed by this Appellate Tribunal.

11. So far as grounds and powers for review of an order are concerned for ready reference it is appropriate to refer to the provisions of Regulation 24 of Delhi VAT Appellate Tribunal Regulation 2005.

Regulation 24 reads as under :

> "(1) Subject to the provisions contained in sub-section (2) of section 76 of the Act and the rules made there under, any person considering himself aggrieved by an order of the Tribunal and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for a review of the order within sixty days from the date of service of the order:
>
> Provided that the Tribunal may at any time, review the order passed by it suo motu also for reasons to be recorded by it in writing.
>
> (1) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.

(2) Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:

Provided that-

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the order was made, without strict proof of such allegation."

In view of the above provision pertaining to review of order, any person feeling aggrieved by the order of the Appellate Tribunal is to satisfy that the review is being sought because of discovery of new and important matter or evidence and that the said matter or evidence was not within his knowledge or could not be produced at the time the order was passed by the Appellate Tribunal or on account of mistake or error apparent on face of record or any other sufficient reason.

12. While referring to the findings in para 12 & 13 of the judgment passed by this Appellate Tribunal for drawing adverse inference against the dealer, learned counsel for the applicant has submitted that copy of deployment order was

never furnished to the dealer. In this regard, reference has been made to an application submitted by the dealer under Regulation 20 of DVAT Regulations, 2005 on 07/10/2019 to submit that Sh. A. K. Singh concerned VATO (Enforcement-I Branch) who had conducted survey on 29/06/2011 was issued notice by this Appellate Tribunal but he did not respond to the said notice. On behalf of the applicant, it has been submitted that Sh. A. K. Singh having not appeared, error has crept in the findings recorded by this Appellate Tribunal regarding supply of deployment order to the dealer. The contention is that in the given situation, adverse inference should have actually been drawn against the Revenue and not against the appellant.

13. It may be mentioned here that in the course of arguments in the appeals, one of the contentions raised by learned counsel for the appellant was that the survey conducted by Enforcement-I Branch was illegal, the reason being that it could not be said as to who had authorized the said branch to conduct survey.

In this regard, reference was made by learned counsel for the appellant to reply dated 07/08/2015 received from PIO(EI)/Assistant Commissioner (E-I), in response to the information sought by the dealer under the Right to Information Act.

While dealing with this contention this Appellate Tribunal observed in the manner as:

> ".....As regards delegation of powers to Enforcement- I branch team, dealer was supplied information under RTI Act, in reply to its query.
>
> The query was raised by the dealer under Right to Information Act, for the first time on 27/08/2015 i.e. after the disposal of the objections by Learned OHA, and surprisingly, never prior thereto.
>
> 13. It was informed by the PIO "survey is assigned with the approval of the competent authority. Photocopy of the deployment register was stated to have been enclosed to the said response. But there being no enclosure, the dealer filed appeal before the First Appellate Authority, under RTI Act, and accordingly the department was directed to furnish copy of deployment order.
>
> Undisputedly, the deployment order came to be supplied to the dealer. It may be mentioned here that the dealer has not submitted copy of said deployment order.
>
> There is no reason for non furnishing of said deployment order. As a result, adverse inference has to be drawn against the dealer that if the said deployment order was placed, it would not have supported the case of the dealer on the point of approval by the competent authority to Enforcement-I branch

to conduct survey at the business premises of the dealer-assessee."

14. In the arguments on the present review applications, we have enquired from learned counsel for the applicant as to whether the applicant filed second appeal under RTI Act, on the ground that copy of deployment order had not yet been supplied to the applicant. Learned counsel for the applicant had candidly admitted that no second appeal was filed under RTI Act on the ground that copy of deployment order had not yet been supplied.

In the given facts and circumstances, this Appellate Tribunal did not fall in error while observing that the dealer had not submitted copy of deployment order and there was no reason for non furnishing thereof, and accordingly in drawing adverse inference against the dealer for the reasons recorded therein.

15. Another point raised on behalf of the applicant is that even though the dealer-applicant had not sought deployment order in Form DVAT-50 soon after the survey or during assessment or during hearing before objections, as rightly observed by this Appellate Tribunal in the judgment, the applicant – appellant could raise this legal objection before this Appellate Tribunal in appeal.

