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

Appeal No : 99-104/ATVAT/2020
Appeal No : 105-110/ATVAT/2020
Date of Decision :28/06/2022

M/s. Amway India Enterprises Pvt. Ltd.,
Ground & 1st Floor,
Heirarchical Commercial Centre,
Jasola, New Delhi – 110025. .... Appellant

V

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

Counsel representing the Appellant : Sh. A. K. Bhardwaj,
Counsel representing the Revenue : Sh. P. Tara

JUDGMENT

1. By way of present 12 appeals, the appellant, a dealer registered vide Tin No. 07170192778, has challenged order dated 6/2/2020 passed by learned Objection Hearing Authority (here-in-after referred to as OHA).

2. Vide impugned order learned OHA disposed of 12 objections filed by the appellant – objector. Those objections were filed against notices of default assessment of tax, interest and

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APPELLATE TRIBUNAL VAT DELHI

penalty dated 27/2/2018 and 28/2/2018, issued u/s 9(2) of Central Sales Tax Act (here-in-after referred to as CST Act).

3. The matter pertains to tax period - May, 2011 July, September, November, 2011 and Jan. 2012, March 2012.

4. It may be mentioned here that aforesaid assessments dated 27/2/2018 & 28/2/2018 u/s 9(2) of CST Act were framed consequent upon remand of the matter vide order dated 8/1/2018 passed by the learned OHA.

While remanding the matter, learned OHA had set-aside the previous assessment made on 12/7/2013 as regards central sales.

5. It may also be mentioned here that feeling aggrieved by the aforesaid order of remand dated 8/1/2018, passed by learned OHA, objector – dealer filed appeals No. 370-394/17 before this Tribunal on 7/2/2018. Subsequently, on 9/2/2018, the objector – dealer filed applications, in the aforesaid appeals before this Tribunal. One prayer was that the appellant be allowed to plead additional grounds. Another prayer was for stay of proceedings which were being conducted by the Assessing Officer on the basis of order of remand dated 8/1/2018.

6. Case of the appellant is that the aforesaid application filed by the appellant – dealer was to come up before this Tribunal on

28/2/2018 but the Assessing Officer made assessment on 27/2/2018 i.e. a day before, the application was to come up before this Tribunal.

7. Further, it is case of the appellant that vide order dated 14/5/2018, this Tribunal took cognisance of the assessment made by the Assessing Officer, stayed the operation of the assessment order dated 27/2/2018 and at the same time restrained the Revenue/ Department from taking any coercive step to recover any amount towards the disputed demand, till the disposal of appeals. Those appeals stand disposed of by this Appellate Tribunal.

In order to challenge the assessment dated 27/2/2018 and 28/2/2018, the dealer filed objections u/s 74 of DVAT Act before learned OHA.

Vide impugned order dated 6/2/2020, said objections came to be dismissed/rejected.

Hence these appeals.

8. Vide assessments dated 27.2.2018 and 28.2.2018, Learned Assessing Authority in total raised demand of following amount(s) of tax and interest and that of penalty:

S. No.	Tax Period	Disputed Amount of Tax & Interest	Disputed Amount of Penalty (In

		(In Rs.) (CST Act)	Rs.) (CST Act)
1	May 2011	1,23,03,167	61,40,648
2	July 2011	1,26,32,912	63,85,118
3	September 2011	1,30,80,333	66,96,103
4	November 2011	1,33,92,310	69,44,936
5	January 2012	1,59,96,486	84,06,475
6	March 2012	1,00,01,438	53,24,958

9. The dealer challenged the said assessments. While upholding the assessments, Learned OHA dismissed the objections, vide impugned order which is under challenge in these appeals.

Levy of Tax and Interest under CST Act

10. While challenging the impugned order as regards levy of tax and interest, the appellant has put forth the following grounds:

(1) The impugned order is based upon OHA's order who has acted in an utmost arbitrary manner and has failed to judiciously interpret the legislative provisions of the DVAT Act in para 32 (b) of his order.

