

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar: Member (Judicial)

Appeal Nos. : 138-139/ATVAT/13

Date of Judgment: 15/09/2022

M/s. Indus Valley Trading (P) Ltd.,
2485/8, 2nd Floor,
Karol Bagh, New Delhi.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. H. C. Bhatia.

Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. By way of present appeals, dealer registered with Department of Trade and Taxes (Ward – 45) has challenged order dated 30/03/21 passed by Learned Additional Commissioner/Objection Hearing Authority (hereinafter referred to as OHA).

The matter pertains to tax period November 2011-12.

Vide impugned order, Learned OHA disposed of two objections filed u/s. 76(4) of Delhi Value Added Tax Act, 2004 (hereinafter referred to as DVAT Act).

2. By way of objections dealer had challenged demand of tax and interest of Rs. 6,00,655/- raised u/s. 32 of DVAT Act and other demand of Rs. 5,80,151/- by way of penalty, imposed u/s. 33 read with Section 86 (10) of DVAT Act.

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3. Dealer – Appellant is engaged in the business of sales of Katha, Chemicals & Machinery, etc. On 14/11/2011, business premises of the dealer were subjected to survey by survey team of enforcement branch of Department of Trade & Taxes. The survey led to discovery that stock of goods was short by Rs. 1,15,92,019/- and that cash in hand was excess by Rs. 10,993/-. Incriminating documents in the form of 18 loose written papers were also seized by the said team, from the possession of the dealer- objector.

That is how, the matter was referred to VATO of Special Assessment Cell for the purpose of framing assessment and the above mentioned assessments came to be framed.

4. Feeling aggrieved by impugned order passed by Learned OHA, dealer has come up in appeals.
5. As observed by the Learned OHA in the impugned order, as regards variation in stock and cash, from the clarification furnished by the dealer, following facts transpired:

“I) - The so called intimation that the company also stores its goods in the public warehouse has been declared to the department by filing an application dated 16.11.09 on the company's letter head with the VATO (through Annexure IV) which appears to be vague, does not hold merit since the only way to apply for any amendment in the Registration details is through DVAT 07 as prescribed.

II) - With regard to the plea of the dealer in its clarification above (at iii of para-5) that said director was asked to sign the statement prepared and typed by the member of the survey team without even allowed to go through the statement carefully, it is found that the statement having 3 pages contains all the data and information provided by the dealer ranging from Director's names, their PAN No(s), last sale & purchase, Company's Expenses viz. Salary/wages, telephone, Electricity, Rent besides Company's Bank accounts details viz. banks name, branches and

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account numbers any of which the dealer has not found any fault with. Now finding that dealer is liable to face the consequences of paying due tax and penalty, dealer has resorted to the tactics of sort of disowning the facts given in its statement.

III)- Further dealer now stating that "Director was also asked to sign a blank letterhead of the company forcibly" at point (iii) & (xii) of Para-5, is baseless considering the fact that survey was conducted as earlier as on 14th November 2011 and had it actually been so, dealer could have brought this fact to the higher authorities of the department subsequently.

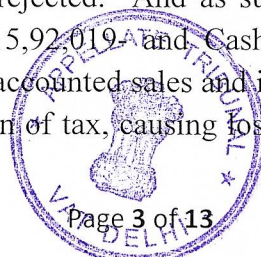
IV)- With regard to the plea of the dealer in its clarification above (at vi of para-5) that "On the day of survey the Enforcement Team was informed that we keep our goods in the warehouse of Jagdamba Enterprises, Lawrence Road, Delhi. On the insistence of the Enforcement team a copy of our stock statement with Jagdamba Enterprises on 14.11.11 was given to the team on that day", it is found that said statement copy of which is now filed, is having a letter from M/s Jagdamba Enterprises, a Ware Housing Division, dated 14.11.2011 to the dealer being assessed, forwarding a copy of account showing stock balance besides Receipt details and Details of Delivery, running as long as 13 pages. It is not acceptable that same could have been prepared by the warehouse on the same day of survey and delivered too, to the dealer for onward submission to the Enforcement team for its consideration as being now made out to be. And this is despite the fact that dealer failed to brought out a simple information in its statement of even having goods in any warehouse.

V)- At point (vii) of para-5, dealer has stated that "The Enforcement Team raised a query why the number of packages / boxes in the warehouse were 2169 as opposed to 2170 indicated by the stock statement of the Company given to them. We informed the Enforcement Team that one box of kattha was available in our office for sample purpose". This again shows that dealer has resorted to fabrication of afterthoughts to avoid facing the consequences of paying the due tax and penalty thereof.

