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

Appeal Nos. 1252-1253/ATVAT/13
Date of Judgment: 28/09/2022

M/s Excel Motors,
E-20/B-1, Mohan Co-op.,
Industrial Estate,
New Delhi-110044.

.....Appellant

v.

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

Counsel representing the Appellant : Sh. S.K. Verma.
Counsel representing the Revenue : Sh. S.B. Jain.

JUDGMENT

1. Dealer – appellant registered with Department of Trade & Taxes, vide Tin No. 07290156725 is a limited company engaged in business of sales of motor cars, automobile parts.

2. Dealer – assessee has challenged order dated 6/1/2014 passed by learned Additional Commissioner (Zone-III & V) – Objection Hearing Authority (OHA) while disposing of objections u/s 74 of Delhi Value Added Tax Act 2004

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(here-in-after referred to as the Act). The operative part of the impugned order reads as under :-

> "Therefore, in these facts and circumstances of the case and detailed narration made above, the case of the objector is found to be without any substance and thus, is rejected and orders of default assessments of tax, interest and penalty issued by the VATO of the Spl. Cell under sections 32 and 33 of the DVAT Act are upheld and confirmed.
>
> However, the credit/adjustment of amounts deposited by the objector in compliance of the order passed by the undersigned in pursuance of provision of Third Proviso to section 74(1) of the DVAT Act will be given to him after proper verification thereof from the Ward Scroll. Accordingly, the objections stand disposed of in the above terms."

3. Objections u/s 74 of DVAT Act were filed by the dealer – objector challenging the default assessment of tax and interest framed u/s 32 of DVAT Act by the Assessing Authority – VATO on 30/3/2013, on the basis of survey report.

4. The matter pertains to tax period March 2011-12.

5. Framing default assessment, Assessing Authority called upon the dealer – assessee to pay Rs. 6,63,596/- i.e. Rs. 5,76,011/- by way of tax and Rs. 87,585/- by way of interest.

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6. As finds mentioned in the default assessment, survey was conducted by Enforcement-I Branch of the Department, at the business premises of the dealer on 27/3/2012. The survey is stated to have led to discovery of variation in stock and variation in cash.

In addition thereto, it was found that :

(i) The dealer – assessee was charging registration/ logistic charges from its customers;

(ii) The dealer had made scrap sale;

(iii) The dealer used lubricant oil; and

(iv) Goods purchased locally were transferred to its Faridabad branch as stock transfer, but ITC was not reduced proportionately.

7. Accordingly, learned Assessing Authority framed the assessment as under :-

> "Since the dealer is engaged in trading of Motor Car & Auto Spare Parts, taxable @ 12.5% VAT, hence, GTO is calculated by adding resultant variation in stock of Rs. 45,22,617/-, variation in cash of Rs. 85,472/- are taxed @ 12.5% VAT with interest, as it appears that the dealer is engaged in unvouched sale-purchase. Further penalty is imposed u/s 86(15) for preparing records and accounts in a manner which is false, misleading or deceptive.
>
> The sale under Central Sales Tax Act, 1956 made by the dealer against statutory forms, shall be looked into by the VATO / AVATO concerned during reconciliation / assessment of Central Sale."

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8. Vide separate assessment framed on the same date i.e. 30/3/2013, Assessing Authority imposed penalty of Rs. 5,76,011/- upon the dealer – assessee, u/s 33 read with Section 86 of DVAT Act.

9. Feeling dissatisfied with the above two assessments framed on 30/3/2013, dealer – objector filed objections before learned OHA.

10. The objections came to be disposed of vide impugned order dated 6/1/2014.

11. Learned OHA decided the objections giving following reasons :-

> "I have heard the arguments made on behalf of the objector and also minutely perused the orders of default assessments of tax, interest and penalty issued by the VATO of the Spl. Cell under sections 32 and 33 of the DVAT Act together with the objections filed by him in the form DVAT-38 under section 74(1) of the Act. Simultaneously, the paper book filed and other documents submitted on behalf of the objector have also been carefully perused and seen.
> Accordingly, on going through them all, it transpires that as per the survey report, the difference in stock was reported by the survey them was to the tune of Rs. 1,46,01,004/- (excess) but it is on hearing the objector properly and considering the documents like details of stock, copies of five new vehicles and ledger accounts of separate heads of expenses etc. furnished by the objector before the assessing authority of the Spl. Cell that the latter has accepted the explanation of the objector in that behalf to a larger extent and reduced the

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variation in stock from Rs. 1,46,01,004/- to Rs. 45,22,617/- only.