(2) The OHA does not enjoy powers under the DVAT Act to extend the period of limitation u/s 34(1) of the DVAT Act for the purposes of fresh assessment. The powers under section 34(2) of the DVAT Act providing for extended period of limitation vest only with Appellate Tribunal or a Court.

(3) The Assessing Authority had the exclusive and original jurisdiction to make an assessment u/s 32(1) of the DVAT Act read with section 9 (2) of the CST Act within the time limit

prescribed u/s 34 (1) of the DVAT Act and in not having exercised the said jurisdiction within the prescribed period, Assessing Authority cannot be permitted to proceed and frame a time barred assessment independently or in terms of the directions of the OHA;That, since the impugned assessment is based upon illegal directions it has no legal legs to stand and is required to be set-aside, being without jurisdiction.

(4) That, assuming while denying that the OHA has the powers to remand the matter with an extended period of limitation u/s 34 (2) of the DVAT Act, even then the said power is restricted to the Act under which he is adjudicating – It does not extend to another Act on which he is not adjudicating.

(5) That the inaction on the part of the Assessing Authority to remedy the mistake in the orders of the assessment under the DVAT Act, dated 12.07.2013 cannot be substituted by legal overreach on the part of OHA and then by the VATO in terms of extending the limitation and providing a fresh time limit for a time barred assessment.

(6) Without prejudice to the above grounds, the Impugned Order has also wrongly taxed the AMAGRAM DVAT turnover by including it under the CST turnover.

(7) That even otherwise the AMAGRAM is a periodical and not liable for VAT/CST being exempt from tax under First Schedule of the DVAT Act.

Imposition of Penalties

11. As regards, challenge to the impugned order **concerning penalty**, appellant has put-forth the following grounds –

"That, the penalties amounting to Rs. 3,98,98,238.00 (for the 6 tax periods) are arising from an order with is barred by limitation and therefore the imposition of penalties are bad in law.

That, even on merits the penalty u/s 86 (10) is not leviable for all the 6 tax periods as has been done in the impugned orders.

That, such a penalty can be imposed only when it is established that return furnished by the dealer is false, misleading or deceptive in a material particular or the dealer omits from a return furnished under the Act any matter or thing without which the return is false, misleading or deceptive in a material particular.

As noticed from the facts, the Appellant Company filed returns disclosing all the disputed turnovers pertaining to exempted goods and as such, there was no omission of the said turnover as such; that the view taken by the dealer on the books and periodicals are exempt from tax under First Schedule of DVAT Act was a deliberate view based on his understanding and interpretations of the DVAT laws—it is a different matter that such an approach/interpretation on the part of the dealer was not acceptable to the VAT authorities, but the aforesaid approach of the dealer was bonafide and as such it cannot be said that the returns filed by the dealer were false, misleading and deceptive in material particular.

The claim of the dealer was bonafide may be not acceptable to the department and it is definitely an arguable issue and that for

the said reasons, the provisions of section 86 (10) cannot be invoked as has been done in the impugned order."

Arguments heard. File perused.

12. Learned counsel for the appellant has pointed out that even though the turnover pertaining to Central Sales was made available to the department in separate return furnished under CST Act, Assessing Authority included the same while framing assessments for the six tax period – May-2011/July-2011/Sept. 11/Nov.-2011/ Jan.-2012 and March, 2012, without framing any assessment framed under the CST Act. Learned counsel has further pointed out that on 30/03/2016, Assessing Authority framed default assessment of tax & interest under Section 9(2) of CST Act because of non-production of "F" forms pertaining to all the four quarters of 2011-12 and raised demands, but did not frame any assessment as regards the exempted sales as shown by the dealer-appellant in the return. The contention is that in this situation, it cannot be said to be a case of mistake.

The contention is that the Assessing Authority had the exclusive and original jurisdiction to make assessment, but, *within the time limit prescribed* u/s 34(1) of DVAT Act; that law does not permit OHA to extend the period of limitation for the purpose of fresh assessment; and that the said jurisdiction having not been exercised *within the prescribed*

period, the Assessing Authority could not be permitted to proceed with the matter.

Accordingly, learned counsel for the appellant has urged that the impugned order, vide which learned OHA has upheld afresh assessment as regards the central sales, under CST Act, deserves to be set-aside.

