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

Appeals No. :53-73/ATVAT/2015
Appeals No. : 76-77/ATVAT/2015
Date of Judgment: 25/7/2022

M/s. Indian Oil Corporation Ltd.,
World Trade Centre, Babar Road,
New Delhi-110001. .....Appellant

v.

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

Counsel representing the Appellant : Sh.A. K. Bhardwaj and Sh Manish Hirani.
Counsel representing the Revenue : Sh.C. M. Sharma.

JUDGMENT

Appeal Nos. 53-73/15

1. These appeals have been filed challenging the impugned orders passed by learned OHA whereby objections filed by the dealer – appellant have been dismissed, while upholding the demand of interest and penalties as shown in the table below :

Narinder Kumar 25/7/2022

ASSESSMENTS OF INTEREST				
	Tax Period	**Tax**	**Interest**	**Total**
1	Apr-12		1,260.00	
2	May-12		11,298.00	
3	Jun-12		1,78,920.00	
4	Aug-12		30,073.00	
5	Sep-12		35,725.00	
6	Oct-12		31,775.00	
7	Nov-12		27,697.00	
8	Dec-12		65,147.00	
9	Jan-13		91,527.00	
10	Feb-13		76,202.00	
11	Mar-13		70,812.00	
			6,20,436.00	6,20,436.00

PENALTIES U/S 86(10)		
1	May-12	42,538.00
2	Jun-12	4,33,205.00
3	Aug-12	1,32,090.00
4	Sep-12	1,05,885.00
5	Oct-12	1,08,922.00
6	Nov-12	1,36,892.00
7	Dec-12	2,43,021.00
8	Jan-13	3,65,314.00
9	Feb-13	2,97,774.00
10	Mar-13	2,92,805.00
TOTAL		21,58,446.00
Total for Assessments + Penalties		**27,78,882.00**

2. As per notices of default assessment of tax and interest, learned Assessing Authority reviewed the assessment orders earlier passed on 15/5/2014. The reason for reviewing the default assessment of tax and interest is that the buyer – appellant herein and selling dealers subsequently revised their online 2A/2B data.

3. In the memorandum of appeals, challenging the levy of interest, the prayer is that the said demand be set-aside as by way of impugned assessments and impugned order liability has been cast upon the dealer – appellant – purchaser to see that the seller actually pays the tax collected, in view of mismatch between Annexure 2B & 2A.

4. The dealer – appellant has claimed that liability to pay interest cannot be fastened u/s 42(2) of DVAT Act on the person who was never required to pay tax to the Department at the time of purchase.

5. So far as challenge to the assessment of penalties is concerned, dealer – appellant has put forth the ground that even though the dealer – appellant voluntarily paid the tax amount and the department adjusted the same towards the amount stated to be due because of mismatch, since it is impossible for a purchasing

dealer to keep a track of the payment of taxes actually made by the seller, the levy of penalty deserves to be set-aside.

Levy of Tax is also challenged -during pendency of appeals- raising additional ground

6. It may be mentioned here that initially by way of 12 appeals, the assessments were challenged only as regards imposition of interest, but during pendency of the appeal, an application was filed by the dealer – appellant in all the 12 appeals seeking permission to raise additional grounds of appeal challenging imposition of tax as well, in view of decision in the case M/s. On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT & Ors. W.P.C. No. 6093/2017 by our own Hon'ble High court on 26/10/2017.

Vide order dated 22/7/2019, application seeking permission to raise the above said additional ground of appeal was allowed subject to costs.

So the additional ground in 12 appeals initially filed while challenging levy of interest is that the tax was levied upon the dealer – assessee against the provisions of law.

7. Dealer – appellant named above is a Public Sector Undertaking engaged in marketing various petroleum products. It is a registered dealer, having been got registered under Delhi Value Added Tax Act and Central Sales Tax Act.

These two Appeals No. 76-77/15relate to tax period July 2012.