Learned counsel for the applicant has submitted that as per record he had submitted before this Appellate Tribunal an application in the form of a written note that 13/1/2016 when the respondent – Revenue permitted ~~the~~ him (learned counsel) to inspect the record in terms of orders passed by this Appellate Tribunal, he found that for DVAT-50 was not in the record so shown to him on 13/1/2016.

It may be mentioned here that while dealing with the point raised as regards DVAT 50, this Appellate Tribunal observed in the manner as:

> "Section 68 (2) of DVAT Act provides that where the Commissioner delegates his powers under Chapter X, the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers.
>
> Admittedly, Authorized Representative of the dealer was present at the site at the time survey was conducted. Here, it is not case of the dealer that at the time survey was conducted at the business premises, its Authorized Representative asked for production of DVAT 50 and that the team from Enforcement-I did not produce the same.
>
> Furthermore, no material has been brought to our notice to suggest that on the spot or soon after survey, the dealer lodged

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any protest that survey was conducted even after authorised representative of the dealer asked for production of the authority in the form of DVAT 50 or that the team did not produce the same or any member of the team represented that it was not carrying any such authority."

Accordingly, this Appellate Tribunal held that dealer had failed to establish that Enforcement-1 branch visited the business premises of the dealer-appellant and conducted survey, without delegation of any power.

In view of the above findings, we do not find that the judgment passed by this Appellate Tribunal suffers from any error on this point.

16. As regards ground E in the review application dealer has alleged that this Appellate Tribunal while disposing of the appeals recorded the contention of the applicant as regards non compliance with provision of section 60(2) of DVAT Act but did not return any finding whatsoever thereon.

On the other hand, learned counsel for the Revenue has submitted that this submission of learned counsel for the applicant is without any merit, the reason being that the contention raised by learned counsel for the appellant on this point was discussed and the point was adjudicated.

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In this regards, the contention raised by the dealer-appellant in the appeals and the observations and reasons recorded by this Appellate Tribunal while dealing with the same are reproduced hereunder"

> "14. Ld. Counsel for the dealer- appellant contended that as per Section 60 (2) of DVAT Act, power to entering/ searching any business premises, the commissioner has to record reasonable grounds to believe that any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner and for the purposes of administration of this Act, it is necessary so to do the acts as prescribed in clause (f) of sub section 2 of Section 60.
>
> The contention is that, in this case, Revenue has failed to prove that there was any such reasonable ground, and as such the survey conducted by Enforcement – I Branch is illegal.
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> In support of his contention, Ld. Counsel for the appellant has referred to decisions in **Larsen and Toubro Ltd. v. Govt. (NCT of Delhi)** 2016 SCC Online Del 664 : (2016) 89 VS 35 and **Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner, Trade & Taxes, Delhi &Ors**W.P.(C) 714/2016.

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In **Larsen and Toubro Ltd.** case's (supra), there was nothing in the file to suggest as to what reasons weighed with the Commissioner to order a survey u/s 59 of the Act and subsequently order sealing of the property u/s 60 of the Act.

In that case as on 15/03/2013, that is the date of inspection, the petitioner was not functioning at H-45, Udyog Vihar and rather it was functioning D-4, Udyog Vihar.

In **Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner, Trade & Taxes, Delhi &Orscase's** (supra), Hon'ble High Court observed that Section 60 mandates that the Commissioner must have reasonable grounds to believe that "any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner"; that this satisfaction of the Commissioner has to be based on materials that are available on record.

Therein, the power was found to have been mechanically exercised using a cyclostyled form. The notice set out only one ground, in a pre-printed form, that the dealer "failed to produce the books of accounts till 7:30 PM in spite of issue of notice under Section 59 of the DVAT Act 2004". Hon'ble Court observed that all this did not satisfy the statutory requirement u/s 60(2)(f) of the Act."

15. On the other hand, learned counsel for Revenue submitted that survey was conducted after due permission and authorization granted in accordance with law.

16. In this regard, it is significant to note that the dealer never sought any such information from the department about deployment order, in form DVAT 50, soon after the survey or during assessment or during hearing on objections in this regard.

Had it been so urgently sought for, the department would have supplied the same. In such a situation, Learned OHA would have also called for the record from the department and satisfied itself.

