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

Appeals No. 353-358/ATVAT/13
Date of Judgment: July 29th, 2022.

M/s PRL Projects and Infrastructure Ltd.,
34/1 Vikas Apartments, East
Punjabi Bagh, New Delhi-110026.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Appellant : Sh. S. K. Verma
Counsel representing the Revenue : Sh. C. M. Sharma

JUDGMENT

1. The above captioned appeals have been filed challenging order dated 06-08-2012 passed by learned Additional Commissioner-Objection Hearing Authority (here-in-after referred to as OHA), whereby the objections filed by the Dealer-objector u/s 74(1) of Delhi Value Added Tax Act (here-in-after referred to as DVAT Act) were rejected.

2. The matter pertains to levy of tax, interest and penalty relating to tax period 2008-09.

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The dealer felt aggrieved by the following demands raised by learned Assessing Authority vide assessments dated 08-03-2010 framed u/s 32 and 33 of DVAT Act:-

S. No	Obj. No.	Period of objection	Obj. u/s	Tax	Interest	Penalty	Total
1	3360	1th Qtr.2008-09	32	50145	11994	.....	62139
2	3361	1th Qtr.2008-09	33	.....	.....	50145	50145
3	3362	3rd Qtr.2008-09	32	329419	53880	.....	383299
4	3363	3rd Qtr.2008-09	33	.....	.....	329419	329419
5	3364	4th Qtr.2008-09	32	557120	70060	.....	627180
6	3365	4th Qtr.2008-09	33	.....	.....	557120	557120

3. Dealer-Appellant, a public limited company is engaged in business of building infrastructure. It stands registered vide TIN No.07750327192. Case of the dealer-appellant is that it had applied for composition applicable to works contractors u/s 16(12) of DVAT Act in Form WC-01. The scheme of 3% entitled the dealer to procure goods from outside the state. Accordingly, composition was allowed for the tax period 2008-09. But the dealer is stated to have filed returns and by mistake deposited composition amount @2.5% instead of 3%.

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4. On 30-11-2009, a notice in DVAT 37 was issued to the dealer for the purpose of conducting of audit for the financial year 2008-09. Audit was conducted on 31-12-2009. At the time of audit, Sh. Anand Garg, contractor of the dealer company made statement before the Audit Team. In the course of Audit, following irregularities are stated to have been detected:-

> "1. The dealer has opted for composition and has paid tax @2.5% on his gross turnover during the year 2008-09.
>
> 2. As per notification No. F.3(78)/Fin./(T&E)2005/061508 kha dated 17/03/06, two schemes have been notified and the dealer has opted for first scheme, which specifies that the dealer will pay "Two and half percent of the entire turnover if the dealer opting to pay tax under the scheme makes all the purchases and the sales during the period for which composition is opted within Delhi only".
>
> So, the dealer was not allowed to make interstate purchases whereas he has made interstate purchases of Rs. 44,16,619/-; during the assessment year the 2008-09. Further, as per condition No. 1(a) the dealer was not allowed to make purchase from unregistered dealers but he has made purchases of Rs. 14,30,080/- from unregistered dealer during the assessment year 2008-09."

5. As a result, Assessing Authority framed default assessments of tax, interest and penalty in the manner as:-

"**First Quarter 2008-09**

In the first quarter of 2008-09, GTO has been taken as Rs. 8,18,343/-, however, the deduction on account of labour & services has been calculated @25% i.e. the rate applicable in respect of civil contractors.

The ITC on purchases of other goods (no purchase of iron & steel) made during the first quarter of 2008-09 has been taken from the DVAT 30 and is Rs. 26,575/- the tax has been calculated @12.5% shown as either carry forward amount or tax deficiency amount if tax deficiency occurs, interest at 15% has been charged.

Accordingly, the tax, interest and penalty for the first quarter of 2008-09 is calculated as under:-

Tax	**Interest**	**Penalty u/s 86(10)**	**Total Amount**
73398	16439	73398	163235

Second Quarter 2008-09

In the second quarter of 2008-09, GTO shown as nil by the dealer, hence no default assessment has been made.

Third Quarter 2008-09

In the third quarter of 2008-09, GTO has been taken as Rs. 37,13,869/-. However, the deduction on account of labour &

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service has been calculated @25% i.e. the rate applicable in respect of civil contractors.

The ITC on purchases of other goods (no purchase of iron &steel) made during the second & third quarter of 2008-09 has been taken from the DVAT 30 and is Rs. 18,756/-, the tax has calculated @12.5% shown as either carry forward amount or tax deficiency amount. If tax deficiency occurs, interest at 15% has been charged. Accordingly, the tax, interest and penalty for the third quarter of 2008-09 is calculated as under:-

Tax	**Interest**	**Penalty u/s 86(10)**	**Total Amount**
345831	51875	345831	743537

Fourth Quarter 2008-09

In the fourth quarter of 2008-09, GTO has been taken as Rs. 73,00,627/- however, the deduction on account of labour & services has been calculated @25% i.e. the rate applicable in respect of civil contractors.

The ITC on purchases made during the fourth quarter of 2008-09 has been taken from the DVAT 30 and is Rs. 71,426/-. The purchases of iron & steel of Rs. 6,57,500/- made during fourth quarter of 2008-09 has been taken for calculating 4% WCT sale, the tax on GTO excluding purchase of iron & steel has been

calculated @12.5% the tax so calculated has been shown as either carry forward amount of tax deficiency amount.

If tax deficiency occurs, interest at 15% has been charged. Accordingly, the tax, interest for the fourth quarter of 2008-09 is calculated as under:-

Tax	Interest	Penalty u/s 86(10)	Total Amount
619618	67053	619618	1306289

Accordingly, the total demand raised on the dealer M/s PRL Projects & Infrastructure is as under:-

Tax	Interest	Penalty u/s 86(10)	Total Amount
1038847	135367	1038847	2213061

6. As per impugned order passed by learned OHA, advocate for the objector participated in the objections proceedings and raised the following arguments:-

"that the AA failed to appreciate that while opting for the composition scheme the objector had opted for composition scheme as prescribed u/s 16(12) of DVAT Act i.e. as prescribed

vide Notification No.- No.F.3(78)/Fin. (T&E)/2005-06/15908, Kha dated: 17-03-2006 and not under the composition scheme as prescribed u/s 16(1) of the DVAT Act. In-fact the objector was not at all entitled for the composition scheme u/s 16(1) of the DVAT Act in as much as his turnover in the preceding financial year was more than the limit as prescribed under Sec. 16(1) of the Act."

