BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar: Member (Judicial)

Appeal Nos. :249-256/ATVAT/16
Date of Judgment: August 25, 2022.

M/s. Bharti Electronics,
7, Bhera Enclave, Paschim Vihar,
Delhi-110041. .....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. By way of above captioned appeals no. 249-256, dealer – assessee registered with Department of Trade and Taxes, vide TIN No. 07680290031, has challenged order dated 09/11/2016 passed by learned OHA-Special Commissioner-1, whereby its 8 objections relating to the following tax period and demands towards tax, interest and penalty raised by the Assessing Authority have been rejected :

S. No	Tax Period	Nature of Objections	Disputed amount (In Rs.)
1	I Qtr. 2014-15	u/s 32 of DVAT Act, 2004	61,00,768/- (Tax+Interest)
2	I Qtr. 2014-15	u/s 33 of DVAT Act, 2004	51,52,199/- (Penalty)

Narinder Kumar 25/8/22

3	II Qtr. 2014-15	u/s 32 of DVAT Act, 2004	46,61,349/- (Tax+Interest)
4	II Qtr. 2014-15	u/s 33 of DVAT Act, 2004	40,66,425/- (Penalty)
5	III Qtr. 2014-15	u/s 32 of DVAT Act, 2004	18,77,132/- (Tax+Interest)
6	III Qtr. 2014-15	u/s 33 of DVAT Act, 2004	16,93,409/- (Penalty)
7	IV Qtr. 2014-15	u/s 32 of DVAT Act, 2004	5,03,192/- (Tax+Interest)
8	IV Qtr. 2014-15	u/s 33 of DVAT Act, 2004	4,69,612/- (Penalty)

2. The objections were against notices of default assessments issued u/s 32 and 33 of DVAT Act.

3. As per case of revenue, a survey was conducted on a complaint received regarding alleged concessional 'C' Forms sale to five parties of Haryana. These parties were M/s Eternity Impex (06051708922), M/s Global Enterprises (06401940705),M/s M.P Enterprises (06211708446), M/s Techno India and M/s Sun Enterprises (06611710069),M/s M.P Enterprises(06211708446).

Asstt. Commissioner and AVATOs were also deputed for verification of genuineness of a these dealers.

As per their report, these firms were non-functioning/non-exiting. Accordingly, the notice u/s 59(2) of DVAT Act was issued by the Assessing Authority to the dealer, but the dealer is said to have not given any satisfactory reply.

The dealer also failed to furnish any proof regarding Toll receipts payable at Gurgaon Toll Plaza in the year 2014-15.

4. Learned OHA rejected the objections by observing in the manner as:

> "I have heard the arguments/ submissions made by the Counsel for the objector and also gone through the impugned default assessment and penalty order and records produced before me during the course of hearing. Perusal of the record reveals that the objector though filed petrol/ diesel bills and a/c statement for vehicle used for business activity but failed to prove the movement of the goods in course of Inter State Trade or Commerce. Merely stating that the dealer despatched the goods through a vehicle owned by him is not sufficient. Moreover it cannot be a mere coincidence that the RCs of all the dealers to whom the central sales have been claimed to be made were cancelled within short span of time.
>
> Keeping in view the facts and the circumstance and submission made and that the objector failed to file any documentary evidence in support of his claim, I find that the assessment orders of tax, interest and penalty do not suffer from any infirmity. The objections are, therefore, rejected."

5. Feeling dissatisfied with the rejection of the objections, dealer has filed these appeals.

6. So far as default assessments of tax and interest for all the quarters are concerned, Assessing Authority treated sales to the five firms named therein, as local sales, after survey was

conducted on the basis of a complaint received relating to 'C' forms as regards transactions with said five firms, and the said firms were found non-functioning/non-existent as per report submitted by Assistant Commissioner and AVATOs.

The other ground for framing of the default assessment of tax and interest is that the dealer-assessee-appellant was not maintaining any GRs as regards sales to the said five dealers.

For the aforesaid reasons, separate assessments of penalty were framed u/s 33 read with section 86(10).

7. Learned counsel for the appellant has contended that upon notice by Learned OHA, buying dealers had appeared and submitted documents, but Learned OHA has nowhere discussed the same while affirming the assessments.

8. As regards the observation made by the Assessing Authority that the five firms named in the assessment were found not functioning or were non-existent, same were made when Assistant Commissioners and AVATOs, deputed for verification of genuineness of the said dealers with, so reported.

For the first time, learned OHA observed in the impugned order that registration of all the said dealers, to whom the dealer-appellant is stated to have made Central Sales, were cancelled within a short span of time.

However, in the impugned order it does not find mention as to on which date registration of the said five dealers was cancelled or that the registration was cancelled even before the dealer-appellant entered into transactions with the said dealers.

