

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar, Member (Judicial)

Appeal No. 1015-16/ATVAT/11

Appeal No. 1181/ATVAT/11

Date of Order : 8/6/2022

M/s Metal and Electricals,
673, Farsh Khana,
G. B. Road,
Delhi.

.....Appellant

V.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. V.Lalwani

Counsel representing the Revenue : Sh. P.Tara (Appeal No. 1181/11).
Sh. N. K. Givlati (Appeals No. 1015-16/11).

JUDGMENT

1. Present appeals came to be presented by the dealer-appellant, a proprietorship concern, challenging common order dated 06/09/2011 passed by Learned First Appellate Authority (Zone -III), whereby the first appeal filed by the dealer u/s. 43(5) of Delhi Sales Tax Act (hereinafter referred to as DST Act) and Section 9 of Central Sales Tax Act (hereinafter referred to as CST Act), were dismissed.



Narinder Kumar
8/6/22

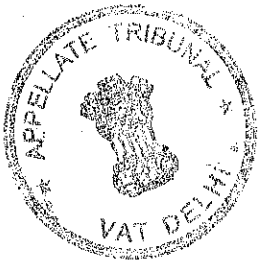
2. In the first appeals, assessments pertaining to tax period 2001-02 were challenged. Said assessments were framed by Assessing Authority, relating to tax period 2001-02 (under DST Act and CST Act) and also to the assessment year 2002-03 framed under DST Act.

Appeal No. 1015-1016

3. On 21/07/2006 assessment u/s. 24 of DST Act was framed by Assessing Authority (ward 25) while observing as under:-

“In response to notice ST-15 given to the dealer Sh. S.K Kapoor, Advocate with PAO appeared and filed his reply stating that he has already filed copies of credit notes and copy of purchase account. On examining the documents, five credit notes amounting Rs.1177/- pertaining to the year 2001-02 are accepted. One Credit note amounting Rs. 397131/- dated 29-8-1995 is not acceptable as it pertains to the year 1995-96 and the assessment year (re-opened) is 2001-02. One credit note amounting Rs 257075/- dt 13-05-2000 is also not acceptable as it pertains to the year 2000-01.

The total concealment of purchases is found to be Rs.654206/-. The GTO of the dealer for the year 2001-02 under local act is increased by Rs.257075/- + 12% as ratio of gross profit and to be taxed @8% with interest and under Central Act is increased by



Rs. 397131/- plus 12% as ratio of gross profit and to be taxed @ 10% with interest/-. A penalty of Rs. 1.44 Laks is imposed. Central Assessment will be framed in Central Order.”

4. Separate Assessment order u/s 9 of CST Act, 1956 was framed by the same Assessing Authority.
5. Feeling aggrieved by the Assessments, the dealer challenged the same before First Appellate Authority.
6. Learned first Appellate Authority dismissed the appeals by observing in the manner as:-

“Attention is called at the order of AA which reads “as per record available in file, it is found that the actual value of forms issued to the appellant and tax paid purchases is Rs. 9220623/- whereas purchase value is shown as Rs. 8565240/- in the trading account. The form value is more than then the purchase shown by the dealer in its trading account. In view of the discrepancies, it was decided to re-assess the case to safe-guard the revenue of the Government. On examining the documents filed by the Counsel of the appellant in response to the notice ST-15, it was found that the credit notes amounting to Rs. 397131/- dated 29.8.1995 (under Central Act) pertains to the year 1995-96 and credit note for Rs.257075/- dated 13.5.2000 (under Local Act) pertained to year 2000-01. And hence the same was not



21/6

acceptable during the assessment year 2001-02. The total concealment of purchase was found to be Rs. 654206/-. Accordingly, the AA increased the GTO under local and Central Act by 12% as ration of gross profit and taxed @8% with interest. Also penalty was imposed.