Simultaneously, it is also seen that in the report of the survey team, there were also the mentions about the objector's (i) selling scrap & used lubricant oils, (ii) charging of registration/logistic charges from the customers and (iii) transfer of goods purchased locally, to its Faridabad Branch without reducing the input tax credit proportionately on them but again, it is on hearing the objector in detail as well as taking the documents furnished by the objector before the said authority that the latter has proceeded to accept them all and not to raise any demand of tax etc. on account of any of them. Therefore, the argument of the objector that he was not given proper opportunity of being heard and that the documents furnished by him before the authority below were not considered nor taken into account by him, is found to be factually without any truth and substance.

Therefore, since the arguments made and documents furnished by the objector in this behalf have already been duly considered and taken in account by the VATO of the Spl. Cell and there is nothing new from what has already been stated and present before the authority below, the case of the objector on this score fails and is rejected.

As regards next argument of the objector against difference of Rs. 85,472/- in the cash found in excess, in the order of default assessment of tax and interest framed u/s 32 of the DVAT Act, it has been found mentioned that amounts of Rs. 5,000/-, Rs.2,000/-, Rs.735/- and Rs.5,826/- respectively were stated to be given by the objector to his employees as advance and for incurring day to day expenses while an amount of Rs. 99,033/- was stated to be received by him against receipt Nos. 18874 to 882 whereas in the paper book filed by the objector now at this objection hearing stage,

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it has been stated and clarified on the part of the objector that difference in the cash was the shortage by Rs. 7,735/- which amounts were given to his employees as advance and for refreshment/ snacks etc. for which the accounts were rendered by the staff subsequently or adjusted against salary and there is no mention about receipt of Rs. 99,033/- claimed by him before the authority below.

Moreover, in this paper book, the supporting documents furnished by the objector in this respect, have been stated to be placed on record at pages 10 to 16 thereof whereas the documents available on these pages are the photocopies of various invoices-cum-challans issued by M/s Hindustan Motors, Tiruvellore-631203 in respect of sale of car vehicles by the said company to the objector. Therefore, on this score too, the arguments of the objector cut no ice and hence, the same are accordingly rejected."

12. Hence, these two appeals.

13. As per grounds of objections filed by the dealer – appellant, VATO (Spl. Cell) who framed assessment had no jurisdiction for want of any order of transfer of jurisdiction, and as such the default assessments are patently illegal.

In the course of arguments, Learned Counsel for the appellant has not pressed this ground of objection.

14. It may be mentioned here that in the course of arguments learned Counsel for the appellant has not challenged framing of assessments or the passing of the impugned order on the point of cash variation.

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15. Case of the dealer – appellant is that the default assessments framed by the Assessing Authority are by way of non speaking orders and also framed without taking into consideration the material placed on record and without affording any opportunity to the dealer of being heard.

As a result, dealer has prayed for setting aside of the impugned order passed by learned OHA whereby he confirmed the assessments framed by the Assessing Authority.

16. Learned counsel for the appellant has not disputed the Audit at the business premises of dealer-appellant on 27/03/2012. However, the submission is that dealer had submitted its reply to the Audit report.

While referring to the figure of stock variation available in the default assessment and the Annexure appended thereto, learned counsel for the appellant has submitted that it cannot be made out from these two documents as to on what basis the said figure as regards stock variation was arrived at.

Further, it has been submitted that even though notice u/s 59(2) of DVAT Act was issued by the learned Assessing Authority to the dealer-assessee, no pre-assessment notice was issued to the dealer communicating to the assessee

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allegations levied against the said dealer, seeking its explanation.

According to him, had the Assessing Authority communicated to the dealer all the allegations/basis, only then it would have been able to explain the same, before framing of assessment.