It is well settled law that at the time of entering into transactions, the dealer is required to verify that the other dealer is a registered dealer and also that the items, in which the said other dealer is going to deal, find specific mention in the certificate of registration. No other fact is to be verified by the dealer.

On going through the impugned order, it is found that learned OHA has not discussed any of the documents produced by the buying dealers. There is no reason in the impugned order for rejection of the said record produced by the buying dealers. In the given facts and circumstances, learned OHA was required to discuss the said record produced by the representative of the said dealers, before upholding the assessments of tax, interest & penalty. For want of any discussion of the said record, matter needs decision afresh by learned OHA, taking into consideration the entire material available on record, after providing reasonable opportunity to the dealer of being heard and in view of settled law on the point.

2/18

9. Learned counsel for the dealer-appellant has then referred to provision u/s 7 of DVAT Act which provides as to the sales not liable to tax, and contended that provisions of Section 3, 4 and 5 of Central Sales Tax Act, 1956, prohibit VATO to frame assessments under DVAT Act. Learned counsel has urged that the notices of default assessments of tax, interest and penalty having been issued under DVAT Act, and not under CST Act, are without jurisdiction.

At the same time, learned counsel has referred to assessment dated 25.3.2019 framed under CST Act in respect of the same tax period i.e. all the four quarters of the year 2014-15, whereby all the sales have been treated to be interstate sales. The contention is that in view of this subsequent assessment under CST Act, the assessment framed under DVAT Act treating the very sales as local sales automatically goes. In support of his submission, counsel for the appellant has placed reliance on decision in **Moral Alloys Pvt. Ltd. v. Commissioner of Trade & Taxes,** W.P.(C) 10153/2018 decided by our own Hon'ble High Court on 13/08/2019 and another decision **M/s Nav Bharat Enterprises Ltd. v. Sales Tax Officer**, (1987) 066 STC 0252.

Counsel has also submitted that the dealer had to file a petition before the Hon'ble High Court challenging issuance of notice for revision of the assessment framed under CST Act, but the said petition stands withdrawn in view of the

submission on behalf of the Revenue that the department no more pressed said notice issued to the dealer.

10. Learned counsel for the Revenue has contended that dealer-objector was required to prove movement of goods, but it failed to lead any evidence in this regard and as such notices of default assessment of tax, interest and penalty were rightly issued, and have been rightly upheld by learned OHA while rejecting the objections.

Learned counsel for the Revenue has further submitted that the revenue authorities found that the firms, to whom concessional 'C' Forms sale stated to have been made, were non-existent/ non-functioning; that the dealer was not maintaining any GRs regarding central sales to Haryana Dealers; that as per statement of the driver, the goods used to be delivered only on one vehicle no. DL-LR-6401 (Maruti Eeco) to Gurgaon, Bahadur Garh.

Learned counsel for the Revenue has also admitted framing of assessment subsequently under CST Act whereby all the concerned sales have been treated as inter-state sales and demand has been raised for the reasons recorded in the said assessment.

Factum of withdrawal of the notice issued by the department to the dealer for exercise of powers of revision is admitted by learned counsel for the Revenue, with liberty granted by Hon'ble High Court.

2/8

11. While framing assessment, learned Assessing Authority observed that on survey it was found that the dealer-appellant was not maintaining GRs regarding transactions of Central Sales to the said five dealers from Haryana. The Assessing Authority also relied on the fact disclosed by the driver of vehicle No. DL-LR-6401 (Maruti Eeco) that only he used to deliver goods every month at Gurugram and Bahadurgarh.

No material was placed before Assessing Authority or before learned OHA so as to discard the version narrated by the said driver regarding delivery of goods by him using only one vehicle.

Learned Assessing Authority further observed that dealer had failed to furnish any proof by way of toll receipts in proof of payment of Toll tax at Gurgaon Toll Plaza during the relevant tax period. Before learned OHA it was submitted on behalf of the objector that Toll Tax receipts are not required to be preserved by the selling dealer by way of proof of movement of goods in such like transactions.

Learned OHA observed in the impugned order that the objector submitted petrol/diesel bills and statement of account depicting use of the vehicle for business activity, but the dealer failed to prove movement of goods in the course of Interstate Trade or Commerce.

2/8

Case of the dealer-objector before learned OHA was that buying dealers were directed to provide requisite permission and they provided the same. The said dealers produced copy of certificate of their registration and issuance of 'C' forms. As already observed, learned OHA has nowhere discussed any of the documents produced by the said buying dealers, while affirming the assessments made. Therefore, once again I find that the matter needs to be decided afresh by learned OHA.

12. As per notice of default assessment of tax and interest under CST Act dated 25/03/2019, issued by AVATO (Ward-62), in respect of tax period-Annual 2014, sale indicated in the returns as inter-state sale against statutory forms have been rejected and treated as inter-state sale at full rate of tax. Accordingly, assessment has been framed levying tax @ 12.5% with interest and raising demand of Rs. 2,25,30,020/-. Said assessment came to be framed due to non-production of statutory forms.