13. In support of his contention, learned counsel for appellant has relied upon decision in **State of Punjab &Ors. v. M/s Shreyans Indus Ltd. Etc.** in Civil Appeal Nos. 2506-2511 of 2016 decided on 04/03/2016 by Hon'ble Supreme Court. Therein, reference was made to the decision in **Bharat Heavy Electrical Ltd. v. Assistant Commissioner of Commercial Taxes (INT-I), South Zone, Bangalore and others,** (2006) 143 STC 10, wherein it was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess an assessee gets extinguished and this extension confers a very valuable right on the assessee.

14. On the other hand, learned counsel for the Revenue has submitted that the Assessing Authority has framed impugned assessments acting upon the directions issued by learned OHA while passing order dated 08/01/2018, and that too within the prescribed period, and that in view of provisions of

Section 74 B of DVAT Act, it cannot be said that the impugned assessment has been made beyond the prescribed period of limitation or without jurisdiction.

Learned counsel has referred to the provisions of Section 80 of DVAT Act, and contended that the order passed by Assessing Authority is in substance and according to the intent and purposes of DVAT Act, and as such any mistake, defect or omission in such assessment will not make the orders invalid.

Learned counsel has further contended that the OHA, in exercise of powers vested with him u/s 74(7) of DVAT Act, correctly remanded the matter under CST Act for correct assessment, particularly, when objection in this regard was raised by the appellant itself that the assessment pertaining to central sales turnover should have been made under CST Act, and not under DVAT Act.

15. In order to appreciate the contentions raised by learned counsel for the parties, reference to the facts is of much significance.

Initially, the assessments were framed by the Assessing Authority on 12/07/2013 for the period from April 2011 to March 2012.

16. Appellant company is engaged in the business of resale of

goods by 'direct selling method'.

Vide order dated 29/1/2013, it was directed by the VAT Department to get special Audit conducted, u/s 58A of DVAT Act, for the year 2011-12, through a designated auditor, namely, M/s Matta & Associates, CA.

On completion of Audit, a report was submitted by the above said firm to the VAT Department on 25/4/2013. Then, a show cause notice was issued by the concerned VATO for assessment purposes. The company filed detailed reply to the said notice.

After going through the reply to the above notice, Assessing Officer framed 12 assessments for the tax period beginning from April, 2011 to March, 2012 u/s 32 of the DVAT Act and raised tax demand with interest of Rs. 5,09,52,590/- (including tax of Rs. 4,10,47,163/- & interest Rs. 99,05,427/-). In this way, said assessment was initially made by Assessing Officer vide on 12/7/2013.

During the entire tax period 2011-12, the dealer declared tax free sales-

(i) of Rs. 68,47,544/- under DVAT Act and

(ii) of Rs. 79,79,64,762/- under CST Act

As regards sale of 'Books and Periodicals', said exemption

was claimed in accordance with Entry-5 of First Schedule of DVAT Act. Special Auditor was of the view that the dealer was liable to pay tax @ 5%.

That is how, on this ground, Learned VATO imposed additional tax of Rs. 4,02,40,615/-. However, the said assessments included assessments pertaining to turnover of Central Sales. No separate assessments was framed by the Assessing Authority as regards turnover of Central Sales.

Feeling dissatisfied with the orders of default assessments and imposition of penalty under DVAT Act, the appellant filed objections u/s 74 of the DVAT Act.

In those objections the issue relating to the periodical magazine of the appellant "AMAGRAM' was as to whether it was exempt under entry No. 5 of the Schedule-I of the DVAT Act or exigible to tax @ 5% under entry No. 52 of the Schedule-III of the DVAT Act.

Learned OHA decided said issue involved in the previous objections against the appellant by confirming the assessment of tax @ 5% framed as regards sale of 'AMAGRAM' *under the DVAT Act*, and to the extent of Rs. 68,47,544/-.

At the same time, keeping in view that the assessment framed under DVAT Act included CST turnover of Rs. 79,79,64,762/-Learned OHA remanded the matter to

Assessing Authority.