7. Learned OHA, after going through the provisions of composition scheme for civil works contractors, as notified vide notification no.- No.F.3(78)/Fin. (T&E)/2005-06/15908, which came into force with effect from 01-04-2006, observed in the manner as:

"I have gone through the details of the notifications for opting composition scheme, orders of the AA and also the arguments of the counsel.

After going into details of his arguments, I am of the opinion that there we have to narrow down our discussions on the option preferred by the dealer, his activities and the conditions of the scheme.

At the time of opting composition scheme, it was well known to the dealer that he cannot make inter-state purchase, even for the items like bitumen mix which is not allowed to be prepared inside the geographical boundary of Delhi.

Before opting for the scheme it should have been considered by the dealer to choose the scheme available in view of the nature of transactions required in his business.

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Further one more scheme was also available in which he had to pay 3% as tax on GTO with a facility to make interstate purchase. In the present case the objector preferred to pay 2.5% of tax on turnover, thus should not have made interstate purchases.

I have also perused the conditions of the scheme. There is no provisions in the conditions under which any authority can grant any relaxations.

As it is clear that the dealer has violated the conditions of the scheme and no remedy for the same is available under the scheme. Hence objections filed are rejected and the order of the Assessing Authority are upheld.

However, the credit of tax paid @2.5% in my opinion should be available to the dealer. So VATO to give credit to the tax paid by the dealer.
It is held accordingly."

8. That is how, dealer-objector has come up in appeals against the impugned order.

9. At this stage, it would be appropriate to reproduce the contents of the notification pertaining to composition scheme. Said notification reads as under :

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Notification NO. F.3(78)/Fin.(T&E)/2005-06/1508, kha dated 17/3/2006

"Whereas the Lt. Governor of the National Capital Territory of Delhi is of the opinion that it is expedient in the interest of general public so to do. Now, therefore, in exercise of the powers conferred by sub-section (12) of section 16 of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005), (hereinafter referred to as "the Act"), the Lt. Governor of the National Capital Territory of Delhi, subject to the conditions specified in column (3) against the classes of dealers specified in column (1) of the Table below, and other general conditions as prescribed in this notification and in supersession of earlier notification No. F.3(75)/Fin(T&E)/2005-06/893 kha dated 30th November, 2005, hereby, provides for the scheme of composition of tax payable by the said dealers as specified in column (2) of the said Table, namely:-

Eligible class or classes of dealers	**Composition Amount**	**Conditions**
(1)	(2)	(3)
Every registered Dealer engaged exclusively in works contracts of the nature of Civil Construction i.e. construction,	(i) **Two and half per cent** of the entire turnover if the dealer opting to pay tax under this scheme makes all the purchases and the sales during	(1) The dealer shall- (a) not be eligible for making purchases, within Delhi, from a person who is not registered under the Act except in the case of goods specified in the First Schedule; (b) not be eligible to claim tax credit under section 9, 14 and 15 of the

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electrification, fitting out, Improvement or repair of any building or complex, residential or commercial, bridge, flyover, dam or other similar structure or of any canal or road or such other similar activities as may be specified by the Commissioner from time to time.	the period for which composition is opted within Delhi only. ii) Three per cent of the entire turnover on account of works contracts executed in Delhi if the dealer is engaged in procuring goods from or making sales to or making supplies to any place outside Delhi.	Act; (c) not calculate his net tax under section 11 of the Act; (d) not collect any amount by way of tax under the Act; (e) not be entitled to issue 'Tax Invoices'; (f) continue to retain the original copies of all tax invoices and all retail invoices for all his purchases and copies of all retail invoices issued by him in respect of his sales as required under section 48 of the Act; (g) not make interstate purchases of the material on the strength of his registration certificate or declaration Forms / certificates i.e. C Form, D Form, E-I Form, E-II Form and 'F' Form, for the purpose of utilizing it in the execution of works contracts; and
		(h) not import or procure goods from outside the country. (2) Where the dealer has made any payment to a sub-contractor for the execution of works contract whether wholly or partly, and the sub-contractor has also opted to pay tax under this scheme, the dealer shall issue a certificate to such subcontractor, in Form

		CC 01 appended to this notification and such sub-contractor shall be eligible to reduce his turnover liable to be taxed under this scheme by the amount mentioned in the said certificate by enclosing it with his return. Such amount shall not constitute part of the field 3 of DVAT 17 for such sub-contractor. The contractor shall not deduct TDS from payments made to such sub-contractors in respect of the turnover covered by the certificate. (3) The dealer applying for afresh registration can opt for this scheme by filing an application in Form **WC 01** appended to this notification along with his registration application Form DVAT 04. (4) A dealer who is paying tax under section 3 of the Act, can opt this scheme by filing an application in Form **WC 01** appended to this notification within a period of thirty days from the first day of the year with effect from which composition is opted. Such a dealer shall pay tax, at the rates specified in section 4 of the Act, on the opening stock of goods, held by him on the first day of the year with effect from which the dealer opts to pay tax under this scheme, where such stock has been purchased within Delhi or purchased on the strength the

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		registration certificate or declaration Forms or certificates in the course of interstate trade and shall further reverse the input tax credit claimed on the capital goods during the three years immediately preceding the first day of the year with effect from which the dealer opts to pay tax under this scheme. The dealer shall furnish, along with his application for opting the scheme, the details of such opening stock and such capital goods, as mentioned above, in Form **SS 01** appended to this notification and the proof of payment of tax in DVAT20. (5) Once a dealer has opted to pay tax under this scheme, he shall, except under the circumstances described at Sl. No. (7) below, not be eligible to withdraw his option before the end of the year for which opted to pay tax under this scheme. (6) A dealer who, having opted to pay tax under this scheme for a particular year, does not intend to opt for payment of tax under this scheme for the following year, shall, subject to the conditions contained in section 20 of the Act in so far as they are applicable and further subject to furnishing of intimation regarding withdrawal from

		this scheme in form **WC 02** within thirty days from the end of the year for which opted to pay tax under this scheme, be eligible to claim credit of tax paid on the opening stock held by him on the first day of said following year. (7) A dealer who has opted to pay tax under this scheme and has defaulted to furnish the returns for two consecutive tax periods by the prescribed due dates shall, with effect from the first day of the period immediately next to the latter tax period in respect of which the default has been committed- (i) cease to be liable to pay tax under this scheme (i) be liable to pay tax under section 3 of the Act. Such a dealer shall also, subject to the conditions contained in section 20 of the Act in so far as they applicable and further subject to furnishing the intimation in Form **WC 02** within seven days after the end of due date prescribed for filing of return for the latter tax period in respect of which the default has been committed, be eligible to claim credit of the tax paid under this Act on the opening stock held by him in Delhi on the first day of the period immediately

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		next to the latter tax period in respect of which the default has been committed. (8)The dealer dealing in works contracts other than private works contracts and who under this scheme is required to pay composition amount at the rate of three percent, shall make an application to the contractee authorizing him to deduct tax at the applicable rate of three per cent instead of two per cent as provided in sub-section (1) of section 36A. Note – Private contract for the purpose of this means a contract undertaken for any person other than – (1) the Central Government; or the State Government or their departments or their under takings or their cooperative societies and (2) a company registered under the Companies Act, 1956 (1 of 1956).

