

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

Appeal Nos.: 385-386/ATVAT/08

Date of Judgment : 04/08/2022

M/s. New Rama Krishna Sanitary Emporium,  
WZ-5/38, Ganesh Nagar,  
New Delhi-110018.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. A.K. Babbar.

Counsel representing the Revenue : Sh. S. B. Jain.

**JUDGMENT**

1. By way of present appeals, dealer registered with Department of Trade & Taxes, Delhi, has challenged order dated 04/06/2008 passed by Joint Commissioner-V-Learned OHA.
2. As is available from record, on 29/12/2005, Enforcement Branch of Department of Trade & Taxes, Delhi conducted inspection at the business premises of the dealer-appellant herein and found stock variation, cash variation, loose papers reflecting unaccounted for transactions worth Rs. 5,40,000/-.
3. Default assessment of tax and interest was framed u/s 32 of



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DVAT Act, relating to the tax period from 01/04/2005 to 31/12/2005, on the basis of cash variation, stock variation, sales calculated on the basis of seized documents and ITC claimed relating to 2<sup>nd</sup> quarter of tax period of the year 2005.

4. Assessing Authority is stated to have issued notice to the dealer in DVAT-37 on 10/08/2006 and to have got the same delivered upon the dealer personally calling upon him to appear on 20/10/2006. On the failure of the dealer to furnish reply, Assessing Authority framed assessment of tax, interest and penalty as noticed above.
5. Feeling aggrieved by the default assessment of tax, interest and levy of penalty, dealer filed objections before Learned OHA. Learned Joint Commissioner-OHA disposed of the objections by observing as follows:

“It is evident from the above that there was considerable variation in the value of stock actually available at the time of inspection/inventorization and that reflected in the record maintained by the dealer. The physical stock found at the time of survey was worth Rs. 990852/- and as per trading a/c as on 29.12.05 the closing stock was worth Rs. 1082752/-. All the papers and trading a/c are signed by the partner of the firm on 29.12.05.

Similarly, there was actual variation in the cash which was available at the time of inspection and as reflected in cash register.



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Hence, no relief can be granted to the objector in this regard. Further, actual verification of stock register and cash book had revealed that the record/accounts of the dealer were not prepared in prescribed manner, accordingly, imposition of penalty u/s 86 (13) of the Act by the VATO was in order and in fulfillment of provision of the above said section of DVAT Act. However, on perusal of 23 seized papers reflecting unvouched sale of Rs. 5,40,000/-, it appears that papers from Sr. No. 1 to 15 are purchase bills (tax invoices) issued by different parties in favour of the objector. The objector has filed copy of purchase register which shows that the said invoices have been duly entered in the register. Further, regarding paper bearing serial No. 19 showing transaction of Rs. 8,22,869/- and paper bearing Sr. No. 20 showing transaction of Rs. 3,93,358/-, the counsel has stated that the same are details of C forms for the year 2004-05. The counsel has contended that verification of 'C' forms vis-a-vis the detail contained in Paper No. 19 & 20 would establish that the said detail/figures are nothing but the particulars of transactions covered by relevant 'C' form. In this connection it is relevant to emphasize that for ascertaining the veracity of the contention of the dealer it is necessary to verify the 'C' forms, the details of which are claimed to have been recorded in paper No. 19 & 20 vis-a-vis the 'C' forms submitted in the department. Without the said verification it is difficult to make a conclusive remark about the acceptability of the claim."

6. Vide impugned order, Learned OHA partly allowed the

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objections regarding default assessment of tax and interest i.e. by upholding levy of tax on account of stock and cash variation, but remanded the matter to Learned VATO – Assessing Authority as regards levy of tax in respect of turnover of Rs. 5,40,000/- as per loose papers seized by the enforcement team.

The assessment of penalty was also upheld.

The operative part of the impugned order reads as under:

“I have gone through the objections filed in DVAT-38 forms documents furnished in support of said objection, default assessment of tax interest order and penalty assessment order and have heard the arguments of the counsel of the dealer and those of DR, whereupon, the order regarding assessment of penalty is upheld and objection in this regard in (sic) disallowed.

The objection regarding default assessment of tax and interest is accepted partly. The tax imposition on a/c of stock and cash variation is upheld and the matter/issue relating to imposition of tax in respect of loose papers worth Rs. 5,40,000/- seized by enforcement team is referred back to VATO concerned, with the direction that the VATO shall pass the order afresh after proper examination/verification of relevant record including 'C' forms details of which are claimed to have been incorporated in Paper No. 19 & 20. If the contents of the said papers do not tally with the 'C' forms submitted by the dealer, then the VATO is at liberty to impose tax on the transactions as per the prescribed rate,



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keeping in view the relevant provisions of law and observations recorded in the preceding para.. The record shall be submitted by the dealer before the VATO within one month. It is held accordingly.”

7. Arguments heard. File perused.

### **Cash Variation**

8. It may be mentioned here at the outset that in the course of arguments, learned counsel for the appellant has not pressed the appeal as regards cash variation. In other words, learned counsel has not challenged the assessment or the reasons recorded by the Assessing Authority and by learned OHA as regard cash variation.