In this regard, Learned OHA issued directions to the Assessing Authority for framing of the fresh and appropriate orders under the relevant provisions of the CST Act as regards the balance turnover of Rs. 79,79,64,762/-.

17. Learned counsel for Revenue ~~further~~ has contended that the OHA, in exercise of powers vested with him u/s 74(7) of DVAT Act, correctly remanded the matter under CST Act for correct assessment, particularly, when objection in this regard was raised by the appellant itself.

~~17.~~ In this regard, learned counsel for Revenue has relied on decision in **M/s Shaila Enterprises v. Commissioner of Value Added Tax,**(2016) 94 VST 367 (Del), in particular, para 17, to point out that same contains discussion as to the power of OHA on the point of remand, and to issue directions for making of fresh assessment as contained u/s 34(2) of DVAT Act.

Reference has also been made to decision in **M/s Aimil Ltd v. Commissioner of Value Added Tax,** W.P. (C) No. 4597/2017, decided on 24/5/2017 by our own Hon'ble High Court.

18. Section 80 of DVAT Act reads as under:

"(1) 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 flaw 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.

(2) xxxxxxxxxx

(3) No assessment made under this Act shall be invalid merely on the ground that the action could also have been taken by any other authority under any other provisions of this Act."

19. In view of the above provisions of section 80 of DVAT Act, I find merit in the contention of learned counsel for the revenue that the mistake, defect or omission in the assessment made by the Assessing Authority by including the central sales turnover while making assessment regarding turnover covered by DVAT Act, will not make the orders invalid. In the given situation, only option available to the Learned OHA was to issue directions to the Assessing Authority to issue separate notice of default assessment as regards central sales turnover, so as to segregate it from the turnover covered by DVAT Act.

As regards time-period prescribed for making of assessment, as noticed above, assessment was made by Assessing Officer

on 12/7/2013 and Learned OHA disposed of the objections vide order dated 8/1/2018.

As noticed above, the Learned OHA accepted the objection of the appellant-objector that as regards the aforesaid turnover, assessment was required to be made under CST Act, and found that it was by mistake made under DVAT Act alongwith the other turnover covered by DVAT Act, it was a case of inadvertent mistake.

In the given facts & circumstances, the decisions cited by learned counsel for the appellant do not help the appellant, and the question of expiry of prescribed period for making of assessment does not arise.

As a result, there is also no merit in the contention raised by learned counsel for the appellant that the department should have gone in revision, instead of passing an order of remand.

20. It is true that the department should have been diligent enough to take note of that in the returns the dealer had also specifically mentioned about exempted sales. It is also true that separate assessments were required to be made i.e. one under DVAT Act and the other under CST Act, pertaining to local turnover and central sales respectively, if exigible to tax.

No doubt, common assessment was made pertaining to turnover pertaining to both types of sales, but as discussed above, Learned OHA had powers to rectify this mistake and he exercised the same in accordance with law.

So far as dealer is concerned, when it came to know from the assessment initially made under CST Act that the same pertained only in respect of statutory forms i.e. F forms, in respect of all the four quarters, the dealer could file review petition before the said concerned Officer or Assessing Authority who framed assessment under CST Act to get the needful done, particularly when there was nothing to suggest that self assessment pertaining to exempted sales was accepted by the department. But, no such step was taken by the dealer. In this situation, it cannot be said that the department was stopped from rectifying error or mistake and that too in accordance with law. Here, the directions were to pass fresh and appropriate orders under the relevant provisions of CST Act. Consequently, there is no merit in the contentions raised by learned counsel for the appellant.

Sale of magazine "Amagram" and the impugned assessment

21. Learned counsel for the appellant has contended that the magazine is a brochure of the appellant and as a monthly

periodical which imparts information to the Amway business owners about various events etc., and as such attracted applicability of entry No. 5 of the First schedule.

Learned counsel for the appellant has submitted that entry no. 52 of III[rd] Schedule is general in nature as goods like books, general / periodicals and journals which find mention in entry no. 5 of First schedule can also be covered by entry no. 52, but they stand excluded because of specific entry no. 5.