I have perused the order of AA, submission made by the counsel of the appellant, written submission along with copies of credit notes and judgments pronounced by various courts filed by the counsel of the appellant and my finding are as under:-

On perusal of the credit notes for instance for Rs. 397131/-, it is found that the M/s Jaipur Metals & Electricals Ltd vide its ref. Acc/CN/119 dated 29.8.1995 has issued credit note for Rs.397131/- against bills No. 950586,587,588,589,590,591 & 592 all dated 28.7.1995. That is credit note has been issued by the selling dealer within one month from the execution of date of sale. Similar is the case with other notes amounting to Rs.257075/- Moreover, it is unimaginable to believe that the credit notes issued in the year 1995 and 2000 was received by the appellant in the year 2001-02. The dealer has failed to produce any such documents or bank statement to prove his claim. Hence the plea of the appellant that these credit notes pertain to previous year but the relevant account of the same period has been closed therefore as per accounting ethic and accounts practice these credit notes has to be adjusted in the assessment year in which it has been received, so that in creditor account to be reduced accordingly in the balance sheet otherwise



it will be added in income declared by the Income Tax Department, does not come to his rescue.

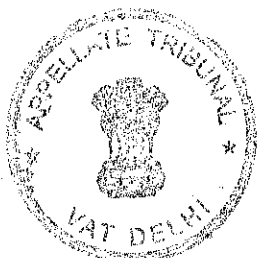
Hence, in light of above facts and findings I do not find any merit in the case of the appellant and dismiss the same. The appellant is directed to deposit the balance demand within 30 days from the date of order, failing which AA is directed to initiate the process to recover the balance demand amount from the appellant as per the Act.

Ordered accordingly.”

7. Hence these appeals.
8. As per grounds of appeal this is neither a case of concealment nor of suppression of turnover and that actually the credit notes were adjusted by the dealer subsequently, when the relevant period in which their adjustment was required to be made, had already expired.

Appeal No. 1181/11

9. On 21/07/06 assessment was ^{also} framed relating to tax period 2002-03 by Learned Assessing Authority (Ward 25) u/s. 24 of DST Act due to the following reasons:



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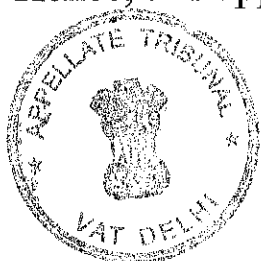
“In response to ST-15 given to the dealer Sh. S.K Kapoor, Advocate appeared and filed reply stating that he has already filed copies of credit notes and copy of purchase account.

On examining the documents, nine credit notes pertaining to the year 1995-96 are not acceptable as the assessment (re-opened) is for the year 2002-03. One credit note amounting Rs 702/- dt 23-03-2002 is accepted. A copy of FIR regarding burglary is also filed. The Sales Tax department has not been informed by the dealer at the time of occurrence of burglary. Dealer's contention of getting tax relief on burglary is not accepted.

The total concealment of purchase is found to be Rs.947374/-. The GTO of the dealer for the year 2002-03 under local act is increased by Rs.947374/- + 8.4% as ratio of gross profit i.e. total of Rs. 1026953/- and to be taxed @8% with interest under local act. A penalty of Rs. 2.5 Lak under local act is also imposed. Central Assessment will be framed in Central Order.”

10. Feeling aggrieved by the above assessments, pertaining to the 2002-03 dealer filed appeal u/s. 43(5) of DST Act. Learned First Appellate Authority – Additional Commissioner (Zone X) dismissed the appeal while observing that the Assessing Authority framed assessment in conformity with the rules and regulations.

11. Hence, this appeal No. 1181/11.



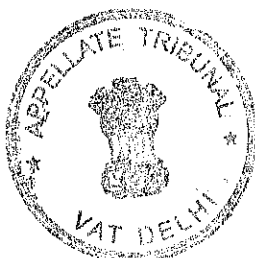
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12. The ground of appeal put-forth by the dealer is that Learned Assessing authority wrongly assumed that this is a case of concealment of purchases, and thereby erred in increasing the GTO under Local Act. ✓

Another ground put-forth by the dealer is that the credit notes received by the dealer from the suppliers pertained to the previous year but the same were adjusted in the assessment year during which the same were received, the reason being that the period to which the said credit notes pertained was already over.