Even otherwise as per assessment framed by the Assessing Authority, there was variation of cash to the tune of Rs. 1,558/-. This variation was found by checking the cash available at the time of inspection and the entries reflected in the cash register.

Accordingly, the assessment framed and the impugned order passed by learned OHA as regards levy of tax and interest, on the basis of cash variation are upheld.

### **Stock variation**

9. As noticed above, the Enforcement Team found stock variation to



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the tune of Rs. 91,900/-. Enforcement Team tallied the stock actually available at the time of inspection/ preparation of inventory, with the entries recorded in the register.

Learned counsel for the dealer – appellant has contended that nowhere it has been observed by the Department or by learned OHA as to on what basis this figure of Rs. 9,90,852/- i.e. of the physical stock found at the time of inspection, was calculated.

Appellant has not placed on record copy of inspection report prepared by the team of Enforcement branch of the Department. Even in the course of arguments, learned counsel for the appellant has not been able to supply copy of the inspection report.

Section 78 of DVAT Act provides that the burden of proving any matter in issue in proceedings u/s 74 of the Act or before the Appellate Tribunal which relates to the liability to pay taxes or any other amount under this Act shall lie on the person alleged to be liable to pay the amount.

In the situation, it was for the dealer – appellant to prove as to why no reliance could be placed on the figure i.e. 9,90,852/- i.e. the value of physical stock found at the time of survey. But when the very basis i.e. the inspection report has not been made available by the dealer – appellant, it cannot be said that no such variation in stock actually found at the business premises of the



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dealer, was noticed by the Enforcement Team.

Learned OHA has categorically recorded that as per trading account as on 29/12/2005 i.e. date of inspection by the Enforcement Team, the closing stock was worth Rs. 10,82,752/-, but the physical stock found at the time of survey was worth Rs. 9,90,852/-.

The dealer could also produce copy of the trading account depicting the closing stock as on 29/12/2005 and copy of the inventory prepared at the spot depicting the stock actually found, but the dealer has not produced any such document. In absence thereof, it cannot be said that no such stock variation was found by the Enforcement Team.

In case of inventory of the items found actually present at the business premises, their value is calculated as per the value of each item as provided by the representative of the dealer.

There is nothing on record to suggest that representative of the dealer had not provided to the Enforcement Team value of the stock/items actually found at the time of inspection.

It is available from the impugned order passed by learned OHA that all the papers and trading account were signed by the partner of the firm on 29/12/2005 i.e. the day of inspection itself. There

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is nothing on record to suggest that any protest was lodged by the said representative/ partner challenging the genuineness of the inventory prepared at the spot either in respect of the quantity or their value.

It is not case of the dealer – appellant that any letter of protest was sent by the dealer to the Department or the concerned officer or the concerned ward challenging the correctness of the inspection report or the inventory on any aspect or alleging that the said representative was forced to sign the said report or inventory. In absence thereof, I do not find any merit in the contention raised by learned counsel for the dealer – appellant that no stock ~~variation~~ worth Rs. 9,90,852/- was found by the Enforcement Team.

### **Penalty**

10. Vide separate assessment, learned Assessing Authority levied penalty of Rs. 50,000/- u/s 86(13) of DVAT Act, so far as second quarter of 2005-06 is concerned. The reason for levy of penalty was that at the time of inspection conducted by enforcement Team on 29/12/2005, it was found that the dealer was not maintaining books of accounts in the prescribed manner.

Section 86(13) (c)(ii) provides that where a person is required to prepare record or accounts but he fails to prepare prescribed or

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notified record and accounts in the prescribed manner, such person shall be liable to pay, by way of penalty, a sum of Rs. 50,000/- or 20% of the tax deficiency, if any whichever is greater.

Learned counsel for the dealer – appellant has contended that no notice was issued by VATO to the dealer before imposing penalty u/s 33 of DVAT Act and as such the impugned assessment imposing penalty and the impugned order upholding the same, deserve to be set-aside. In support of his contention, learned counsel has relied on 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 or 86(10) 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 (Regd.) Vs. GNCTD, WP (C) No. 4236/2012**, by our own Hon'ble High Court, no notice was required to be issued to the appellant before levy 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

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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 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 cash 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

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(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 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.

Undisputedly, 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).

11. 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

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this way, I find that 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.

12. 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.

### **Result**

13. As a result, finding no merit in the appeals as regard levy of tax, interest in view of the factum of cash variation and stock variation, and imposition of penalty for not maintaining books of accounts in the prescribed manner, both these appeals are dismissed.
14. 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 : 04/08/2022



*Narinder Kumar*  
4/8/22  
(Narinder Kumar)  
Member (J)

Appeal No. 385-386/ATVAT/08/5242-49

Dated: 05/08/2022

Copy to:-

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|---|----------------|
| (1) VATO (Ward- )   | (6) Dealer     |
| (2) Second case file  | (7) Guard File |
| (3) Govt. Counsel   | (8) AC(L&J)    |
| (4) Secretary (Sales Tax Bar Association)   |                |
| (5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch. |                |

  
**REGISTRAR**