Further, the contention is that specific entry prevails over general entry. As regards expression "catalogue", learned counsel for the appellant has submitted that same does not find mention in entry No. 5 of First schedule and entry No. 52 of Third schedule.

Further, ~~It is~~ contention of the learned counsel that the periodical issued by the appellant is covered by 'books' within the meaning of entry no. 5 of First schedule. In this regard, learned counsel has placed reliance on decisions in (1)**Commissioner of Customs, New Delhi Vs Gujrat Perstorp Electronics Ltd.,** decided by the Hon'ble Apex Court, (2) **M/s. Sonka Publication (India) Pvt. Ltd.,** WP(C) No. 10022/2018 decided on 7/5/2019 by our own Hon'ble High Court (3)**The All India Reporter Ltd. Vs The State,** 3 STC 219 decided by Hon'ble High Court of Madhya Pradesh.

Learned counsel for the appellant has urged that the findings recorded by learned OHA while affirming the findings of the Assessing Authority deserve to be set-aside and the appellant be exempted from paying any tax on these goods as provided in entry no. 5 of First schedule.

22. On the other hand, learned counsel for the Revenue has contended that firstly the Assessing Authority has rightly framed assessment of tax as regards the magazine as its sale is covered by entry No. 52 of Third schedule, the same being a catalogue which is a printed material as per circular dated 26/4/2005.

Learned counsel for the Revenue has specifically pointed out to the initial portion of the circular where it finds mention that on a number of representations received from different trade associations, bodies regarding clarification as regard to the entries, including printed material, matter was considered by the Government and approval was granted vide cabinet decision No. 958 dated 13/4/2005, before passing this circular. The contention is that having been so approved by the Government, this circular has all force of law.

Learned counsel has further pointed out that in the second column of the circular, which pertains to items to be included in the printed material, books meant for reading stand

excluded. The contention is that while catalogues find specific mention in column no. 2 of the circular, the magazine issued and sold by the appellant being a catalogue, learned OHA has rightly upheld the findings recorded by the Assessing Officer in levying tax @ 5%.

Further, it has been submitted that same point has already been decided on 18.8.2021 by this Appellate Tribunal in Appeals No.370-394 of 2017 filed by the dealer-appellant while rejecting this very contention of the appellant and upholding levy of tax @ 5% as regards sale of "AMAGRAM" and same is binding, even though under challenge before Hon'ble High Court.

Admittedly, the previous assessments framed on 12.7.2013 pertaining to tax period April 2011 to March 2012 were challenged by the dealer-appellant before Learned OHA by filing objections.

Vide order dated 8.1.2018, Learned OHA partly allowed those objections and partly affirmed the tax, interest and also the penalty as per assessments framed by Learned Assessing Authority. The dealer appellant challenged the order dated 8.1.2018 passed by learned OHA by filing appeals No.370-394 of 2017.

Same point has already been decided by this Appellate Tribunal on 18.8.2021 in Appeal No.370-394 of 2017 filed by the dealer-appellant while rejecting this very contention of the appellant and upholding levy of tax @ 5% as regards sale of "AMAGRAM" as regards turnover under DVAT Act. The only difference in this set of appeals and the previous set of appeals is that the previous appeals upheld previous assessment as regards sale of AMAGRAM and exigibility thereof to tax under DVAT Act in addition to the rate of tax.

In this set of appeals, challenge is to rate of tax as regards the turnover on sale of central sales of "AMAGRAM" and the assessments framed under CST Act, and not under DVAT Act.

In this way, for the present, findings recorded by this Appellate Tribunal while determining the controversy as regards rate of tax applicable to the turnover on sale of "AMAGRAM" are binding.

23. Even then, I proceed to deal with the question of rate of tax on the turnover on sale of "AMAGRAM", so far as turnover pertaining to Central Sales is concerned.

Entry No. 5 of the First Schedule contains the following items

"Books, periodicals and journals including maps, charts and globes."

24. Entry No. 52 of the Third Schedule contains the following items –

"Printed material including diary, calendar".