Further, the contention is that there is nothing on record to suggest as to on what ground Assessing Authority termed it to be a case of incomplete return, to attract the provisions of Section 32 for the purpose of framing of assessment.

While referring to the impugned order passed by learned OHA, on behalf of the appellant it has been submitted that two paper books were submitted there but learned OHA did not discuss any of the documents relied on by the dealer in support of the objections against the assessments. Ultimately, the contention is that even on this ground the default assessment and the impugned order deserve to be set aside.

In support of his above said contentions, learned Counsel has relied on decision in **Dhirajlal Girdharilal v. C. I.T. Bombay,** AIR 1955 SC 271 by Hon'ble Apex Court and the decision in **Samsung India Electronics v. Government of NCT of Delhi & Ors.,** W.P.(C) 2685/2014, decided on 07/04/2016 by our own Hon'ble

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High Court. Without producing full text of decisions in **Khem Chand v. Union of India**, (1958) SCR 1080; **Samagya Consultants Pvt. Ltd. v. Commissioner of Sales Tax,** (2001) 122 STC 512; and **Sri Durga Cement Co. Ltd. v. State of Bihar & Others**, (1999) 114 STC 268, Learned Counsel for the appellant has produced only a part / para thereof on the point of pre-assessment notice.

Penalty

17. On the point of levy of penalty, Learned Counsel for the appellant has contended that no reason whatsoever has been given by the Assessing Authority while imposing penalty, and as such the said assessment deserves to be set aside.

Contention on behalf of Revenue

18. On the other hand, learned counsel for the Revenue has contended that keeping in view the claim of the dealer – appellant that he was not afforded reasonable opportunity by learned OHA, matter may be remanded to learned OHA for decision of the objections afresh, after affording reasonable opportunity to the dealer.

On the point of penalty, Learned Counsel for the Revenue has submitted that reasons for its imposition point

mentioned in the default assessment and as such it cannot be said that levy of penalty is without reasons.

Discussion

19. Admittedly, the audit was conducted on 27/03/2012, in presence of Sh. B R Ramesan, GM (Services) of the appellant. Undisputedly, Sh. B R Ramesan made statement before the team of Enforcement Branch.

Further, it stands admitted that notices u/s 59(2) of DVAT Act 2004, were issued to the dealer on 04/06/2012 and 16/02/2013 calling upon the dealer to appear before the learned Assessing Authority at the given date and time. It is also admitted case of the parties that the dealer through its authorized signatory, Sh. Dinesh Goyal, represented on 25/06/12, so far as first notice dated 04/06/2012 is concerned, to explain stock variation, cash variation and as regards logistic charges.

20. In the course of arguments, it has not been pointed out as to what were the contents of the notices u/s 59(2) of DVAT Act, first one issued on 04/06/2012 and the second one issued on 16/02/2013, so as to enable this Appellate Tribunal to go through their contents and appreciate the contention that no valid notice was issued to the dealer prior to framing of assessment u/s 32 of DVAT Act. In

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absence of the copies of the two notices, it cannot be said that the same were not valid notices.

21. On going through the record, I find that on behalf of the appellant, it has been rightly pointed out by learned counsel that while framing impugned assessment of tax and interest, learned Assessing Authority did not specify as to whether it was because of furnishing of case of incomplete return or incorrect return or a return that did not comply with the requirements of DVAT Act. Learned Assessing Authority was required to specify the reason. In this regard, reference may be made to decision in Samsung India Electronic's case (supra).

22. The provisions of DVAT 2004 do not provide for issuance of a notice before framing of the assessment. Section 32(2) of DVAT Act provides for service of notice of assessment of the amount of any additional tax, where the Commissioner frames an assessment under this section. In this regard, reference may be made to decision in **Sales Tax Bar Association (Regd.) v. Govt. of NCT Of Delhi & Ors,** W.P.(C) No.4236/2012, decided by our own Hon'ble High Court on 7 December, 2012.

23. Dhirajlal Girdharilal's case (supra) cited on behalf of the appellant, was an appeal by special leave directed against the order of Hon'ble High Court of Judicature at Bombay,

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whereby application u/s 66(2) of Indian Income tax Act, 1922 was summarily dismissed by the Hon'ble High Court.