Another ground put-forth by the dealer is that Learned Assessing Authority converted purchases into sale only on the basis of assumption.

13. It may be mentioned here that Learned First Appellate Authority dismissed the appeal filed by the dealer while rejecting the contentions raised on its behalf regarding adjustment of the credit notes during the year 2002-03, on the ground that the same were received in the said tax period.



Learned First appellate Authority observed that no adjustment of credit notes could be made by reducing purchases after 6 years, as provisions of DST Act.

Metal & Electricals - 1015-16/11 & 1181/11 ~

14. The first argument advanced by the learned counsel for the appellant – dealer – assessee in respect of all the three appeals is that as per section 24 of DST Act, Commissioner is required to record reasons before enforcing these provisions, but in this case, department has not proved recording of any reasons by the Commissioner, and as such the impugned assessment and the impugned order deserves to be set-aside. In support of this contention learned counsel has referred to decision in **Samagya Consultants (P) Ltd. v. Commissioner of Sales Tax and Anr.**, 2001 122 STC 512 Delhi and **U. P. Cooperative Federation Ltd. v. State Of U.P. And Others** (2010) 36 VST 386 (All).

On the other hand, learned counsel for the Revenue has referred to the averments put-forth by the appellant itself in para 4 of this memorandum of appeal and submitted that it was on account of audit that the dealer was called upon to explain the discrepancies noticed by the Audit Department,

11/12/16



and as such, there is no merit in the contention raised by learned counsel for the appellant.

15. I have gone through the decision in **Samagya Consultants (P) Ltd's** (supra) delivered in writ petitions where issuance of notice u/s 24 of DST Act was challenged on the ground that no reason was recorded before its issuance.

I have also ^{gone} ~~go~~ through the decision in **U. P. Cooperative Federation Ltd's** case (supra), ~~was also~~ delivered in a writ petition challenging notice issued by Additional Commissioner to show cause as to why tax may not be imposed on rice brand and kinkee as the petitioner had not provided form 3 Ga(1) to the millers.

Here in this case, in para 4 of the memorandum of appeal, it has been averred that the Assessing Authority called upon the dealer to explain objections raised by the Audit Department regarding some discrepancies in purchase value declared in the trading account with Statutory Form issued against said purchases made during this period.

In the assessment order, learned Assessing Authority clearly mentioned that it was in ^{response to} ~~respect~~ of ST-15 given to the dealer

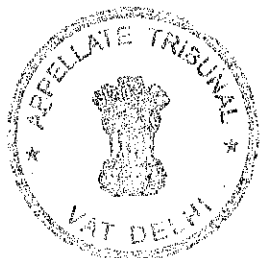


that Sh. S. K. Kapoor, Advocate appeared on behalf of the dealer and filed reply.

16. In the course of arguments, query has been put to learned counsel for the appellant regarding notice issued by the Department in Form ST-15. Thereupon, learned counsel for the appellant has not straightway disputed receipt of the said notice. Learned counsel for the appellant has admitted that advocate of the dealer appeared before learned Assessing Authority to explain discrepancies.
17. There is nothing on record to suggest that the dealer ever sought an information from the Assessing Authority to know about recording of reasons for issuance of ST-15 or asked for supply of copy of the document containing said reasons. Rather, the dealer without doing so participated in the proceedings through its advocate and even filed reply thereto. Dealer has failed to produce copy of the said ST-15.

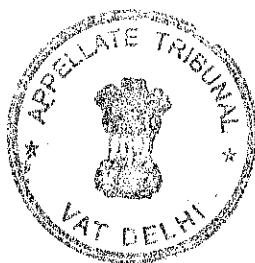
Learned counsel for the appellant has submitted that he is not having any copy of ST-15. Copy of the notice should have been available with the dealer and produced on record so that its contents could be perused to find out as to the purpose of its issuance.