Default assessment of tax & interest and separate assessment of penalty, relating to tax period July 2012, were framed by learned Assessing Authority on 15/05/2014, under Sections 32 and 33 read with Section 86(10) of DVAT Act respectively.

8. Subsequently, learned Assessing Authority reviewed the previous assessments and vide fresh default assessment of tax &interest and separate assessment of penalty, called upon the dealer to pay Rs. 6,22,960/- by way of additional tax & interest and a sum of Rs. 5,02,221/- towards penalty.

9. The assessments are stated to have been reviewed because buyers/sellers subsequently revised their online 2A/2B data.

10. Learned OHA observed in the impugned order that turnover of Rs. 2,35,229/- claimed towards capital goods was reflected in

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the return for the relevant tax period i.e. July 2012 and thatin this regard, the representative of the company was given opportunity to file tax invoices in respect of tax credit availed of by the objector – company towards capital goods.

He further observed that the company had failed to furnish tax invoices in respect of which tax credit was claimed towards capital goods.

11. Feeling aggrieved, dealer-objector filed these two Appeals No. 76-77/15.

12. As per the case of the dealer – appellant, it was pointed out to learned OHA that the data being enormous, it was very difficult for the company to trace the level of default by the erring sellers and the company could at best produce invoices indicating the payment of tax by the appellant to the selling dealers as far as possible.

13. In the memorandum of appeal, dealer – appellant has put-forth its case as under:

> "That, based upon the above plea, the Ld. OHA gave credit for the tax invoices produced for Rs. 2,66,992.00 in the body of the impugned order but kept the tax demand intact at Rs. 5,02,221.00

though it should have been Rs.2,35,235.00 (after reducing 2,66,992.00 from 5,02,221.00). That, even the balance tax of Rs. 2,35,235.00 has been deposited by the appellant herein and therefore, what would ultimately remain would be the interest payable on Rs. 2,35,229.00 which is not quantified in the order. The balance amount of Rs. 2,35,235.00 was paid by the company in order to avoid any further litigation but not as an admission that the said liability of payment of tax to their seller was not discharged by them. In fact by paying the tax now, the company had paid tax twice- once to the selling dealer against his invoice and second to the department on the basis of the mismatch demand.

That, on the above facts the Ld. OHA order's needs rectification with directions not to impose the interest as done in the orders for other tax periods for the f.y. 12-13."

14. Another question raised by the dealer – appellant in the memorandum of appeal is "as to whether demand of interest can be raised by the department on a demand which arises due to default, if any, on the part of the selling dealer. In this regard, reference has been made to provisions of Section 42(1) of DVAT Act.

15. Learned counsel for the dealer – appellant has referred to section 3(2) of DVAT Act which provides that every dealer shall be liable to pay tax at the rate specify in section 4 of this Act on

every sale of goods effected by him, while he is a registered dealer under this Act; or on and from the day on which he was required to be registered under this Act.

In view of this provision, liability to pay the tax is that of the dealer on every sale of goods.

15. In case of mismatch in 2A & 2B, the Assessing Authority shall be required to join the selling dealer in the enquiry to find out as to what led to the mismatch, and then to take appropriate steps or action in accordance with law.

I find that in case of mismatch in 2A and 2B, where the documents submitted by the purchasing dealer with the return/ 2A need verification, the Assessing Authority shall ask or call upon the selling dealer to participate in the inquiry. In other words, in case of any doubt regarding deposit of the tax due by the selling dealer, before deciding the claim regarding input tax credit, joining the selling dealer in the investigation would be of much significance.

In case it is found from the document submitted by the selling dealer that he had not deposited the tax due or the amount of tax collected by him from the purchasing dealer, the Assessing

Authority may proceed against the selling dealer. In such a situation, where does arise the question of levy of tax upon the purchasing dealer who is found to have paid to the selling dealer, the tax due on the purchases?