VI)- With regarding to Explanation of Cash Variation of Rs. 10,993- at Para-7, same is nothing but an afterthought."

Accordingly, Learned OHA observed as under:

"In view of the above facts, the dealer by giving one or another pretext as afterthoughts, it trying to escape from facing the liability of paying the evaded due tax and therefore, the clarification of the dealer with respect to variation in Stock and cash-in-hand is not accepted and is rejected. And as such, the amount of variation of Stock of Rs. 1,15,92,019/- and Cash variation of Rs. 10,993/- are considered as unaccounted sales and is treated as suppression of sales leading to evasion of tax, causing loss to the Government exchequer



and therefore is taxed @5% along with penalty under section 86(10) of DVAT Act for deficiency of tax.”

6. As regards sales under Central Sales Tax Act, 1956, made by the dealer during the aforesaid assessment period against C Forms, etc., Learned OHA observed that the same shall be looked into by the VATO concerned of Ward – 45, during reconciliation / assessment of Central Sale.
7. Feeling aggrieved by the impugned order passed by learned OHA, objector has come up in appeals.
8. Arguments heard. File perused.
9. It may be mentioned here that these appeals were filed in 2013. It was only on 24/08/2022, in the course of final arguments that counsel for the appellant presented an application seeking permission to raise following ground:

“That the appellant being a registered dealer of Ward-45, VATO (ward-45) only had the jurisdiction to frame the assessment u/s 32 and 33 of DVAT Act and VATO (Special Cell) had no jurisdiction to frame the said assessments for want of any delegation to him u/s 68 of DVAT Act, in view of decision in **M/s Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes**, (2016) 90 VST 143 (Del.).”

Another additional ground sought to be raised, as per application is that VATO (Special Cell) has wrongly alleged shortage of stock as the said stock was stored by the appellant in Jagdamba Enterprises, which is a Public Warehouse, and was lying stored there and some stock meant for export was lying in Customs, there was no storage of stock at all.



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Still another additional ground sought to be raised, as per application is that the penalty u/s 86 (10) of DVAT Act has been wrongly imposed without service of notice and without opportunity of hearing being provided.

10. Learned counsel for the appellant-applicant submitted that the ground of jurisdiction is purely a legal ground and as such the same be allowed to be raised. In support of this contention, learned counsel for the appellant has referred to decision in **National Thermal Power Co. Ltd. v. Commissioner of Income Tax**, (1997)7SCC 489; **Commissioner of Trade & Taxes v. M/s Ahluwalia Contracts (India)**, Civil Appeal No.(s) 15605-15606 of 2017, decided by Hon'ble Supreme Court on 04/10/2017.
11. It may be mentioned here that in the course of the arguments, on the application, learned counsel for the appellant has pressed the application only to raise one additional ground that VATO (Special Cell) had no jurisdiction to frame assessments.
12. This prayer seeking permission to raise the only additional ground that VATO (Special Cell) had no jurisdiction to frame the assessment, has been opposed by learned counsel for the revenue on the ground that same was not raised by the dealer before the Assessing Authority or before Learned OHA i.e. on the very first opportunity available to the dealer.

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In support of this contention learned counsel has referred to decision in Commissioner of Trade & Taxes v. M/s Ahluwalia contracts (India) (supra).

13. It is true that in para no. 17 of decision in M/s Ahluwalia Contracts (India) case (supra), it was observed by the Hon'ble Apex Court that had the assessee raised the question of jurisdiction in its reply or in the course of the adjudication proceedings there would have been still time for the Commissioner to cure the defect and issue a valid notice. It is also true that in para no. 19, Hon'ble Apex Court took into consideration the conduct of the assessee in raising the point in the writ petition and not earlier, and observed that non-raising of the said point earlier was not entirely bonafide and the respondent could not be allowed to take advantage of its own wrong.
14. Taking into consideration decision in NTPC's case (supra) that the view that Tribunal is confined only to issues arising out of the appeal was a narrow view of the powers of the Appellate Tribunal and that undoubtedly, the Tribunal will have to discretion to allow or not allow a new ground to be raised, and further that when it is necessary to consider a question of law arising from the facts on record, Tribunal is empowered to decide the same to correctly assessed the tax liability of an assessee.