General conditions : (1) All the provisions of the Act and the rules made thereunder which are not contrary to this scheme shall apply to every dealer opting to pay tax under the scheme.

(2) The tax period for the dealers opting to pay tax under this scheme shall be a quarter unless otherwise prescribed by the Commissioner for a dealer or class of dealers.

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(3) In case a dealer has opted for this scheme but has failed to comply with the conditions specified therein or who, at any later stage, is found not eligible for having opted the scheme, all the provisions of the Act including the liability to pay tax under section 3, along with interest due for delay, if any, shall apply *mutatis mutandi* as if the dealer has never opted for the composition scheme and the amount deposited by such dealer as the composition amount, if any, shall stand forfeited.

This notification shall come into force with effect from 1st April, 2006."

As to which of the two composition schemes was opted by the dealer ?

10. Learned Counsel for the appellant has contended that late deposit of tax by the dealer to avail of benefits of a composition scheme cannot be a ground for denial of its benefit to the dealer. In the course of arguments, Counsel for the appellant submitted that the dealer had opted for composition scheme at 3%, but deposited VAT @ 2.5% only, on his gross turnover.

Counsel for the appellant further submits that it is admitted case of the dealer that it deposited the balance 0.5% tax on 11/03/2010 i.e. after the framing of assessment dated 08/03/2010, in respect of tax period 2008-2009.

Learned Counsel for the appellant has contended that late deposit of tax by the dealer to avail of benefits of a composition scheme cannot be a ground for denial of its benefit to the dealer,

who deposited the deficient amount of 0.5% soon after this deficiency was pointed out by the audit team during audit on 30/12/2009.

11. On the other hand, Learned Counsel for the Revenue has pointed out that the dealer company had opted for First composition scheme, and deposited the deficient amount of VAT i.e. 0.5% only after the framing of the assessment and not prior thereto, and since the dealer made purchases from outside Delhi, it violated the provisions of the first scheme, and as such the Assessing Authority rightly framed assessment in terms of the provisions of composition scheme as notified on 17/03/2006.

12. As per notification dated 17/03/2006, two composite schemes were notified.

First Scheme

Under the first scheme, 2.5% of the entire turnover was to be paid, if the dealer opted to pay tax under this scheme and also wanted to make all the purchases and the sales during the period, for which composition was opted, within Delhi only.

Second Scheme

Under the second scheme, 3% of the entire turnover was to be paid on account of works contract executed in Delhi, if the

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dealer was engaged in procuring goods from any place outside Delhi.

13. Admittedly, in its profile details annexed to DVAT 06, for the assessment year 2009-10, dealer specified that it was in the business of works contract. As per column 4 of DVAT 17 for the period from 01/04/2008 to 30/06/2008, the dealer specified the composition rate of tax as 2.5%. Therein, it did not specify that the relevant composition scheme was of 3%.

In the same column of DVAT 17 for the period from 01/07/2008 to 30/09/2008 the dealer specified the same composition rate of tax i.e. 2.5% and not 3%; in the same column of DVAT 17 for the period from 01/01/2009 to 31/03/2009 the dealer specified the same composition rate of tax i.e. 2.5% and not 3%.

There is thing on record to suggest that the dealer opted for the second scheme. Simply by depositing 0.5% and that too after the framing of the assessment, the dealer did not become entitled to claim that he had opted for the second composition scheme i.e. of 3%. Undisputedly, the said 0.5% was not deposited by the dealer under any orders by the department. Dealer deposited this amount of its own.

There is nothing to suggest that the department could permit the dealer or ever permitted it to convert from first scheme to the second scheme.

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Even if the dealer was in the business of works contract and was to engage in procuring goods, including Bitumen from any place outside Delhi, it should have opted for the second composition scheme of 3% and not the first one of 2.5%.

Here, the dealer opted for the first composition scheme of 2.5%, and as such undertook to abide by the terms and conditions of the said scheme i.e. it shall make all purchases and sales within Delhi during the period of the composition scheme.

Admittedly, the dealer made interstate purchases during the concerned tax period 2008-09. By making interstate purchases the dealer violated the terms and conditions of the composition scheme. Consequently, as per general conditions No. 3 of the notification it incurred the liability to pay tax under Section 3 of DVAT Act along with interest due for the delay, if any and all the provisions of DVAT Act came into application *mutatis mutandi* as if the dealer had never opted for the composition scheme. Further, as per the consequence of such violation, the amount deposited by the dealer as composition amount shall stand forfeited.

In view of the terms and conditions of the notification and the dealer having opted for first scheme and then having violated the same, deposit of 0.5% by the dealer of its own, was of no avail to the dealer so as to claim benefit under the second scheme in place of the first scheme which he had opted for.

14. The contention raised on behalf of the appellant that the terms and conditions of the notification can never be against the provisions of the Act is also of no aid to the dealer, in view of the documents submitted by the dealer regarding option of the first scheme and the interstate purchases made by it.

15. Another contention raised by Learned Counsel for the appellant is that this is a case where no order regarding cancellation of benefits of the scheme to the dealer was passed.

As rightly pointed out by learned counsel for the Revenue, this contention is without any merit. As per general conditions No. 3 of the notification, the dealer incurred the liability to pay tax under Section 3 of DVAT Act along with interest due for the delay, if any and all the provisions of DVAT Act came into application *mutatis mutandi* as if the dealer had never opted for the composition scheme. In other words, no separate order regarding cancellation or withdrawal of the benefits under the composition scheme was required to be passed.

For the same reasons, the contention raised by the learned counsel for the appellant that no assessment could be made by the Assessing Authority u/s 32 of DVAT Act in case of violation of the terms and conditions of the composition scheme, is without any merit.