13. In the course of arguments, Learned Counsel for the appellant has submitted that said assessment framed under CST Act for Annual 2014 dated 25/03/2019 has not been challenged by the dealer by way of objections. But there is no explanation from the learned counsel as to why said assessment under CST Act has not been challenged.

2/8

As noticed above, the impugned order passed by Learned OHA pertains to the assessments in respect of all the four quarters. These assessments have been framed u/s 32 of DVAT Act, while dealing with Central Sales. In Moral Alloys Private Ltd.'s case (supra), a notice u/s 59(2) of DVAT Act is stated to have been uploaded on 11/10/2017 proposing to frame assessment for the period 2011-12. Said notice was stated to be beyond 4 years of the expiry of the period of limitation. Notice was challenged on the ground that it failed to indicate any reasons containing the justification for invoking the extended period of limitation for reassessment in terms of the proviso to Section 34(1) of the DVAT Act.

Therein, in the counter-affidavit, Revenue pleaded that petitioner had failed to produce the requisite document in the form of Declaration C as per Rule 12 of Central Sales Tax (R & T) Rules, 1957 as well as GRs, which showed movement of goods from one state to other in terms of Section 3 (a) of the CST Act. Accordingly, the AVATO decided to treat the central turnover reported by the Petitioner within the state and proceeded to assess it accordingly.

Respondent further pleaded therein that it was 'only by inadvertence that the local as well as central turnover had been assessed "in the same default notice" which ought to have been issued separately to the same effect by the same Assessing Authority.

Hon'ble High Court allowed the petition while observing in para 24 in the manner as:

> "Admittedly, in the present case in the reassessment proceedings the Respondent has sought to make no distinction between the liability under the DVAT and that under the CST Act. In terms of Section 5 of the DVAT Act these two could not be combined. There is no question of treating this as a mere 'technical problem' and permitting the Respondents to repeat the exercise by proceeding against the Petitioner separately. Apart from the facts that this is not merely a 'technical problem', such exercise would be clearly time barred at this stage."

14. As noticed above, this is a case where firstly assessment came to be framed under DVAT Act and subsequently, even after disposal of the objections, assessment under CST Act was framed. So, there are two assessments framed separately under two Acts in respect of the same tax periods. Counsel for the Revenue has submitted that when assessment under CST Act was in the process of being made, dealer-assessee should have brought to the notice of the Assessing Authority that its claim regarding central sales stood already rejected while framing of assessment under DVAT Act, but it failed to do so. Counsel for Revenue also refers to Section 80 of DVAT Act to submit that this is a case of mistake.

There is nothing in the assessment framed under CST Act to suggest that dealer participated in those proceedings or if the

dealer was or was not served with any notice before framing of assessment. It begins with the sentence that the dealer failed to produce statutory forms as per Rule 4 of CST (Delhi) Rules.

In the given facts and circumstances, where two assessments have been framed under two different Acts regarding same transactions of the same tax periods, at different times, it is to be seen as to what would be the appropriate course to be adopted to achieve the ends of justice.

15. At this stage, reference may be made to provisions of section 74B of DVAT Act, which provides for rectification of mistakes or errors.

16. There is a proviso to sub-sec. (2) of Section 74 B. It clearly empowers the authority passing the order on objection, notwithstanding anything contained in this Act, to rectify the order or part of the order on any matter *other than the matter which has been so considered and decided in any proceedings by way of objection,* in relation to any order or part of an order.

17. In view of the above proviso it can be said that where an Assessing Authority, makes suchlike mistake of issuing notice of default assessment in respect of turnover of central sales under DVAT Act, by way of one assessment order, the Objection Hearing Authority dealing with objections against

2/18

such assessment, shall be competent to rectify the order or part of the order on any matter "other than the matter considered and decided in the objections" i.e. as to the subsequent assessment – framed under CST Act, when dealer has now apprised this Appellate Tribunal for the first time about framing of subsequent assessment.

Decision in Nav Bharat is distinguishable on facts

18. In Nav Bharat's case, relied on by Learned Counsel for the appellant, sales tax returns were filed by the petitioner under local Act i.e. Delhi Sales Tax Act; and also under the Central Sales Tax Act. Therein, 2 orders were passed. In the separate order, as regards Central Sales Tax Act, there was no tax payable under the said Act. However, the petitioner was sought to be taxed only under the local Act i.e. Delhi Sales Tax Act. Therein, the order under CST Act had attained finality.

Herein, Central Sales are stated to have been assessed firstly by the Assessing Authority under DVAT Act treating the Central Sales as Local Sales, and subsequently under CST Act treating the Central Sales as Central Sales. Assessment under DVAT Act has been challenged firstly by way of objections and then by way of present appeals.

