BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar: Member (Judicial)

Appeal Nos. : 59-60/ATVAT/2008
Date of Judgment: 12/08/2022

M/s. Chander Bhan Jain & Sons,
D-3/24, Maya Puri, Phase-II,
New Delhi-110064 .....Appellant

v.

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

Counsel representing the Appellant : Sh. A. K. Babbar
Counsel representing the Revenue : Sh. M. L. Garg

JUDGMENT

1. Dealer-appellant presented appeal u/s 74 of Delhi Value Added Tax Act (hereinafter referred to as the DVAT Act), on 16.05.2008.

2. Dealer was registered with Department of Trade and Taxes, Delhi. On 06.03.2007, Assessing Authority – VATO (VA), framed default assessment of tax and interest, u/s 32 of DVAT Act, for the period from 01.04.2005 to 31.03.2006, due to following reasons:

> "whereas I am satisfied that the dealer has not furnished the returns for the years 01.04.2005 to 31.03.2006 that does not comply with the requirements of Delhi Value Added Tax-2004 and during period the audit

Narinder Kumar 12/8/2022

of the company, the following discrepancies were found and accordingly the default assessment has been made as under:

1. ITC claimed on transitional stock of Rs. 2,200/ but not produced relevant purchase bills /invoices on which ITC was claimed. As the genuineness of ITC could not be test checked so the dealer is liable to pay tax for Rs. 2,200/-, interest Rs. 440/ under DVAT Act 2004.

2. ITC claimed on retail invoice No.98 dt.5.9.2005 of Rs. 13,465/- which is disallowed. Hence, the dealer is liable to pay tax for Rs. 13,465/-, interest Rs. 2,188/-.

3. The firm has made Central Sales against the following retail invoices against C form @ 2% CST but movement of goods i.e. GR not produced. Hence, the interstate sale is treated as local sale and taxed @ 4% under DVAT Act 2004 and interest is also imposed.

Bill No.	Date	Amount	CST	DVAT Imposed	DVAT due	Interest
12	22.09.05	47,082/-	942/-	1,883/-	941/-	153/-
13	07.10.05	43,500/-	1,740/-	1,740/-	----	----
Total					941/-	153/-

4. Dealer has received goods i.e. un-serviceable cables from MTNL, Delhi on gate passes only through auction during the month of July and August-2005 and has shown the corresponding sale @4% as Non-ferrous scrap and PVC cable scrap. The said stock has been sold as and when received the goods from MTNL on gate passes. The dealer has not claimed ITC in relevant tax period against the stock received/purchased from MTNL Delhi. The dealer has paid VAT @ 12.5% on unserviceable cable against the purchases made from MTNL and has also claimed input tax

12/8/22

credit in the return period w.e.f. 1.10.2005 to 31.12.2005 i.e. IIIrd Quarter of 2005-06.

As the Cables (High Voltage Cables, XLPE Cables, Jelly Filled Cables Optical Fibre Cables) are entered in Schedule-III at entry No. 40 & 41A(27) which is taxable @4% so the scrap of cables cannot be taxable more than the rate of fresh cables. Hence, the claim of Input tax credit @12 1/2% on scrap of cables/unserviceable cables is not justified. Further, the dealer has not claimed input tax credit in relevant tax period where the goods were received/purchased and sold by the firm."

Accordingly, the dealer – assessee was directed to pay tax to the tune of Rs. 19,40,224/- with interest of Rs. 2,42,528/-.

The Assessing Authority also framed assessment regarding penalty of Rs. 28,25,480/-.

Feeling aggrieved by the assessments, the dealer filed objections u/s 74 of DVAT Act, before learned OHA. Learned Additional Commissioner – III – OHA, partly allowed the objections vide order dated 17.03.2008, by observing in the manner as:

"Section 9(8) of the DVAT Act 2004 states as-

The tax credit may be claimed by a dealer only if he holds a tax invoice at the time the prescribed return for the tax period is furnished.