16. In **A.N.A. Naina Mohamed Sons case,** *W.P. No. 4074 of 2010* decided on 04/07/2019, by Hon'ble High Court of Madras, (incomplete title shown in the text provided by counsel for the appellant), an audit was carried out which revealed that the petitioner, a dealer in Hardware and Paints had collected tax in respect of three invoices as regards turnover for the assessment year 2007-08, whereupon notice u/s 3(4) of Tamil Nadu Value Added Tax Act, 2006 was issued proposing levy of tax u/s 3(2) of the said Act.

The petitioner submitted reply to the said notice admitting that it had collected taxes, but pleaded inadvertent collection of meagre taxes refunded to the buyers.

The department was of the view that the dealer having opted to discharge his liabilities by way of composition scheme in terms of Section 3(4) of the TNVAT Act, it violated the conditions set out in the said scheme. Accordingly, TNVAT was imposed upon the dealer. At the same time, benefit of composition scheme was denied to the said dealer.

In that case, contention raised on behalf of the petitioner – dealer was that the respondent having permitted the dealer to discharge taxes under the scheme of composition, it was not permissible thereafter to revisit such permission. In support of this contention, this reliance was placed upon decision in

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Sinetech vs. Commercial Tax Officer, Korattur, Assessment Circle, Chennai, (2008) 15 VST 398.

On the other hand, the contention raised by learned Special Government Pleader was that when the dealer – petitioner had opted to pay the tax under the composition scheme, it was prohibited from collecting by way of taxes or purporting by way of taxes. In this regard, reliance was placed on decision in **S. Meenakshi and Others vs. The State of Tamil Nadu**, (1977) 40 STC 201, for the proposition that the moment the conditions were violated, the dealer – assessee would go out of the composition scheme and it would be open to the assessing officer to resort to re-assessment by invoking Section 16 of the Tamil Nadu General Sales Tax Act, and the benefit of the Scheme would no longer be available.

In **A.N.A. Naina Mohamed Sons's** case (supra), question before Hon'ble High Court of Madras was as to whether the composition scheme is open for revisit under any circumstances, including violation of the conditions of the very scheme itself.

Ultimately, Hon'ble High Court observed that decision in **Sinetech's** case (supra) was not applicable to the case of **A.N.A. Naina Mohamed Sons's** case.

In para No. 30, Hon'ble High Court of Madras further observed as under:

"30. If and when the aforesaid decision is applied to the facts of the present case and in the light of the observations made by this Court, the ratio laid down in S.Meenakshi's case (supra) would stand in preference to the ratio laid down in Sinetech and consequently, the decision of the Hon'ble Division Bench affirming Sinetech will not be of relevance to the law involved in the instant Writ Petition."

Hon'ble High Court of Madras referred to first proviso to Section 3(4) of the TNVAT Act which envisages that a dealer opting to pay taxes under the composition scheme shall not collect any amount by way of taxes or purporting to be by way of tax.

Hon'ble High Court took note of the fact that undisputedly the dealer – petitioners had collected taxes at least in respect of three invoices, which would be in violation of the conditions of the composition scheme as one of the conditions prohibited them from collecting any amount by way of taxes. Hon'ble Court further observed that when the assessee violated such a condition, it is deemed to have retracted itself from the benefit of the composition scheme.

Hon'ble High Court then extracted relevant portion of the decision in **S. Meenakshi and Others's** case (supra) and in para 17 was of the affirmed view that it would not be open to an

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assessee to violate the terms of the composition scheme and simultaneously, claim the benefit therein.

Hon'ble High Court of Madras referred to extract paras No. 7 to 10 of decision in **Deputy Commissioner of Commercial Taxes, Vellore vs. Devendran & Co.**, (47) STC 264, as incorporated in Sinetec's case (supra). In Devendran & Co.'s case (supra), the only question that remained for consideration was whether the respondent had power u/s 16 of the TNGST Act to reopen the assessment on the basis of decision in (2005) 140 STC 22. In the peculiar facts and circumstances of the said case, Hon'ble court had held that the question of revising the compounding order did not arise especially when a dealer was exercising option in payment of rates in compound rate and the petitioner was also made to pay tax @ 4% on the entire contract value; and further that section 16 of the TNGST Act is not intended to withdraw the said option exercised by the dealer. Hon'ble Apex Court, in State of T.N. v. Devendran & Company, (1998) 9 SCC 394, observed that no interference was called for, as section 16(1)(b) applies only if assessment has been made at a rate lower than the assessable rate but in the said case, the assessment was not at a rate lower than that at which the turnover ought to have been assessed; it was actually a case of seeking to reassess under a different head.

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In the given facts and circumstances, decision in Devendran's case does not come to the aid of the dealer – appellant.

17. In the case of **Koothattukulam Liquors vs. Deputy Commissioner of Sales Tax**, (2015) 12 SCC 794, decided by Hon'ble Apex Court and cited by counsel for the appellant, while dealing with the concept of payment of compounded amount of tax, Hon'ble court observed in the manner as:

> "19. The concept of payment of compounded amount of tax is a bilateral agreement between the parties. The scheme of composition provides that the State Government is empowered to accept a lum sum amount in lieu of tax that may be payable by the dealer in respect of such goods or class of goods and for such period as may be agreed upon. For that purpose, the dealer is obliged to execute an agreement of undertaking to pay the sales tax in lump sum and the same is assessed at an agreed rate as envisaged under the Act itself. The scheme as introduced by the legislature provides for a bilateral agreement between the assessee and the Sales Tax Authorities with an object to dispense with the requirement of regular assessment and for the easy purpose of levy and collection of the tax payable under the Act. A dealer, who has opted for payment of lump sum amount in lieu of tax, is not required to file monthly, quarterly or annual returns of his turnover. It is the choice of a dealer to opt for compounded payment of tax and if the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an

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agreed amount of tax. The department and the dealer are thereafter bound by the said agreement."

Herein, the choice or option of the dealer was for first composite scheme i.e. of 2.5% and once it was accepted by the authority concerned, it became an agreed amount of tax and as such both the parties were bound by the said agreement. In case of violation, as per agreement the dealer became liable to pay tax and interest as if he had never opted for the said composition scheme.