No doubt, in **Hindustan Poles Corporation v Commissioner of Central Excise, Calcutta,** (2006) 145 STC 625, decided on 27/3/2006, Hon'ble Supreme Court of India observed that the residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries. Unless the Department can establish that the goods in question can by no conceivable process of welding be brought under any of the tariff items, resort cannot be had to the residuary item.

In **Sonka Publication (India) Pvt Ltd.'s case (supra),** our own Hon'ble High Court observed as under -

> "In C.C. (General), New Delhi v. Gujarat Perstorp Electronics Ltd. 2005 (186) ELT 532 (SC), Hon'ble Supreme Court was seized of the issue "whether the goods and materials imported by the Company in the form of FEEP comprising of equipments, drawings, designs and plans are classifiable under Chapter Heading 49.01 or 49.06 of Schedule 1 of the Customs Tariff Act, 1975 and the Company is entitled to the benefit under

Notification Nos. 107/93-Cus and 38/94-Cus. or they are classifiable under Chapter Heading 4911.99 as contended by the department?" In the process of answering the said question in favour of the Assessee, Hon'ble Supreme Court observed as under:-

> "In popular sense, "book" means a collection of a number of leaves or sheets of paper or of other substance, blank, written or printed, of any size, shape and value, held together along one of the edges so as to form a material whole and protected on the front and back with a cover of more or less durable material. The Court also referred to dictionary meaning. It was observed that one must refer not only to the physical, but also functional characteristic of "book". It must be functionally useful for the purpose of assessee's business or profession. To put it differently, it must be a tool of his trade an article which must be part of the apparatus with which his business or profession was carried on. It must have utility value enabling its owner to pursue his business or profession with greater advantage. It must, thus, satisfy a dual test. It must bear both physical and functional characteristics of a book. It must be a collection of a number of sheets of paper or of other substance, having suitable size, shape and value, bound together at one edge so as to form a material whole and protected on the front and back with covers of some kind and functionally useful to the assessee for carrying on his business or profession."

25. In **The All India Reporter Ltd.'s case (supra)**, Hon'ble High Court of Madhya Pradesh observed as under -

> "The All India Reporter which is issued in monthly parts containing law reports is periodical for the purpose of time 26 of the old unamended Schedule II to the C.P. and Berar Sales Tax Act, 1947. Consequently subscriptions received for the regular supply of the monthly parts should be excluded from the turnover, as relating to the supply of tax-free goods, while the sale prices of the separate yearly volumes made out of the monthly parts cannot be excluded from the turnover."

Circular dated 26/4/2005

26. It may be mentioned here that clarification was issued by the Government on items to be covered under "Textile", Sugar", "Tobacco", Paper" & Printed material" . Relevant portion of circular No. 2 of 2005-06 No. F.(144)/2004/policy/ VAT/ 814-964 dated 26/4/2005 issued by the Government, for the purposes of clarification is extracted below –

> "Clarification on items to be covered under "Textile", Sugar", "Tobacco", Paper" & Printed material"
>
> A number of representations were received from different Trade Associations/Bodies regarding clarification with respect to the entries for Textile. Tobacco, Sugar, Paper and Printed material in First & Third Schedule of DVAT Act. The matter was carefully considered by the Government with the prior approval

of the Government vide cabinet decision No. 958 dated 13.04.2005.

Sl. No.	Column 1 Category	Column II items to be included
5.	Printed material	Stationery articles, namely, accounts books, (Sl. No. 49 of the 3rd Sch.) paper envelops, diaries, calendars, race cards, catalogues but excluding books meant for reading.

27. As submitted by learned counsel for the appellant, dictionary meaning of 'Catalogue 'reads as under -

1.	CAMBRIDGE UNIVERSITY PRESS	"a book that contains a list of all the products"
2.	COLLINS	A catalogue is a list of things such as the goods you can buy from a particular company

Applying the above meaning of word 'catalogue' to the magazine of the appellant, and the provisions of the aforesaid circular issued by the Govt., the decisions cited by learned counsel for the appellant, do not come to the aid of the appellant, and it can safely be said that same is a catalogue, and accordingly covered by printed material.