22/9/16



Even otherwise, in the given situation, when the proceedings came to be initiated on the basis of audit, it cannot be said that this is a case where present assessment proceedings were initiated without any reason. In the peculiar facts and circumstances of the case, decisions in **Samagya Consultants (P) Ltd's and U.P. Co-operative Federation's** case (supra), do not come to the aid of the dealer – appellant

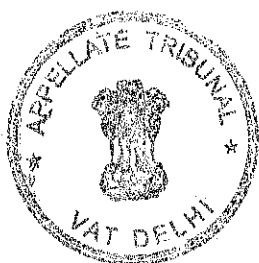
18. As per claim of the dealer in memorandum of appeal ~~is that~~ this is a case where the credit notes pertaining to the year 1995-96 were supplied by the supplying dealer to the appellant in the year 2001-02 on account of return of defective goods to the supplying dealer, and as such entries regarding their receipt were made in the year 2001-02, but the Assessing Authority has wrongly framed assessment while observing that this is a case of total concealment of purchase.
19. From the averments put forth by the dealer – appellant in the memorandum of appeal and from the reply submitted by the dealer to the notice in form ST-15 issued by the Assessing Authority, it is obvious that dealer admits to have received credit notes pertaining to the year 1995-96 in the year 2001-02.



20. In respect of appeals No. 1015-16/11, Learned counsel for the appellant has submitted that the Assessing Authority did not record any findings on the point of return of the defective goods.
21. On the other hand, learned counsel for the Revenue has submitted that there is nothing on record to suggest that the dealer produced before the Assessing Authority any material in proof of return of any defective goods. Learned counsel further submits that even before the learned First Appellate Authority, the dealer did not produce any such evidence and further that while filing these appeals 1015-16/11, the dealer has not produced any such document in support of the said plea.

Ultimately learned counsel for the Revenue has submitted that when the dealer had got issued from the department more statutory forms but the dealer gave utilized lesser number of forms by giving the same to the selling dealer in making the said purchases, the Assessing Authority was justified in arriving at the conclusion that it was a case of concealment.

22. A perusal of the impugned order passed by learned First Appellate Authority would reveal that the dealer did not put



22/8/16

forth any ground of return of any goods to the supplying dealer, in respect of which the said credit notes are stated to have been issued. Had any defective goods been returned by the dealer to the selling dealer, he must have made requisite entries in the account books and also apprised the Department of this fact. However, there is nothing on record to suggest that any such fact was recorded in the account books by way of any entry during the relevant period and that too before the issuance of the credit notes.

There is nothing in the statement of facts put forth by the dealer to suggest as to on which date purchase order was placed and as to against which purchase order defective goods were returned and as to on which date any such defective goods were returned by the dealer – appellant.

In absence of all these material particulars and documentary evidence, there is no illegality in the assessment order and the impugned order passed by learned First Appellate Authority whereby levy of tax and interest has been upheld.

23. Another argument advanced by the learned counsel of the appellant is that fresh assessment can be carried out by the Commissioner u/s 24 of DST Act on the ground that whole or

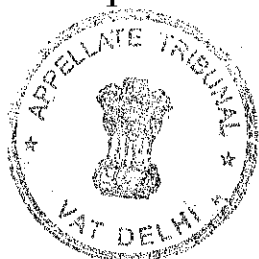


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any part of the turnover of a dealer had escaped assessment. The contention is that simply because the credit notes were entered in the account books of the dealer, subsequently i.e. in the year 2001-02 (as regards appeal Nos. 1015-16/11), when the same were received, it cannot be said to be a case where turnover had escaped assessments, and as such the assessment framed by the Assessing Authority deserves to be set-aside.

24. Learned counsel for the dealer – appellant has contended that issuance of credit notes because of return of certain goods had nothing to do with the sales/turnover, and even on this ground the assessments framed deserved to be set-aside.
25. Learned counsel for the appellant has referred to decision in **Sri Jagannath Promoters & Builders vs. Dy. Commissioner of Income Tax, Berhampur Circle, W.P. (C) No. 14603 of 2014** decided on 26/10/2021 by the Hon'ble High Court of Orissa at Cuttack and submitted that present case being a case of change of opinion, the assessments framed deserve to be set-aside.