Raising of this ground for the first time in appeal does not rebut the presumption attached to the proper discharge of functions by the authorities in discharge of their official duties. Therefore, we do not find any merit in the contention raised by the learned counsel for the appellant the search and survey conducted by Enforcement-1 team was illegal."

17. In view of the forgoing observations, reasons and findings recorded by this Appellate Tribunal, we do not find any merit in the contention raised by learned counsel for the applicant that the said point raised by him was not decided. Consequently, we do not find that this Appellate Tribunal fell in error while deciding the appeals, even on this point.

18. While referring to ground F in the review applications, learned counsel for the applicant has submitted that this Appellate Tribunal erred in not taking into consideration documents relating to reconciliation of stock, delivery note/ purchase return and credit notes, which formed part of the appeal. Learned counsel for the applicant submits that under section 76(5)© of DVAT Act, this Appellate Tribunal could take into consideration the said documents.

However, Learned counsel for the Applicant has candidly admitted in the course of arguments on these applications that no permission was sought by the appellant applicant from this Appellate Tribunal to place on record the said documents, which were admittedly not produced before the learned OHA.

It would be appropriate to reproduce here the reasons and finding recorded by this Appellate Tribunal while dealing with contention raised on behalf of the appellant as regards stock variation:

Stock Variation.

> "As regards stock variation, the contention of learned counsel for the appellant was that the dealer had submitted before the learned Assessing Authority reconciliation statement depicting return of certain goods purchased, but no reliance was placed by the Assessing Authority on these documents, and as such the assessment framed deserves to be set-aside.
>
> A perusal of the copy of reconciliation statement would reveal that same is dated 26/06/2011. There is no mention in the assessment framed by learned Assessing Authority that any such plea was taken by the dealer.
>
> A perusal of impugned order would reveal that only four objections were raised by the dealer. As per objection no. 3 difference in stock and cash was subject matter of reconciliation,

valuation of stock, cash received/expenses and the source of information received.

There is nothing in the impugned order to suggest that any such document in the form of reconciliation statement, accompanied by delivery note/purchase return dated 26/06/2011 was submitted by the dealer before learned OHA. Had it been produced, dealer would have submitted proof regarding its submission there. No such receipt or document regarding submission of this delivery note before learned OHA has been filed. In absence thereof, it cannot be said that learned OHA failed to consider the point of purchase return.

As noticed above, Learned Assessing Authority observed in the notice of default assessment that many documents were not furnished in respect of tax period 2010-2011, 2011-12 (upto June2011). Those were specified in the assessment framed.

The dealer failed to appear before Learned Assessing Authority on 01-03-2012. Before Learned OHA, the dealer raised objection that the A. R. could not attend the proceeding on 01-03-2012, before learned Assessing Authority due of surgery of mother of A. R. Sh. Manoj Kumar. There is nothing in the impugned order to suggest if the dealer filed any medical certificate in this regard.

The Assessing Authority tried his best to again contact the dealer, on mobile phone, and the reply was that his A. R. shall be appearing. However, even thereafter there was non appearance on behalf of the dealer, what to say of production of four type of

documents initially sought by the Assessing Authority and ultimately for 01/03/2012.

There is nothing in the impugned order passed by Learned OHA, that during objection proceeding, the dealer produced any document which it had earlier failed to produce before Learned Assessing Authority.

In the given facts and circumstances, we do not find any ground to set aside the findings recorded by the Assessing Authority and Learned OHA, on the point of stock variation."

19. Even though section 76(5)(c) of DVAT Act allows production of additional evidence before this Appellate Tribunal, when admittedly the appellant did not seek any permission to place the said new documents, earlier not produced before learned OHA, it cannot be said that this Appellate Tribunal fell in error in not taking into consideration the said documents.

Result

20. In view of the above discussion, we do not find that the judgment delivered by this Appellate Tribunal suffers from any error on the face of record. There is no merit in the applications seeking review of the judgment dated 25/3/2022. Consequently, both the applications are hereby dismissed with

cost of Rs. 20,000/- each to be deposited under the appropriate head "others".

21. 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 : 02/06/2022

2/6/2022

(Rakesh Bali)
Member (A)

2/6/2022

(Narinder Kumar)
Member (J)

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In Appeal No. Rev.APP-449-450/22 806-808/ATVAT/12 /4612-19 Dated: 03/06/2022

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 3.6.22