In **New Bismillah Bakery v. State of Gujarat**, R/Tax Appeal No. 885 of 2014 decided by Hon'ble High Court of Gujarat on 15/6/2018, relied on by counsel for the appellant, the following question of law was involved:

"Whether the Gujarat Value Added Tax Tribunal was justified in holding that lump sum tax is payable under the Value Added Tax Act, 2003 on the turnover of sales of "bread? "

Hon'ble High Court answered the question in favour of the appellant by setting aside the judgment of the Tribunal, by observing in the manner as :-

"19. Looking to the above mentioned statutory provisions as also the very purpose of the scheme of composition of tax, we do not

think the Government, by virtue of the said notification dated 31/3/2006, intended to compute the lump sum tax of a manufacturer of bakery items on the basis of his total turnover. The very purpose of the composition scheme would be in jeopardy if the payable tax by a dealer is substituted by percentage of his taxable and non-taxable turnover. We have referred to the notification dated 31/3/2006 issued by the Government in respect to the dealers by first prescribing a certain percentage of the total turnover to be paid by way of lump sum tax, but quickly changing to the percentage of "taxable turnover". This clearly indicates that when inadvertently in case of other class of dealers, the term in the notification which found place was "total turnover", for clarification and proper implementation of the provisions, it was promptly and quickly changed to "taxable turnover". Harmonious and purposive interpretation even in the taxing statutes is not impermissible when the situation so demands."

The decision in New Bismillah Bakery's case is of no help to the dealer – appellant herein, present case being a case of violation of the terms and conditions of the composite scheme opted by the dealer.

18. In **HS Power Projects (P) Ltd. v. Commissioner of Trade & Taxes, Delhi**, ST. Appl. 24/2015, decided by our own Hon'ble High Court on 14/1/2016, cited by learned counsel for the appellant while dealing with the provision of section 6 of Delhi Sales Tax on Works Contract Act, 1999, it was observed that the dealer who elects for such composition is required to submit an

application in the requisite form; and further that under Rule 6(2)(i) the Assessing Authority is to conduct verification before permitting the dealer to avail of the benefit of composition.

Hon'ble High Court further observed that when a dealer avails of the benefit of composition u/s 6(1) of the Act, he is expected to pay tax at the lower rate of tax on the total amount of the contract or the total aggregate value of the contract received or receivable towards the execution of the work contract.

In that case, it was only in the course of hearing before the Hon'ble High Court that the counsel for the appellant produced a copy of composite works contract between the assessee and BSES, Yamuna Power Ltd. Therein, Learned counsel expressed that the assessee was prepared to produce the said works contract before the Assessing Authority to examine whether any of the pure labour contracts stemmed from the execution of the works contract in question. That is how, the matter was remanded to the Assessing authority for afresh examination.

Herein the assessment was made by the Assessing Authority taking into consideration the information made available in the return and accompanying documents. The above said case is distinguishable on facts.

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19. On behalf of the appellant, reference has been made to decision in **M/s Oriental Cuisines Pvt. Ltd. vs. The Deputy Commissioner**, in Writ Petitions decided on 02/04/2018 by Hon'ble Karnataka High Court.

In that case, the petitioner had opted Composition Scheme, in terms of Section 15(1) of Karnataka VAT Act. Composition facility granted by the department was cancelled by the Assistant Commissioner on the ground that the petitioner therein was dealing in liquor either at the principal place of business or branches.

Therein, certificate issued under Rule 137 entitled the petitioner to make payment in terms of Composition Scheme at 4% unless the same was cancelled in terms of Rule 145 of the Rules, but indisputably, the certificate issued under Rule 137 was not cancelled during the relevant tax period April 2014 to March 2015.

There, on behalf of the petitioner, it was mainly argued that the Composition Scheme was cancelled, but as long as the certificate of composition issued by the authorities was in operation, no re-assessment could be made under VAT Scheme unless the certificate was cancelled.

Accordingly, re-assessment order was quashed.

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The decision in **M/s Oriental Cuisines Pvt. Ltd. vs. The Deputy Commissioner** is not applicable to the facts of this case as the present case is the one in which as noticed above, specifically General Condition No. 3 was made part of the scheme of the notification and as a result, all the provisions of DVAT Act including liability to pay tax with interest due for the delay, were to apply as if the dealer had never opted for Composition Scheme. Therefore, there was no question of cancellation of any certificate and as such the argument advanced by Counsel for the appellant is without any merit.

20. Learned Counsel for the appellant has also referred to decision in **Samsung India Electronics vs. Government of NCT of Delhi & Ors.**, decided on 07/04/2016 by our own Hon'ble High Court and submitted that as per said decision, a self assessment would also be another form of assessment i.e. the one deemed to be an assessment made by the Commissioner on the date on which return is furnished.

Reference has also been made to Para 35 of the said decision wherein reliance was placed on decision in **H.M. Industries vs. Commissioner of Value Added Tax**, ST. Appl. 32/2013, decided by our own Hon'ble High Court on 26/09/2014 which was to the effect that unless the conditions of Section 32(1) of the DVAT Act are satisfied, default assessment cannot be made and if made will be liable to be struck down.

Here, as noticed above, General Condition No. 3 was made part of the scheme of the notification and as a result, all the provisions of DVAT Act including liability to pay tax with interest due for the delay, were to apply as if the dealer had never opted for Composition Scheme. Therefore, there is no merit in the contention raised on behalf of the appellant that no assessment could be made after the self assessment, by way of return filed by the dealer, had been treated as an assessment framed by the Commissioner.

At this stage, reference may be made to Chapter X which pertains to audit, investigation and enforcement. As per sub-section (4) of Section 58 of DVAT Act, the Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him, either –

(a) confirm the assessment under review; or

(b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty if any pursuant to Sections 32 and 33 of this Act.

This is a case where assessment came to be made after an audit was conducted on 31/12/2009 at the business premises of the dealer. So, this case was covered by the provisions of Section 58 and even on this ground there is no merit in the contention raised by Learned Counsel for the appellant.

Whether any notice was required to be issued to the dealer before framing of assessment?

21. Counsel for the appellant has contended that before passing the impugned assessment, the department should have issued notice to the dealer so that it could explain the things, and since no notice was issued, the assessment deserved to be set aside.

Learned counsel for Revenue has rightly pointed out that audit was conducted on 31/12/2009 and on its basis assessment was framed.

Dealer admits conducting of audit on 31/12/2009 in presence of Sh. Anand Garg, its Director. In this situation, where was the question of issuance of any notice by the department to the dealer when the terms and conditions of the notification were clear and unambiguous, and it is admitted case of the dealer that interstate purchases were made by it during the concerned tax period, even after having opted for the first scheme as per version of the department.

22. Learned Counsel for the appellant has pointed out that on the top of the impugned assessment words "Audit Report" find mention and argued that in view thereof this document cannot be termed to be an assessment order.