As noticed above, in this case the credit notes were produced by the dealer before the Assessing Authority only after the Audit Department observed certain discrepancies in the



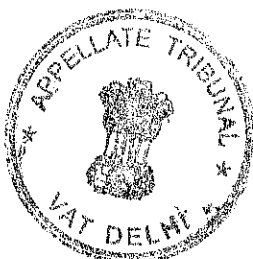
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account books regarding the purchase, as noticed above, and the same led to issuance of notice in form ST-15, these facts were not within the notice of the department at the time the previous assessments were made.

In the given facts and circumstances, there is no merit in the contention raised by learned counsel for the dealer – appellant in respect of all the three appeals that this is a case only of change of opinion. Decision in **Sri Jagannath Promoters & Builders** case (supra) does not come to the aid of the dealer, as in that case the same material was re-examined and a fresh opinion was arrived at by the respondent.

From the material available on record, it can safely be said that these are the cases where the dealer concealed the purchases and also did not justify the difference between the statutory forms got issued from the department and actually utilized, and rather put forth the plea of issuance of credit notes only after notice in form ST-15 was issued and not prior thereto. Therefore, there is no merit in the contention raised by learned counsel for the appellant challenging the assessments framed due to the aforesaid reasons.

26. Another argument advanced (in appeals No. 1015-16/11) by learned counsel of the appellant is that the Assessing



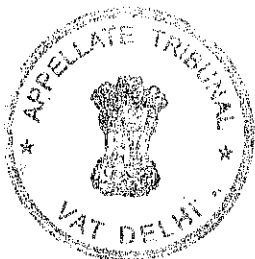
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Authority has framed assessment creating part of the turnover under the provisions of Delhi Sales Tax Act and part of the turnover under Central Sales Tax Act, without any reason. Further, it has been contended that the Assessing Authority had no such powers to split up the sales as per his choice and levy of tax as regards tax period 2001-02. In support of this contention, learned counsel has referred to decision in **R.H. Enterprises & Ors. v. Commissioner of Sales Tax & Ors.** (1992) 85 STC 251, as finds ^{briefly} mentioned in the written submissions.

27. In this regard, it may be mentioned here complete text in the decision in case **R.H. Enterprises & Ors.** has not been made available by learned counsel for the appellant.

As submitted on behalf of the Revenue, during the relevant period ^{the} Assessing Authority appointed for framing of assessment for Local Act (DST Act) was also empowered to frame assessment for central sales.

As finds mentioned in the assessment pertaining to Central Sales, it was framed for the very reasons recorded by learned



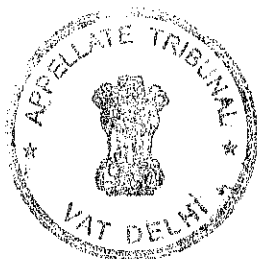
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Assessing Authority for framing of the assessment under DST Act, pertaining to the same tax period 2001-02.

In view of the above discussion, in the peculiar facts and circumstances of the case, there is no illegality in the impugned order and the impugned assessments even though framed separately under Local Act and CST Act, keeping in view the relevant turnover i.e. pertaining to local sales and the turnover pertaining to central sales, by increasing the GTO for the said tax period – 2001-02 under the Local Act i.e. DST Act and CST Act.

28. As regards appeal No. 1181/11, from the pleadings put-forth by the dealer and from the documents of the Revenue, it transpires that the dealer appeared before learned Assessing Authority, in response to ST-15, to explain discrepancies observed at the time of audit and it was at that time that the dealer filed copies of credit notes pertaining to the year 1995-96 and one credit note dated 23/03/2002. At that time, version put-forth by the dealer before learned Assessing Authority was that a burglary had taken place and in this regard, FIR was lodged and as such, the dealer was entitled to relief on the point of tax.