28. In the course of arguments, learned counsel for the appellant has not disputed that the said magazine is not distributed free and rather same is sold by the appellant.

Therefore, the sale is covered by the definition of "sale" of goods as defined under DVAT Act.

Said sale of the printed material for advertisements, marketing and promotion of sales of products, is actually sale of Catalogue.

As a result, I do not find any merit in the contentions raised by learned counsel for the appellant that AMAGRAM is a periodical or not exigible to VAT or that its sale is exempt from VAT being covered by First Schedule of DVAT Act.

Imposition of penalty u/s 86(10) of DVAT Act

29. On this issue, in the impugned order, learned OHA has observed in the manner as –

> "13. It is noted that in the remand back proceedings, objector dealer has failed to appear before the Assessing Authority and further no additional grounds or submissions have also been made during the present proceedings, therefore, above mentioned Issue No.3 has already been covered by the order dated 08.01.2018 passed by the OHA. Nevertheless to say, that the order dated 08.01.2018 passed by the OHA has been challenged before the Hon'ble Tribunal, VAT; however the

appeals are still pending. Therefore, the observations as well as decision as laid down by the OHA still holds the ground vis-à-vis above issue no.3. Further, the OHA vide its order dated 08.01.2018 *(para 43)* has already upheld the imposition of penalty u/s 86(10), however, the matter was remanded back only to assess penalty under the Central Act instead of Local Act and the penalty has now been imposed under the Central Act.

14. In view of the above discussion, I am of the considered view that impugned notices of default assessment of tax & interest and notices of assessment of penalty dated 27.02.2018 & 28.02.2018 u/s 9(2) of the CST Act by the VATO (Ward-203) for the tax periods May-2011, July-2011, September-2011, November-2011, January-2012 & March-2012 have been rightly issued in accordance with law and accordingly all the 12 (twelve) objections filed by the objector dealer are hereby dismissed/rejected in above terms.

15. Ordered accordingly."

30. On the point of imposition of penalty under this provision of law, Learned Counsel for the appellant has contended that as per decision in **Hindustan Steel Ltd. Vs State of Orissa,** 1970 AIR 253 penalty cannot be ordinarily imposed, unless the dealer acts deliberately in defiance of law or is guilty of conduct contumacious or dishonest or unless the dealer has acted in conscious disregard to its obligation.

Ld. Counsel has also placed reliance on decision in **M/s. Jatinder Mittal Engineers and Contractors V Commissioner of Trade & Taxes, Delhi**, STA No. 2/2011 & 3/2011 decided on May 12,2011, by our own Hon'ble High Court.

On the other hand, Ld. Counsel for the Revenue has submitted that when the Assessing Authority clearly observed that the dealer consciously violated the provisions of law and furnished inaccurate particulars of taxable sale, it cannot be said that the Revenue has illegally imposed penalty u/s. 86(10) of the DVAT Act.

Record reveals that on remand of the matter, none appeared before learned Assessing Authority.

While disposing of objections, Learned OHA simply observed that the penalty has been imposed under Central Sales Tax Act and assessments of penalty have been rightly issued in accordance with law.

Before upholding the assessments as regards penalty, learned OHA was required to give reasons. However, in the impugned order learned OHA has not recorded any reason to uphold the assessment of penalties. In the given situation, even if Commissioner, VAT had already issued circular dated 26/04/2005 regarding clarification of item "printing material",

which must be within the knowledge of the dealer – assessee, for want of any reasons by learned OHA, the penalty upheld vide impugned order deserves to be set aside. I order accordingly.

Conclusion

31. In view of the findings recorded above, these appeals No. 99-104/2020 as regards challenge to the levy of tax and interest are dismissed but the appeals No. 105-110/2020 pertaining to imposition of penalties are allowed.

32. Copy of the judgment 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 : 28/06/2022

Narinder Kumar 28/6/22

(Narinder Kumar)
Member(J)

Appeal No.- 99-104/ATVAT/20 / 4888-95

Appeal No. 105-110/ATVAT/20

Dated: 28/06/22

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)

28/6/22

REGISTRAR

APPELLATE TRIBUNAL VAT DELHI