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Therefore, the prayer to raise the question of law regarding his jurisdiction i.e. of VATO (Special Cell) to frame assessments is allowed to be raised, but subject to the condition that the facts sought to be referred to on the said point are shown to have been duly proved on record.

Jurisdiction to frame assessments in respect of dealer

15. As noticed above, impugned assessment, came to be framed on 20/03/2012 by learned VATO (ward-207-Special Cell), u/s 32 and 33 of DVAT Act. The contention raised on behalf of the appellant is that there is nothing on record to suggest that there was any delegation of power to VATO (ward-207-Special Cell) to frame assessments qua the dealer and as such the impugned assessments framed deserve to be set aside. In support of this contention learned counsel has referred to decision in **M/s Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes**, (2016) 90 VST 143 (Del.); **Commissioner of Sales Tax, Up v. Sarjoo Prasad Ram Kumar**, (1976) STC 533 (SC); and **M/s Playwell Impex Pvt. Ltd. v. Commissioner of Trade & Taxes**, Delhi, in Appeal No. 688-689/2013, decided by this Appellate Tribunal on 15/12/2021.
16. Reference has also been made to order no. F.2(7)/DVAT/L&J/2005-06/1028-1035 dated 31-10-2005, to submit that when there is no material on record to suggest, as to who delegated the powers to VATO (Special Cell) to frame



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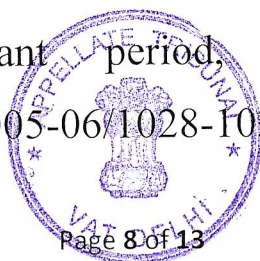
assessments under DVAT Act and that the said VATO was having territorial jurisdiction, the impugned assessment framed by him, deserves to be set aside.

17. On the other hand, learned counsel for the Revenue has contended that it was for the dealer-appellant to prove its claim/objection that VATO (Special Cell) had no delegation of powers to frame assessments u/s 32 and 33 of DVAT Act, but the dealer-appellant has not brought on record any such material, and as such it cannot be said that VATO (Special Cell) made assessments without jurisdiction.
18. As regards decision in Capri Bathaid's case (supra), learned counsel for the Revenue has submitted that therein following question was one of the points which arose for consideration of the Hon'ble High Court:

"Whether the AVATO Enf-I who undertook the survey, search and seizure operation and later passed the default assessment orders of tax, interest and penalty, was duly empowered to do so in terms of the DVAT Act?"

Learned counsel has contended that here it is not case of the dealer-appellant that both the functions i.e. conducting of survey and framing of assessments, were performed by VATO (Special Cell). Rather, here survey was conducted by a team and VATO (Special Cell) was not a member of the said team, and as such decision in Capri Bathaid's case is not applicable to the present case.

19. During the relevant period, admittedly, order no. F.2(7)/DVAT/L&J/2005-06/1028-1035 dated 31-10-2005 was



in force for the purposes of exercises of powers u/s 32 and 33 of DVAT Act. As per this order, all officers appointed under subsection (2) of section 66 of DVAT Act, 2004, not below the rank of Assistant Value Added Tax Officer, were empowered to frame such assessments. Herein, indisputably, VATO (Special Cell) was an officer above the rank of AVATO.

20. In order to prove that VATO (Special Cell) who framed the impugned assessments had not been delegated any such powers in respect of the area, where the business premises of the dealer-appellant is situate, as provided u/s 78 of DVAT Act, it was for the dealer-appellant to discharge its burden. However, dealer has not brought on record any material to suggest that VATO (Special Cell) was never delegated powers. It should have collected relevant documents or certified copies thereof at the very initial stage for being placed on record, but no document in this regard has been produced to prove this objection.
21. In absence of any such material on record by the dealer-appellant, it cannot be said that VATO (Special Cell), had no jurisdiction or that he was not delegated with the powers to frame assessment u/s 32 of DVAT Act.
22. In Capri Bathaid's case (supra), Hon'ble High Court held that default notices of assessment of tax and penalty framed by the AVATO Enforcement-1 were wholly without jurisdiction, for the reasons recorded therein.



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23. In Capri Bathaid's case the officers named in the authority in the form of DVAT 50, were authorized only to carry out audit investigation and enforcement and there was no ^{delegation} ~~verification~~ to carry out the power^s of assessment. Here, no such point has been raised by learned counsel for the appellant.