On the other hand, learned counsel for the Revenue has submitted that the document is an assessment framed under

Section DVAT 32 of the Act, and that simply because words "Audit Report" have been typed on top left side of this document, it cannot be said that this is an audit report. Learned counsel has also referred to provisions of Section 80(1) of DVAT Act while submitting that contents of the assessment order are in substance and effect in conformity with or according to the intent and purposes of this Act and as such this clerical mistake in the nomenclature of the document does not adversely affect case of the Revenue.

From the contents of the document and its effect which are in conformity with or according to the intent and purposes of this Act, by no stretch of imagination it can be said that this document is an audit report. This case is therefore covered by the provisions of Section 80(1) of DVAT Act .

23. Counsel for the appellant has pointed out that the assessment order is an unsigned order, which was supplied by the department to the dealer.

The copy of the impugned assessment has been filed by the dealer. No certified copy thereof has been filed. There is nothing on record to suggest that this is the very copy of the impugned assessment supplied by the department to the assessee. At no point of time soon on receipt of copy of assessment, any objection ~~was~~ appears to have been raised or protest lodged by the dealer with the department as to the deficiency, if any, in the copy

of the assessment, on the ground that unsigned assessment had been supplied to it. Therefore, this submission of Counsel for the appellant is rejected, as same is not based on record.

24. One of the arguments advanced by counsel for the appellant is that the assessment appears to have been framed by two officers and not by one VATO or AVATO and as such the same deserves to be set-aside.

No such objection was raised by the dealer – objector before learned OHA in the course of objections u/s 74 of DVAT Act. There is nothing on record to suggest that the two officers had not been assigned / delegated powers by the Commissioner for framing of assessment(s). Therefore, there is no merit in this argument advanced on behalf of the appellant.

Grant of ITC and allowing of deductions towards Labour and Services Charges

25. Learned Counsel for the appellant has submitted that this is a case where no ITC has been granted to the dealer as regards the tax already deposited and that no deductions were made on account of labour and services. It has also been submitted that Learned Assessing Authority should have provided an opportunity of being heard to the dealer before any decision on the point of ITC, grant of deductions on account of labour and service charges and on the point of exemptions as regards

interstate sales, so that the dealer could put forth its claim/case and same could be decided as per law.

Further it has been submitted that no opportunity of being hard was granted to the dealer before making assessment. The contention is that the assessment is nullity for the reason that the principle of natural justice of audi alteram partem has not been observed. In support of this contention, learned counsel has referred to decision in **Ponkumm Traders case**, 1972 83 ITR 508 Ker.

26. At this stage, reference may be made to decision in **Sales Tax Bar Association (Regd.) Vs. GNCTD,** WP (C) No. 4236/2012. Therein, our own Hon'ble High Court has observed in the manner as :

> "The juristic policy enacted with clarity in the DVAT Act is of unilateral assessment first at the hands of the assessee and if the Assessing Officer is not satisfied therewith, then at the hands of the Assessing Officer. The Assessing Officer, of course while doing his unilateral assessment has the benefit of the assessment done by the assessee as well as any other material which may be available, and has to make the assessment to the best of his judgment. Only if the assessee remains dissatisfied with such unilateral assessment done by the Assessing Officer does the stage of „bilateral assessment" in the form of objections under Section 74 comes into play and which undoubtedly provides for an opportunity of hearing as is being demanded by the petitioners.

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16. The expression "to the best of his judgment" was in State of Kerala Vs. C. Velukutty (1966) 60 ITR 239(SC) held as requiring the assessing authority to not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. It is thus not as if VATO, while exercising powers under Sections 32 or 33 is rudderless. He is required to exercise judgment in the matter and assess what he honestly believes to be a fair estimate of the proper figure of assessment, taking into consideration local knowledge and repute and his own knowledge of previous returns and assessments and all other matters which he thinks will assist him in arriving at a fair and proper estimate. Guess work though held implicit in best judgment, is required to be honest guess work. The limits of the power are implicit in the expression "best of his judgment". It was held that a judgment is a faculty to decide matters with wisdom truly and legally on settled and invariable principles of justice. The same principles were reiterated in State of Kerala Vs. K.T. Shaduli Yusuff (1977) 2 SCC 777.

17. What falls for consideration is, whether inspite of Section 74 providing for such an opportunity of hearing, can any fault be found with Sections 32 and 33 in not providing such an opportunity.

18. Though the counsels for the petitioners have argued that the remedy of objections is not available owing to Section 79 of the Act but in the face of the express provision in the explanations to Sections 32 and 33 that a person disagreeing with the notices of assessment thereunder may file an objection under Section 74 of

the Act, the said contention is clearly erroneous and is not accepted.

19. The Supreme Court in Liberty Oil Mills Vs. Union of India (1984) 3 SCC 465 gave illustrations of situations where post-decisional hearing subserves principles of natural justice. It was held that the rule of audi alteram partem only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard. With reference to orders of suspension without hearing, it was observed that though it may involve hardship but hearing post-suspension suffices. Even in Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia (2005) 7 SCC 764 it was held that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket - they must yield to and change with exigencies of situations - they must be confined within their limits and cannot be allowed to run wild - while interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life; the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential.

20. Prof. de Smith, the renowned author of "Judicial Review" (3rd Edition), was in Swadeshi Cotton Mills v. Union of India (1981) 1 SCC 664 quoted (with approval) as opining that statutory provision for an administrative appeal or even full judicial review on merits are sufficient to negative the existence of any implied duty to hear before the original decision is made; that the said approach is acceptable where the original decision does not cause serious

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detriment to the person affected. In the same judgment, it was enunciated that where a statute does not, in terms, exclude the rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre- decisional stage.

21. Though Sections 32(3) and 33(2) make the additional tax if any due and penalty assessed thereunder payable immediately on such unilateral assessment but Section 35(1) though uses the words "may not proceed to enforce payment of the amount assessed", clearly provides that the recoveries of the said amounts are not to be made until two months after the date of service of the notice of assessment. The second proviso to Section 74(1) requires an assessee preferring the objections to only pay the admitted amount of tax and liability to be paid and not the tax and/or penalty qua which objections have been preferred. Further, as aforesaid a time of two months has been given for preferring the objections. Section 35(2) again provides that where objections have been preferred, the demand under Sections 32 and 33 may not be enforced until the objection is resolved. A conjoint reading of the said provisions clearly shows that enforcement of the demand under Sections 32 and 33 if made the subject matter of objection, is dependent upon the outcome of the objections and till the objections are decided, the disputed demand under Sections 32 and 33 is not to be enforced. Though undoubtedly the third proviso to Section 74(1) has now given a power to the Objection Hearing Authority to direct the disputed tax or penalty or any part thereof also to be deposited but the very fact that the second proviso as well

as Section 35(2) have also been retained along therewith on the statute book is indicative of the invocation of the third proviso being only if the circumstances so demand and not in the usual course. Moreover the order if any under the third proviso to Section 74 (1) is to be after giving an opportunity of hearing to the dealer. The contention of the petitioners that the third proviso to Section 74(1) is being invoked as a matter of routine is not only without any specific pleading and particulars but even otherwise does not constitute a ground for us to interfere with the scheme once the legislative policy is plain and clear. Moreover a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs (Krishna Iyer,J in R.S. Joshi, Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd. (1977) 4 SCC 98).