22/9/16



Learned Assessing Authority considered the said plea, but rejected the same on the ground that the dealer had not informed the Revenue at the time the said burglary is alleged to have taken place.

Surprisingly, in this appeal (No. 1181/11), learned counsel for the appellant argued that credit notes were issued by the selling dealer to the purchasing dealer i.e. appellant on account of return of goods.

In para 6 of the facts of the case, forming part of appeal, the factum of theft has been alleged to be the ground in respect of the credit notes. No explanation has been furnished in this regard.

Argument being against the averments put-forth in the memorandum of appeal, same is liable to be rejected even on this ground.

Had any theft taken place, the dealer would have informed the Department and also reflected entries in the relevant account books. As noticed above, the dealer did not inform the Department about any such theft and rather produced copies of the credit note for the first time in the year 2002-03 and that

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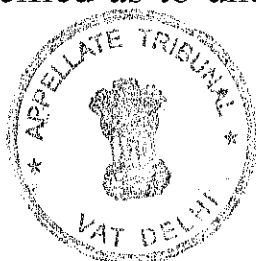


too after the audit. In the given circumstances, learned Assessing Authority rightly rejected the plea of theft ^{but farth} to justify issuance of credit notes by the dealer. ✓

For the same reasons, there is no illegality or irregularity in the impugned order passed by learned First Appellate Authority.

Penalty

29. As noticed above, while framing assessments pertaining to the tax period 2001-02, learned Assessing Authority also levied penalty of Rs. 1.44 lakh. and while framing assessment in respect of tax period 2002-03, a penalty of Rs. 2.05 lakhs, due to the above said reasons for framing of assessment of tax and interest.
30. Learned counsel for the appellant has referred to provisions of 55 to 57 of DST Act and submitted that before levy of penalty, a notice is required to be issued to the dealer by the Commissioner, but no such notice having been issued, the levy of penalty deserves to be set aside. It has also been contended that levy of penalty deserves to be set-aside because in the assessments, Assessing Authority nowhere specified as to under which provision of law the penalty was



9/6

levied. In support of his contention, learned counsel has referred to decision in **Brajalal Banik v. State of Tripura and Anr.**, 1990 79 STC 217 Gauhati.

31. Under Section 55 of DST Act, Commissioner may impose penalty after giving the dealer an opportunity of being heard. As noticed above here, the dealer has not placed on record copy of notice that was issued to him by the Assessing Authority. In absence thereof, it cannot be said as to what were the contents of the said notice as regards penalty.

32. Be that as it may, while imposing penalty, Assessing Authority is required to specify the provision of law under which the penalty was actually levied. However, in the assessment order, the learned Assessing Authority has not specified any provision of law under which impugned penalties came to be levied.

While hearing first appeal, learned First Appellate Authority upheld the assessment framed by the Assessing Authority, without taking into consideration that the Assessing Authority had nowhere specified as to under which provision of law the penalties were levied.



In view of the above discussion, the assessments of penalties in respect of both the tax periods deserve to be set-aside. Same are hereby set-aside.

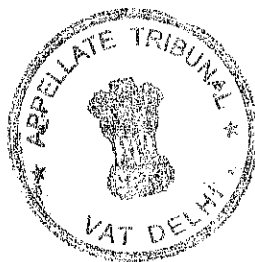
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Result

33. In view of the above discussion, finding no merit in the appeals No. 1015-16/11 & 1181/11 as regards levy of tax and interest, the impugned order passed by learned First Appellate Authority is upheld *and all appeals are dismissed.*
34. As regards levy of penalties in respect of both the tax periods, the appeals are allowed. Consequently, the impugned order upholding the penalties levied by the Assessing Authority is set aside.
35. File be consigned to the record room. Copy of the order be sent 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 : 8/6/2022



Narinder Kumar
8/6/22
(Narinder Kumar)
Member (J)

Appeal No. ^{1015-16/ATVAT/11} / ^{1181/ATVAT/11} 4776-83

Dated: 04/06/22

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. | |

REGISTRAR