In Nav Bharat's case, only when the dealer-petitioner challenged by way of appeal, the order pertaining to local tax,

the Assistant Commissioner observed that the given turnover was taxable under the provisions of Central Sales Tax Act, and further observed that the orders under CST Act, required revision by the competent authority.

Herein, Learned OHA has not made any such observation in the objections filed against assessment framed under DVAT Act.

In Nav Bharat's case, the Appellate Authority was not seized of any appeal or matter arising under Central Act, and rather it was dealing with appeal or matter only under provisions of Local Act. In the given situation, Hon'ble Judge observed that had any direction been issued with regard to taxability of some items under the local Act, then possibly a fresh order could be passed in furtherance of the directions issued.

Here, Learned OHA was seized of objections against single notice of default assessment issued as regards turnover(s) of Central Sales and he has upheld the assessments framed under DVAT Act.

In Nav Bharat's case, Hon'ble Judge upheld the observations made by the Assistant Commissioner in the order dated 16.9.1982 that the competent authority should take proceedings to revise the order under CST Act. Significant to note that there, the directions by the Assistant Commissioner were to revise the order under CST Act.

Here, no such directions have been issued by Learned OHA.

Change in law after Nav Bharat's case

Nav Bharat's case pertained to assessment year 1975. Therein, sales tax returns were filed under Delhi Sales Tax Act and Central Sales Tax Act and two orders of assessment were issued on 10.4.1978. As per order under CST Act, no tax was payable. However, sales were taxed under Local Act-Delhi Sales Tax Act; dealer filed appeal only against order under Local Act. Assistant Commissioner passed order on 16.9.1982 for revision of turnover which was taxable under Central Sales Tax Act (and not under Local Act), by the competent authority.

Present matter pertains to tax period 2014-15. Delhi Value Added Act, 2004 came into force w.e.f. 1.4.2005. In Nav Bharat's case, Hon'ble Judge observed that the procedure for imposing tax under Central Sales Tax Act was the one provided by the Local Act, but the two proceedings are independent of each other. At the same time, Hon'ble Judge observed, "it is true that in some cases orders may be interrelated, interlinked or interconnected because a controversy may arise as to whether a particular type of sale is taxable under the local Act or the Central Sales Tax Act. " It was very clearly observed that separate assessment orders are passed when two separate returns are to be filed.

2/8

Consequently, applying the law in force in the form of proviso to sub-section (2) of DVAT Act, 2004, to the facts of present case, I find that this is a fit case where the matter needs to be remanded to Learned OHA to excise powers u/s 74B of DVAT Act, in accordance with law for the purposes of rectification of mistake.

Time Limit

19. As noticed above, the assessments were framed under DVAT Act pertains to the tax period 2014-15. These were framed on 20/10/2015. Learned OHA disposed of the objections vide order dated 09/11/2016.

Section 74 B of DVAT Act, 2004 deals with rectification of mistakes and review. It provides two separate time limits ~~of~~ four years for rectification of mistake.

Firstly, sub-section (1) of section 74 B, provides a maximum period of 4 years from the end of the year in which the order passed by him, was served. It is so, where Commissioner on his own motion, is to rectify the mistake apparent on record.

Secondly, sub-section (1) of section 74B of DVAT Act, prescribes that the Commissioner may rectify any such mistake, in case any person affected by an order, "brings to the notice of the Commissioner" -

(a) within " a period of 4 years" from the end of the year in

which the order passed by him, was served or

(b) "thereafter".

The only condition is that the person who is affected by an order, should bring to the notice of the Commissioner mistake apparent on record, within the aforesaid period of 4 years.

The assessment under CST Act has been framed on 25/03/2019. Since the dealer has filed copies of assessments under CST Act on 22/2/2022 and pointed out to this Appellate Tribunal for the first time in the course of arguments on appeal about framing of another assessment i.e. under CST Act, keeping in view the provisions of Section 74B, I find that this is a case for rectification of mistake where in the interest of justice, Learned OHA is very much competent to do the needful.

Result

20. As a result, exercising powers u/s 76(6)(c) of DVAT Act, these appeals are disposed of and while setting aside the impugned order passed by learned OHA, matter is remanded to learned OHA for decision afresh, taking into consideration all the facts and circumstances and the well settled law on all the issues involved, including provisions of Section 74 B of DVAT Act and that too after providing reasonable opportunity to the dealer of being heard.

25/8

21. Dealer to appear before Learned OHA on 08/09/2022.

22. 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 : August 25, 2022

Narinder Kumar 25/8/2022

(Narinder Kumar)
Member (J)

Appeal no. 249-256/ATVAT/16-17/5394-5401 Dated: 26/8/22

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