22. In Haryana Financial Corporation Vs. Kailash Chandra Ahuja (2008) 9 SCC 31, the test of prejudice was applied and it was held that if there is no prejudice, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.

23. To our mind the scheme aforesaid of the Act does not cause any prejudice whatsoever to the assessee. Inspite of our repeated calling, the counsels for the petitioners failed to substantiate the prejudice if any which the assessees suffer in having the opportunity if any required of hearing, at the stage of objections and not at the stage of assessment under Sections 32 & 33. Though the argument, of the assessee if not complies with demands under Sections 32 and 33 acquiring the status of a defaulter was

raised in response thereto, but the counsels were unable to support it with any provision of law. On the contrary a reading of Section 74(1) and Section 35 clearly shows that the liability for payment of the disputed demand under a best judgment assessment under Sections 32 & 33 arises only on the conclusion of objections and which as aforesaid is after the decision on objections and not prior thereto. That being the position, the question of the assessee, during the pendency of objections having the status of a defaulter and thereby suffering any disability does not arise.

24. Even if the hearing, at the stage of objections, is to be treated as a post decisional hearing, we fail to see any effect on the efficacy thereof. Though post decisional hearing was, as aforesaid, held to be not sufficient or effective, being held with a closed mind, after a decision has already been taken but those observations came to be made in the context of a post decisional hearing in the exercise of administrative powers. Here, the scheme of the statute itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. With such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal. Further, it is the contention of the counsels for the petitioners themselves, that the Assessing Authority and the Objection Hearing Authority are different. It thus cannot be said that the same officer would shy away from admitting mistakes and thereby reducing the hearing to a farce.

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25. In Union of India Vs. Col. J.N. Sinha (1970) 2 SCC 458, the Supreme Court held that if a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice and that rules of natural justice can operate only in areas not covered by any law validly made and they do not supplant the law but supplement it. To the same effect is Madan Lal Agarwala Vs. The State of West Bengal (1975) 3 SCC 198.

26. The House of Lords also in Pearlberg Vs. Varty (Inspector of Taxes) [1972] 1 W.L.R. 534 held that before the Courts exercise unusual power of supplementing the procedure laid down in legislation, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. It was further held that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair and that one should rather assume that what has been done is fair, until the contrary is shown. It was yet further held that where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the assessment, it by no means follows that he suffers an injustice in not being heard on the making of the order. Fairness was held to be not requiring plurality of hearings and it was observed that if there were too much elaboration of procedural safeguards, nothing would be done simply, quickly and cheaply.

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27. Recently in Smt. Rasila S. Mehta Vs. Custodian, Nariman Bhavan, Mumbai (2011) 6 SCC 220 also the Supreme Court held that the fact that a statute does not provide for a pre-decisional hearing is not contrary to the rules of natural justice because the decision does not ipso facto takes away any right and the post-decisional hearing satisfies the principles of natural justice.

28. We are however unable to concur with the contention of the senior counsel for the respondents that the assessment at the stage of Sections 32 and 33 is provisional or an inchoate and/or an incomplete assessment subject to completion at the stage of Section 74. We had during the hearing enquired from the senior counsel for the respondents that how can the tax be said to be due or recoverable if the assessment under Sections 32 and 33 was incomplete or provisional. It was enquired whether a demand could be raised without the assessment being complete. No satisfactory reply was possible; on the contrary we find that Section 30 prohibits any claim for payment by a person of any amount of tax, interest or penalty except by making an assessment for the amount. If the argument of the respondents of the assessment under Sections 32 and 33 being provisional or incomplete were to be accepted, then the demand of the assessment and penalty thereunder would be in contravention of Section 30. We therefore do not accept the said contention and hold the assessment of tax and penalty under Sections 32 and 33 to be complete. Merely because an assessment is subject to objections or appeal does not make it any less complete.

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29. We are of the opinion that the legislature has, by the scheme aforesaid merely fixed the date on which the tax falls due. If the assessment of the tax were to await hearings, the date of assessment and hence the date on which the tax can be said to fall due may be unduly deferred. The purpose of introducing the regime of self-assessment appears to be to fix the responsibility of assessing the tax on the assessee and even if in subsequent hearings the self-assessment by the assessee turns out to be wrong and erroneous leading to further tax being found due from the assessee, the same would relate back to the date on which the assess/ought to have done the self-assessment and paid tax correctly."

As regards ITC & deductions on account of labour and services charges, the Assessing Authority had the material made available by the assessee in the form of returns and other DVAT forms like DVAT-30 and also the report submit/ by the audit team, which was considered by the Assessing Authority before framing of assessments. No application for review or rectification of any mistake/was filed by the dealer before the Assessing Authority.

In view of the above proposition of law discussed by our own Hon'ble High Court, in view of the settled law, there is no merit in the contention raised by learned counsel for the appellant that the Assessing authority should have issued notice to the dealer before making assessment.

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Learned counsel for the Revenue has rightly pointed out while reading the contents of the impugned assessment that ITC has been granted to the dealer and at the same time, deductions on account of labour & services have also been allowed in respect of all the four quarters. Therefore, the argument advanced by counsel for the appellant in this regard is against record.

27. On behalf of the appellant, it has been argued that all the objections raised by the dealer in the objections u/s 74 of DVAT Act were not considered by learned OHA and as such the impugned assessment deserves to be set-aside.

On the other hand learned counsel for the Revenue has submitted that learned OHA has specifically dealt with argument advanced on behalf of the dealer.

A perusal of impugned order would reveal that counsel for the objector argued before learned OHA that the Assessing Authority had failed to appreciate that while opting for the composition scheme the objector had opted for composition scheme as prescribed u/s 16(12) of DVAT Act i.e. as prescribed vide notification No. F-3(78)/Fin. (T&E)/2005-06/1508, kha dated 17/3/2006 and not under the composition scheme as prescribed u/s 16(1) of the DVAT Act.