In the light of the rule position explained above, since the dealer did not have the tax invoices with him in the IInd quarter so he cannot claim input tax credit in the IInd quarter. However as the dealer has tax invoices with him so he is liable to get tax credit, for which he is entitled. Hence the objection filed by the objector firm is accepted/allowed to the extent of 4% input tax credit on Rs. 1,55,21,788/-. Since the dealer has not produced any document in support of the transitional stock credit

disallowed, ITC disallowed on retail invoice and the copy of the G.R's of central sales, the tax and interest imposed on the same are upheld.

So far as the issue of penalty imposed by the VATO is concerned, it is apparent that the dealer filed return and claimed Input Tax according to the Tax paid by him on invoice received from the MTNL wherein MTNL has charged VAT @ 12.5% instead of 4%. Though the dealer has claimed ITC at a higher rate, since he has received tax invoice at that rate and paid the same to his selling dealer who in turn deposited the same to the Govt., it does not appear to be intentional on the part of the dealer, hence the penalty u/s 86(10) and u/s 86(12) of Rs. 19,40,224/- and Rs. 8,40,699/- are not sustainable.

However it is a proven fact that the dealer claimed higher input tax then he is entitled as per the provisions of DVAT Act 2004, hence penalty of Rs. 1,00,000/- is imposed on him u/s 86(10).

The other penalties of Rs. 14,406/- u/s 86(10), 10,000/- u/s 86(11) and 20,151/- u/s 86(12) are upheld, as the dealer is unable to produce any argument in support thereof.

Keeping these facts into consideration the objection filed by the dealer, against the orders passed by the VATO, u/s 32 and 33 are partly accepted."

3. Arguments heard. File perused.

4. As noticed above, assessments were framed by learned Assessing Authority on 06/03/2007 u/s 32 and 33 of DVAT Act levying tax, interest and also imposing penalty.

As regards unserviceable cables

5. While challenging the assessments framed by the Assessing Authority and the findings recorded by learned OHA in the impugned order, in the course of arguments, learned counsel

for the appellant has argued the appeal only as regards unserviceable cables which the dealer is stated to have purchased in auction from M/s M.T.N.L. Delhi and sold the same as scrap and also as regards the penalty of Rs. 1,00,000/- imposed for the first time by learned OHA u/s 86(10) of DVAT Act, as regards the sale transaction of said scrap.

In other words, the assessment and the impugned order have not been challenged on any of the following points :

i. ITC claimed on transitional stock of Rs. 2200/- but not produced relevant purchase bills/invoices on which ITC was claimed. As the genuineness of ITC could not be test checked so the dealer is liable to pay tax for Rs. 2200/-, interest Rs. 440/- under DVAT Act 2004.

ii. ITC claimed on retail invoice No. 98 dt. 5.9.2005 of Rs. 13465/- which is disallowed. Hence, the dealer is liable to pay tax for Rs. 13465/-, interest Rs. 2188/-.

iii. The firm has made Central Sales against the following retail invoices against C form @ 2% CST but movement of goods i.e. GR not produced. Hence, the interstate sale is treated as local sale and taxed @ 4% under DVAT Act 2004 and interest is also imposed.

6. It is not in dispute that the appellant had paid VAT @ 12.5% on the said item purchased from M/s M.T.N.L. through auction in July and August, 2005.

7. One of the reasons for rejection of the claim of the dealer-appellant for input tax credit is that the dealer did not claim ITC in the relevant tax period.

In this regard, learned counsel for the appellant has submitted that the tax invoice was issued by M/s M.T.N.L. during the period from 01/10/2005 to 31/12/2005 and that is why, the dealer claimed ITC during the said tax period and not in the month of July and August 2005 when the said item was actually purchased through auction.

In the impugned order, learned OHA allowed the objection raised by the dealer while observing that since dealer was not having tax invoices with him in the second quarter, it could not claim ITC in the second quarter and that it became entitled to claim tax credit on the basis of the tax invoices. As a result, learned OHA allowed input tax to the objector.

The grievance of the dealer is that the input tax credit was allowed by learned OHA only to the extent of 4%, whereas the dealer had paid tax @ 12.5%.

In view of the above findings recorded by learned OHA, the contention raised on behalf of the appellant is that its claim for

ITC @ 12.5% deserved to be allowed but the learned OHA erred in allowing the claim only to the extent of 4%.