As noticed above, here it is also not case of the dealer that VATO (Special Cell) had also conducted survey and subsequently framed assessments.

In the given fact and circumstances, and in view of the question referred to above dealt with by the Hon'ble High Court, I find merit in the contention raised by learned counsel for the Revenue that decision in Capri Bathaid's case does not come to the aid of the dealer-appellant. For the above reasons, there is no merit in the contention raised by learned counsel for the appellant that VATO (Special Cell) had no jurisdiction to frame the assessments.

24. So far as decision by this Appellate Tribunal in M/s Playwell Impex P. Ltd's case is concerned, therein dealer-appellant had brought on record sufficient material to hold that due process of law was not followed in delegation of powers to the VATO, who framed assessments u/s 32 and 33 of DVAT Act. Therein, the material produced on record included information collected from the Revenue in the form of a note approved by the Commissioner, VAT. In presence of the said note to prove delegation of powers to Sh. Bijendra Kumar, VATO therein, but



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in absence of any order passed on the basis of said note approved by the Commissioner, this Appellate Tribunal concluded that the assessments framed were without jurisdiction.

25. In that case, the onus initially put on the dealer-appellant u/s 78 of DVAT Act was discharged by the dealer with the production of record collected from Revenue, and it was thereupon that the onus shifted to the Revenue to prove the relevant order vide which AVATO (Enforcement-I) was actually delegated powers, after the Commissioner had approved the note regarding said delegation of powers. However, in that case, Revenue failed to discharge its onus so shifted.

Here, as noticed above, in this case dealer-appellant has not brought on record any material to discharge the burden to prove its claim/objection i.e. VATO (Special Cell) had no jurisdiction to frame assessment. Therefore, there is no question of shifting of onus from the dealer-appellant to the Revenue. Consequently, decision in M/s Playwell's case also does not come to the aid of the dealer.

For the same reasons i.e. for want of any material on record from the side of dealer-appellant, decision in Commissioner of Sales Tax, UP v. Sarjoo Prasad Ram Kumar's case (supra) does not come to the aid of the dealer-appellant.

26. Learned Counsel for the appellant has referred to the impugned order passed by Learned OHA wherein he observed that during



hearing on the objections, detailed submissions were put forth, in addition to production of documentary evidence, but Learned OHA did not discuss the submissions put forth and the evidence produced, before upholding the assessment framed by Learned Assessing Authority and disposing of the objections.

27. A perusal of the impugned order would reveal that it stands clearly recorded therein that objector had produced documentary evidence and that detailed submissions were also put forth on behalf of the objector.

In this situation, Learned OHA was required to deal with each objection pressed before him, and decide the same while referring to the evidence produced and also give cogent and convincing reasons for arriving at the conclusion or rejection of the objections. However, in the impugned order Learned OHA simply observed as follows:

“Therefore, in view of the fact that the explanations/documents submitted by the objector before the undersigned are almost the same which were furnished by him before the VATO of the Special Assessment Cell and that the same have already been considered and taken into account by the said Assessing Authority in his detailed assessment orders, the undersigned is of the opinion that the objector has no case and the same is liable to be rejected. Accordingly, the objections of the objector are rejected and the orders of default assessments of tax, interest and penalty passed by the VATO of the Special Assessment Cell are upheld. However, the objector will be entitled to the credit of Rs.50,000/- deposited by him in pursuance of the order passed under Third proviso to section 74(1) of the DVAT Act which the Ward VATO shall allow to the objector after verification from the Ward Scroll.

Accordingly the objections stand disposed of in the above terms.”



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28. From the above paragraph of the impugned order, it can safely be said that Learned OHA has approved the assessment, framed by Learned Assessing Authority, without dealing with the submissions of the dealer - objector or without referring to the documentary evidence produced and without assigning any reasons. In the given situation, Learned Counsel for the Revenue has also rightly submitted that the matter needs to be remanded to Learned OHA for decision of the objections afresh.
29. As a result, both these appeals are disposed of and the matter is remanded to Learned OHA for decision on the objections afresh after providing reasonable opportunity to the dealer of being heard.
30. Dealer to appear before Learned Objection Hearing Authority on 28/09/2022.
31. File be consigned to the record room. Copy of the judgment be sent 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 : 15/09/2022



Narinder Kumar
(Narinder Kumar)
Member (J)
15/9/2022

Appeal no. 138-139/MTVAT/13/5522-29

Dated: 16/9/22

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



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