In this regard, reference may be made to the following observations made by Hon'ble High court in M/s. On Quest Merchandising India (P) Ltd. Vs. Govt. of NCT & Ors. W.P.C. No. 6093/2017, it was observed as under –

> "33. Indeed, what Section 9 (2) (g) of the DVAT does is give the Department a free hand in deciding to proceed either against the purchasing dealer or the selling dealer or even both when it finds that the tax paid by the purchasing dealer has not actually been deposited by the selling dealer with the Government or has not been lawfully adjusted against the selling dealer's output tax liability and correctly reflected in the return filed by such selling dealer in the respective tax periods. It uses the phrase, "dealer or class of dealers" which could include either the purchasing dealer or the selling dealer. In the situation envisaged by Section 9 (2) (g) itself, clearly the defaulting party is the selling dealer. He has collected the VAT from the purchasing dealer and failed to deposit it with the Government or failed to lawfully adjust it against his output tax liability and has failed to correctly reflect that in his return. For all these defaults committed by the selling dealer, the purchasing dealer is expected to bear the consequence of being

denied the ITC. It is this that is being questioned as violative of Article 14 of the Constitution."

16. Thereafter, Hon'ble High Court concluded as under :-

"Conclusions

53. In light of the above legal position, the Court hereby holds that the expression 'dealer or class of dealers' occurring in Section 9 (2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has *bona fide* entered into purchase transactions with validly registered selling dealers who have issued tax invoices in accordance with Section 50 of the Act where there is no mismatch of the transactions in Annexure 2A and 2B. Unless the expression 'dealer or class of dealers' in Section 9 (2) (g) is 'read down' in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution".

54. The result of such reading down would be that the Department is precluded from invoking Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the

purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act."

16. In the course of arguments, when I have enquired from learned counsel for the parties if the selling dealers were summoned by the Assessing Authority or by learned OHA for adjudication of the dispute, on the point of mis-match in 2A & 2B, learned counsel submit that from the default assessment and from the order passed by learned OHA, it appears that no step was taken in this regard.

17. I strongly feel that in case of mis-match Assessing Authority or learned OHA must join the selling dealer(s) in the proceedings so that they are able to enquire into and find out as to what had actually led to the mis-match i.e. as to whether it was a case where no transaction of sale had actually taken place or it was a case of collusion between the parties or a case where the purchasing dealer had put forth false version or furnished false return or that the selling dealer(s) was/were concealing some relevant facts or withholding relevant evidence or if the selling dealer had committed a default in depositing or lawful adjusting tax collected from the purchasing dealer.

18. All this can be done only if the selling dealer is joined or associated in the proceedings.

19. In the given facts and circumstances of the case when this Appellate Tribunal has expressed its views to the learned counsel that this is a case where matter should be remanded to learned OHA for decision afresh after joining the selling dealers in the objection proceedings and also providing a reasonable opportunity of hearing to the dealer – appellant and selling dealer, for a thorough enquiry on the above said issues raised here as well as on the point of mis-match, learned Associate Counsel for the appellant, after having instructions from the concerned learned counsel, and learned counsel for the Revenue submit that they have no objection to the remand of the matter to learned OHA for decision afresh, when the matter actually deserves to be remanded.

20. As a result, these appeals are disposed of and while setting aside the impugned orders passed by learned OHA, the matter is remanded to learned OHA for decision afresh after joining the concerned selling dealer(s) in the objection proceedings and also providing a reasonable opportunity of hearing to the appellant-assessee, for a thorough enquiry on the above said issues and as regards mis-match, within a year from today, while taking into consideration all the legal provisions and propositions of law laid down by Hon'ble Courts.

21. Appellant to appear before learned OHA on 12/8/2022.

22. File be consigned to the record room. Copy of the judgment be placed in the files of connected appeals. Copy be also supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date: 25/7/2022

Narinder Kumar 25/7/2022

(Narinder Kumar)
Member (Judicial)

Appeal No - 53-73/ATVAT/15/5178-85
Appeal No. 76-77/ATVAT/15

Dated: 27/08/2022

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)

REGISTRAR