In support of his contention learned counsel for appellant has referred to decision in **M/s Goyal Iron & Steel Store vs. Commissioner of Sales Tax, Delhi**, in Appeal No. 51/2007 decided by this Appellate Tribunal. Learned counsel for the appellant has submitted that M/s Goyal Iron & Steel Store's case was based almost on same facts and same law point, which was decided in favour of the dealer, thereby allowing claim of input tax credit @12.5%, while setting aside the impugned order passed by learned Additional Commissioner allowing input tax credit only @ 4%.

8. Undisputably, same point was involved in M/s Goyal Iron & Steel Store's case (supra) decided by this Appellate Tribunal.

Therein, it was observed that M/s M.T.N.L. was not sure as to how much VAT was required to be charged by it from the dealer-appellant therein, and as such M/s M.T.N.L. sought clarification from the concerned VAT officer. In reply, the concerned VAT officer informed M/s M.T.N.L. that scrap was exigible to VAT @ 12.5% under the entry pertaining to non-specified goods.

12/8/22

In that matter, scrap was purchased by the dealer therein from M/s M.T.N.L. on 16/04/2005 and 25/04/2005 and the said dealer sold the scrap in the month of April 2005 itself.

Therein, Appellate Tribunal observed that M/s M.T.N.L. had issued tax invoice subsequently i.e. on 18/10/2005; keeping in view decision in **Kirloskar Electric Co. Ltd. v/s Commissioner of Sales Tax**, 1991-(083)-STC-085-DEL that State is entitled to the tax which is legitimately due to it and applying the same to the facts and circumstances of the case, it was held that the dealer therein was entitled to benefit of input tax credit for the amount which he had paid on purchase of the scrap in April 2005 i.e. @ 12.5%.

9. Having a cue from the decision in M/s Goyal Iron & Steel Store's case, I find merit in the contention raised by the learned counsel for the appellant that the dealer-appellant herein having paid VAT @ 12.5% to M/s M.T.N.L., in terms of clarification sought by M/s M.T.N.L. from the concerned VAT officer, the dealer was entitled to input tax credit @ 12.5% and not @ 4%. Since learned OHA fell in error in allowing claim of input tax credit only @ 4%, impugned order deserves to be set aside. I order accordingly.

1/7/18

Penalty

10. As regards penalty, learned counsel for the appellant has submitted that while disposing of objections, learned OHA clearly held that the penalties levied by the Assessing Authority u/s 86(10) and 86(12) were not sustainable, but even then he levied a penalty of Rs. 1,00,000/- u/s 86(10) of DVAT Act, as regards higher claim put-forth by the dealer relating to input tax credit.

The contention raised by learned counsel of the appellant is that learned OHA is not empowered to levy penalty for the first time, in the manner it has been levied in this matter. On behalf of the Revenue there is no contest on this point having regard to the words used by Learned OHA in imposing this penalty of Rs. 1,00,000/-.

11. As discussed above, the claim of the dealer for input tax @ 12.5% has been upheld while setting aside the findings recorded by learned OHA that it is entitled to input tax credit only @ 4%. As a result, the observation made by learned OHA in the impugned order that the dealer claimed higher input tax, deserves to be set aside.

Learned OHA passed the impugned order as if he was imposing penalty of Rs. 1,00,000/- for the first time, but law does not permit so. Therefore, the impugned order imposing this penalty

1/18

of Rs. 1,00,000/- is set aside. The assessment as regards penalty u/s 86(10) and 86(12) in respect of unserviceable cable was already set aside by Learned OHA vide impugned order being not sustainable.

Result

12. As a result, Appeals No. 59 & 60/08 are partly allowed in the manner indicated above i.e. as regards assessment and impugned order pertaining to levy of tax, interest and penalty (imposed for the first time by Learned OHA), relating to ~~as regards~~ unserviceable cables, but as regards the assessment of tax, interest and penalty in respect of other heads, the appeals are dismissed as not pressed.

    Department to take steps in accordance with law to give effect to this judgment.

13. 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 : 12/08/2022

(Narinder Kumar)
Member (J)

Appeal no. 59-60/ATVAT/2008/5314-21 Dated: 16/08/2022

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 16/8/22