The prayer in the application was that the Income Tax Appellate Tribunal be directed to state a case and refer the question of law stated by the applicant to have arisen out of the order of the Tribunal, to the Hon'ble High Court, the reason being that Tribunal had disallowed such an application.

Therein, the question of fact was as to whether or not the Hindu undivided family carried on business in respect of shares transferred to it by the firm. Hon'ble High Court observed that it is a question of fact arrived at a decision by considering the material which is irrelevant to the enquiry or by considering material which is partly relevant and partly irrelevant or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then it gives rise to an issue of law.

24. Herein, as is available from the Annexure lying annexed to the default assessment of tax and interest, the authorized representative of the dealer submitted before learned Assessing Authority that the actual value of stock came to Rs. 63347811/-. Learned Assessing Authority, as regard this submission, observed that the same appeared to be

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genuine. Consequently, the Assessing Authority accepted actual stock value given by the dealer.

When learned Assessing Authority accepted that the value of the actual stock, furnished before him, by the representative of the dealer-assessee was correct, learned Assessing Authority was required to explain in the default assessment and also in the Annexure as to how stock variation was still there and in respect of which of transactions and on the basis of which record. However, neither in the default assessment nor in the Annexure, there is mention of any such reason or bases as to how stock variation was still there when the value of the stock, as furnished by the dealer being Rs. 6,33,47,811/- was found to be genuine and accepted.

25. Learned counsel for the appellant has referred to difference in the sum of the stock variation as finds mention in the Audit report with the figure of value of stock i.e. to the tune of Rs. 6,33,47,811/- furnished by the representative of the dealer and submitted that it cannot be said that there was any difference in the figure available in the Audit report and the figure available in the Annexure.

Be that as it may, in absence of any reason in the default assessment as to how stock variation to the tune of Rs. 45,22,617/- was still there, when the Assessing Authority

had accepted the claim of the dealer that the value of the actual stock Rs. 6,33,47,811/-, the default assessment deserved to be set aside, but the learned OHA upheld the same.

26. Learned OHA nowhere discussed any of the documents submitted on behalf of the objector in the form of paper book, what to say of furnishing of any reason for rejection thereof. The matter pertains to 2011-12. Therefore, at this stage this Appellate Tribunal does not find any ground for remand of the matter to learned OHA especially when an order of remand would not serve any purpose in view of the acceptance of the claim of the dealer as regards value of the actual stock and also when Assessing Authority did not furnish/explain as to how he arrived at the figure regarding stock variation.

As a result, the impugned order passed by learned OHA also deserves to be set aside.

Cash variation

27. As regards cash variation, in the course of arguments on merits, learned counsel for the appellant has not challenged the assessments framed by the Assessing Authority or the impugned order passed by learned OHA.

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For the reasons given in the assessments by the Assessing Authority and in the impugned order by learned OHA, and for want of challenge to the said assessment on this point, the same are upheld.

Penalty

28. So far as levy of penalty is concerned, same was imposed u/s 86(15) of DVAT Act i.e. on the ground that dealer was found to have prepared records and accounts in a manner which was false, misleading or deceptive.

However, as rightly pointed out on behalf of the appellant, no such reason finds mention in the assessment framed u/s 33 read with section 86(15) of DVAT Act. In absence of any specification of the application levelled against the dealer and for want of any material in proof thereof, the assessment of penalty deserved to be set aside. However, learned OHA has upheld the assessment of penalty.

It may be mentioned that by upholding the assessment of penalty, learned OHA has not discussed its validity for want of reasons. Accordingly, the impugned order passed by learned OHA also deserves to be set aside.

Result

29. As a result of the above findings, these appeals challenging levy of tax, interest and penalty as well as the impugned

order passed by learned OHA, are partly allowed, in the manner indicated above. Both the impugned assessments and the impugned order passed by learned OHA framed by learned Assessing Authority are accordingly hereby partly set aside, in the manner indicated above.

The assessment of tax and interest framed on the aspects, not challenged before this Appellate Tribunal, is upheld.

30. 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 web-site.

Announced in open Court.
Date : 28/09/2022.

Narinder Kumar 28/9/22

(Narinder Kumar)
Member (J)

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