While discussing the said argument, learned OHA referred to the provisions of section 16(12) of DVAT Act and then referred

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to the above said notification dated 17/3/2006 and reproduced its contents. There is no dispute that the dealer adopted for one of the composition scheme framed u/s 16(12) of DVAT Act.

From the contents of DVAT 38 which find mentioned in the impugned order, it transpires that the dealer pleaded in the objection that the dealer had deposited tax at composition rate of 2.5% due to mistaken legal advice and that the VATO could have realised the mistake, had he gone through the record.

This averment of the dealer goes to show that the dealer actually opted for the composition scheme of 2.5% i.e. the First composition scheme No. 1. So, it cannot be said that the assessment or the impugned order suffers from any illegality. In this situation, decision in **Amrit Foods vs. Commissioner of Central Excise, UP,** 2005(190) ELT 433 (SC), cited by counsel for the appellant does not come to the aid of the dealer.

Challenge to the levy of interest

28. Contention raised by learned counsel for the dealer-appellant is that in this case Assessing Authority levied interest, but in the given facts and circumstances, even if it is assumed for the sake of argument that the Assessing Authority had the jurisdiction to frame assessment, no interest could be levied. In support of his contention, counsel has referred to the provisions of Section 42(2) of DVAT Act.

Section 42(2) of DVAT Act provides for levy of simple interest in case a person in default in making the payment of any tax, penalty or other amount due under this Act and that too from the date of such default.

As already noticed above, as per General Condition No. 3 of the notification dated 17/03/2006, all the provisions of DVAT Act including liability to pay tax with interest due for the delay, were to apply as if the dealer had never opted for Composition Scheme. In view of this General Condition, the parties have agreed even as regard liability towards interest for the delay in payment of the tax due.

So far as the date of the default and accrual of interest is concerned, when the assessee violated the above said condition, it is deemed as if the dealer had never opted for the composition scheme. Consequently all the provisions of DVAT Act including liability of payment of tax alongwith the interest come into application *mutatis mutandi.* In this way, the liability of the dealer to pay interest arose from the date of filing of the return.

Therefore, it cannot be said that interest from the date of default or for the delay in deposit of the tax due could not be levied by the Assessing Authority.

Challenge to the Assessment of Penalty

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29. Learned counsel for the appellant has challenged the assessment regarding imposition of penalty on the ground that no notice was issued by the Assessing Authority to the dealer before imposition of the penalty. In this regard learned counsel has referred to decision in **Bansal Dye Chem v. Commissioner of VAT**, ST. Appeal 29 of 2015, decided on 24.9.2015 by our own Hon'ble High Court.

As regards the contention raised by learned counsel for the appellant that no notice was issued by the Assessing Authority to the appellant before imposition of penalty u/s 33 of the Act, and the decision cited by learned counsel for the appellant, it is pertinent to mention here that in view of decision in **Sales Tax Bar Association's** case (supra) by our own Hon'ble High Court, also relied on by learned counsel for the Revenue, no notice was required to be issued to the appellant before passing orders of penalty.

In Bansal Dye's case (supra), our own Hon'ble Court observed that penalty order u/s 86(10) of the Act was passed by the Assessing Officer, without service of prior notice of penalty on the Assessee and also without affording the Assessee an opportunity of being heard on the point of imposition of penalty, and as a result, set aside the impugned order holding that the said order was unsustainable in law. Therein, it was also observed that the very nature of the proceedings under section 33 of the DVAT Act read with Rule 36(2) of the DVAT Rules

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underscore the need for the VATO to observe the principles of natural justice while making the penalty order, that this entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the assessee an opportunity of being heard prior to passing the penalty order and further that the imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case.

In that case, the premises of the Assessee were surveyed and it was found that there was variation in case and stock, and as a result, the Assessing Officer enhanced the gross profit and levied tax, interest and also penalty. In that case, the Assessee had paid tax, interest and penalty, and it questioned the penalty order, inter alia, on the ground that no opportunity of hearing was afforded on the point of penalty before the passing of the order.

In Sales Tax Bar Association's case (supra), our own Hon'ble High Court clearly observed that the scheme of the statute (DVAT Act) itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. As further held, with such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi

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judicial power and is subject to an appeal to the Tribunal.

In Bansal Dye's case (supra), it was seen that on the basis of survey, a notice was issued to the Assessee under section 59 of the Act as regards the assessment of tax, but the Assessee did not participate in the assessment proceedings and accordingly, notice of default assessment of Tax and interest was issued by the Assessing Officer. On the same day, the Assessing Officer passed the order of penalty, without service of prior notice on the Assessee.

Indisputably, the decision in Sales Tax Bar Association's case on the relevant point of opportunity of being heard, before assessment of penalty, was not referred to by learned counsel for the petitioner or the respondent in Bansal Dye's case (supra).

Even otherwise, here the appellant filed objections before learned OHA, and the learned OHA disposed of the objections after providing to the dealer – appellant opportunity of being heard. In this way, this is a case where impugned order came to be passed by Learned OHA, after affording reasonable opportunity of being heard, in terms of decision in Sales Tax Bar Association's case.

In the given situation, in view of decision in Sales Tax Bar Association Case, decision in Bansal Dye's case (supra), does not come to the aid of the appellant.

However, the assessment regarding imposition of penalty cannot stand on another ground i.e. non framing of separate assessment in this regard. Counsel for the Revenue does not dispute that no separate assessment has been framed as regards penalty. Learned Assessing Authority was required to frame separate assessment as regards penalty. Same having not been framed, the assessment imposing penalty deserves to be set-aside.

Result

30. In view of the above discussions and findings, the appeals challenging levy of penalties are allowed, the imposition of penalties as well as the impugned order passed by learned OHA upholding the same are set-aside.

The appeals challenging the levy of tax and interest are hereby dismissed while upholding the levy of tax and interest and the impugned order passed by learned OHA.

31. File be consigned to the record room. 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 : 29/7/2022

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29/7/2022

(Narinder Kumar)
Member(J)

Appeal no. 353-358/ATVAT/13/5202-09 Dated: 01/08/2022

Copy to:-

(1) VATO (Ward-)

(2) Second Case File

(3) Govt. Counsel

(4) Secretary (Sales Bar Association)

(5) PS to Member (J) for uploading the judgement on the portal of DVAT/GST, Delhi–through EDP branch

(6) Dealer

(7) Guard File

(8) AC(L&J)

REGISTRAR